A Positive Right to Free Labor

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INTRODUCTION

This Article seeks to resurrect a lost thread in our civil rights tradition: the idea that workers have a positive right to free labor. A positive right to free labor includes the right to work for a living wage free of undue coercion and free from discrimination based on immutable characteristics. Not merely the negative guarantee against the state's infringement on individual equality and liberty, a positive right to free labor is immediately enforceable against state and private parties. A positive right to free labor is rooted in the Thirteenth Amendment of the Constitution, which prohibits slavery and involuntary servitude and provides a substantive guarantee of equality and liberty to all people. It is enforced primarily not by courts but by political actors. This Article explores the roots of the Thirteenth Amendment and the confluence of antislavery and pro-workers' rights activism in antebellum America to understand the meaning of that Amendment's abolition of slavery and involuntary servitude. The nineteenth century was a transformative century in both the conditions and the law of labor, and the shift from a paradigm of unfree to free labor was central to the Reconstruction Era effort. As part of that effort, the Thirteenth Amendment played a pivotal role in transforming the law of labor. A positive right to free labor was revived during the New Deal Era, when the definition of civil rights in our country was in flux. A positive right to free labor starts with this transformative promise of the Thirteenth Amendment and seeks to envision what our civil rights law would be like if workers were its primary subject.

Our Constitution is generally perceived as a negative constitution, protecting individuals from government intervention without recognizing any positive rights to government protection.[1] In our civil rights law, the negative constitution manifests itself in the Equal Protection Clause of the Fourteenth Amendment, which prohibits government actors from discriminating on the basis of race, sex, or other immutable characteristics. Its paradigm is the case of *Brown v. Board of Education*, in which the United States Supreme Court held that the Fourteenth Amendment prohibits state-mandated race discrimination.[2] As interpreted by the courts, however, the Equal Protection Clause guarantees only formal

1. *See, e.g.*, DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989).
2. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

equality, prohibiting the government from intentionally discriminating on the basis of those characteristics.[3] Moreover, the Equal Protection Clause does not require the government to intervene in our social and economic structure to ensure a more substantive form of equality.[4] If there are any positive constitutional rights for workers, then they must be present elsewhere in the Constitution.

Unlike the Fourteenth Amendment, the Thirteenth Amendment contains a positive guarantee of rights. It states that "[n]either slavery nor involuntary servitude . . . *shall* exist," regardless of whether a private party or state authority imposes it.[5] It is also the first amendment to give Congress the power to enforce its provision.[6] The framers of the Thirteenth Amendment believed that to be free was to enjoy fundamental human rights, and the Reconstruction Congress used its enforcement power to enact measures to protect those rights. After the end of Reconstruction, the Thirteenth Amendment's promise lay dormant until it was reactivated by the twentieth-century labor movement and the New Deal Congress responding to that movement's demands. In the mid-1930s, civil rights activists drew on the Thirteenth Amendment to advocate a theory of rights which would empower workers who toiled at the lowest level of the economic ladder, including agricultural and domestic workers. They argued that the Thirteenth Amendment protected a positive right to free labor that encapsulated fundamental human rights, including the right not to be unduly exploited by one's employer. After the Supreme Court's ruling in *Brown*, advocates shifted their focus away from the Thirteenth Amendment and towards the Equal Protection Clause. Nonetheless, the positive right to free labor remains part of our constitutional tradition, with exciting potential as a source of workers' rights in the twenty-first century.

I. DEVELOPING A POSITIVE RIGHT TO FREE LABOR: PRO-LABOR AND ANTISLAVERY ACTIVISM IN THE ANTEBELLUM ERA

A positive right to free labor has its roots in the antislavery and labor movements of the early nineteenth century. Prior to the Civil War, the labor and antislavery movements both used the image of slavery to support a positive theory of workers' rights. Northern labor activists voiced their opposition to "wage slavery": work under conditions and

3. *See* Washington v. Davis, 426 U.S. 229, 239 (1976). This approach is most evident in court cases striking down race-based affirmative action measures. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

4. *See* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (finding no constitutional right to a minimum income).

5. U.S. CONST. amend. XIII, § 1 (emphasis added).

6. *Id.* § 2.

wages so unfavorable that it was tantamount to slavery. Free Soil, Free Labor activists insisted that slavery should be abolished because it was an oppressive system of labor that harmed all workers by depressing wages and conditions of labor. Other antislavery activists opposed the race discrimination that was also central to the institution of slavery. Members of these three groups often worked separately, but they sometimes overlapped. Together, they formulated the ideological basis for the positive right to free labor.

A. Changes in the Conditions of Labor in the Early Nineteenth Century

In the beginning of the nineteenth century, workers in the United States were largely not free.[7] Most obviously, almost 4 million workers in the South were enslaved.[8] But throughout the country, employees had little control over their working lives.[9] While colonial labor practices had varied from region to region, indentured servitude was common in colonial America.[10] In the early days of the Republic, the practice of indentured servitude, "a specific condition identified with persons entering the colony bound to multiyear indentures," and apprenticeship lingered from the country's colonial days.[11] Many workers who immigrated to this country at the end of the eighteenth century were indentured servants.[12] Indentured servitude carried over well into the nineteenth century. Servants were paid wages, not taught a skill, and usually bound to their employers for periods of three to five years.[13] Artisans and laborers were often bound to contracts that prohibited them from leaving their employers.[14] Colonial statutes did not distinguish between slaves and servants,[15] and neither did the United States Constitution's Fugitive Slave Clause.[16]

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7. ROBERT J. STEINFELD, THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH & AMERICAN LAW AND CULTURE, 1350–1870, at 7 (1991).

8. *Census of 1860–Population–Effect on the Representation of the Free and Slave States*, N.Y. TIMES, Apr. 5, 1860, at 4, *available at* http://www.nytimes.com/1860/04/05/news/census-1860-population-effect-representation-free-slave-states.html?pagewanted=all.

9. Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 441 (1989).

10. CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 239 (1993). Unless noted otherwise, "America" as used in this Article refers to the United States.

11. *Id.* at 242; *see also id.* at 249, 254.

12. Between 1773 and 1776, fifty percent of English and Scottish immigrants were indentured servants, and from 1785 to 1804, forty-five percent of German immigrants shared the same status. STEINFELD, *supra* note 7, at 11.

13. *Id.* at 44–45.

14. *Id.* at 34.

15. *Id.* at 102.

16. The Fugitive Slave Clause provides: "No person held to Service or Labour in one State under the Laws thereof, escaping into another, shall . . . be discharged from such Service or Labour . . . ." U.S. CONST. art. IV, § 2, cl. 3. Antislavery constitutionalists argued that the clause did

Work itself changed fundamentally in America over the course of the nineteenth century. At the beginning of that century, most workers were agricultural and artisanal, and most were self-employed. These men enjoyed considerable autonomy in their working lives, and they "provided the meaningful point of reference [for] Jeffersonian [r]epublican[s]."[17] This changed rapidly in the mid-nineteenth century. Whereas in 1820, two-thirds of United States workers were self-employed, by 1850, half of workers were employed by others.[18] In eastern industrializing states, as many as three-fourths of workers were nonagricultural workers employed by others by the middle of the century.[19] Early industrialization caused the increasing mechanization of work, and industrial jobs enticed workers to migrate from rural to urban areas.[20] In the South, the invention of the cotton gin revived the institution of slavery by vastly increasing the capacity to process the cotton that was grown and picked by slaves. In the North, New England clothing mills provided factory jobs for workers who sometimes referred to themselves as "white slaves."

Prior to the nineteenth century, the law of employment relationships was based in master-servant law that had its roots in the age of feudalism.[21] The employer, or master, was the head of the household, while his workers were dependents with "status contracts."[22] Rather than belonging to the worker, the worker's labor was considered a resource belonging to the community in which he lived.[23] The master had the property right to the servant's labor, which enabled the master to dictate the conditions of employment.[24] Thus, many northern workers lacked control over their working lives because they were entirely subordinate to their employers. Through the early 1840s, even industrial workers were forced to sign year-long contracts that bound them to their employers.[25] Northern workers did not suffer the degradation and violent exploitation of chattel slavery, but they lacked autonomy and mobility.

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not apply to slaves, but to other indentured servants. *See, e.g.*, WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 192 (1977).

17. DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 27 (1993) [hereinafter CITIZEN WORKER].

18. TOMLINS, *supra* note 10, at 259.

19. *Id.*

20. CITIZEN WORKER, *supra* note 17, at 4.

21. STEINFELD, *supra* note 7, at 16.

22. *Id.* at 56.

23. *Id.* at 62 (as in feudal society).

24. *Id.* at 67 (from medieval law).

25. CITIZEN WORKER, *supra* note 17, at 42 (discussing, for example, workers in Lowell, Massachusetts).

In the first half of the nineteenth century, the practice of indentured servitude began to fall out of favor. Americans began to think of indentured servitude "as a form of involuntary rather than voluntary servitude and as essentially indistinguishable from slavery."[26] By the mid-nineteenth century, prior to the Civil War, indentured servitude was no longer allowed in most states.[27] Instead, labor was viewed as a commodity that could be bought and sold. Pro-worker advocates claimed workers should have the liberty to choose their employers and to exercise control over the conditions of the employment relationship.[28] The paradigm was shifting to one of free labor.[29] Antislavery and pro-labor advocates had changed the fundamental expectations of workers, who chafed at the restrictions that had once seemed inevitable.[30] The "free market" was replacing what radical reformer Cornelius Blatchley referred to as "ancient usurpation, tyranny, and conquest."[31] The Civil War and Reconstruction Era accelerated that shift, as members of the Reconstruction Era Congress sought to replace chattel slavery with the paradigm of free labor.

"Free" northern workers who benefitted from the decline of indentured servitude suffered other perils in the nineteenth century workplace. Industrialization brought about new workplace rules that limited the workers' autonomy and depersonalized the worker's relationship with his or her employer.[32] The nineteenth-century employment relationship failed to comport with the "liberal illusion" of formal legal equality. Instead, the workplace was structured on inequality.[33] Though employers no longer held a property interest in the labor of their employees, employers maintained wide latitude to direct and control the labor that the workers delivered.[34] Vestiges of the master-servant doctrine helped to underpin workplace discipline and legitimate supervisory prerogative, creating a "contradictory co-existence of freedom and subordination" in the law of employment.[35] Thus, employment contracts reinforced asymmetries of power between the worker and his or her employer.[36] Moreo-

26. STEINFELD, *supra* note 7, at 7.

27. *Id.* at 8. Indentured servitude disappeared by the 1830s. *Id.*

28. *Id.* at 86–87, 78–79. "What makes a man human is his freedom from other men. Man's essence is freedom." *Id.* at 79 (quoting C. B. MacPherson). Liberalism differentiated between dependent and independent people; wage earners were considered to be dependent—the goal was for them to become independent. *Id.*

29. *Id.* at 15 (discussing how the modern idea of employment as contract "between juridical equals" is an invention of the nineteenth century).

30. *Id.* at 113.

31. *See* CITIZEN WORKER, *supra* note 17, at 38.

32. *See id.* at 55.

33. TOMLINS, *supra* note 10, at 227.

34. *Id.*

35. *Id.* at 228.

36. *Id.* at 261.

ver, as industrial wage earners, many workers felt as if their work was being degraded and debased. They often expressed concern about not being treated with dignity.[37] Thus, historian Chris Tomlins argues that the changes in labor conditions in the first half of the nineteenth century were problematic for workers. Yes, servants were no longer legally bound to their masters through indentures, but employers, not workers, still controlled the workplace.[38] Longing for autonomy and control over their lives, many U.S. workers turned to the nascent labor movement.

B. The Early Labor Movement

Like the antislavery movement, the early labor movement sought to improve the conditions of the lives of workers. In the 1830s, "the ideology of free labor was vigorously disseminated throughout the country as part of an emotional campaign against slavery."[39] In the 1840s and 1850s, labor activists sought to further disseminate this ideology as part of their campaign for reforms to improve the lives of free workers. As workers involved themselves in politics, they helped to transform the law that governed their lives. Political engagement was central to the republican ideology that workers embraced, helping to define free labor.

Before the late 1820s, a "labor movement" did not exist in the United States.[40] Journeymen formed associations, but they were mostly civic-minded, single-trade organizations.[41] However, changes taking place in work patterns and authority prompted workers to begin to form groups to improve the conditions of their workplaces.[42] Initially, the labor movement was concentrated in the urban northeast, especially in New York City, Philadelphia, and the mill towns of Massachusetts.[43] By the 1830s, there was "a growing and explicit emphasis on the extension of organization and permanence of unions as the *only* basis upon which working people could expect to have any impact on the polity."[44] Well-established trade unions formed in numerous cities, including Philadelphia, New York, Boston, Albany, Buffalo, Washington, D.C., and Cincinnati.[45] The number of unions expanded during the antebellum era.

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37. *See id.* at 386.

38. *Id.* at 390.

39. STEINFELD, *supra* note 7, at 177.

40. TOMLINS, *supra* note 10, at 152.

41. *Id.* at 153.

42. ERIC FONER, POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR 58 (1980) [hereinafter POLITICS AND IDEOLOGY].

43. SEAN WILENTZ, CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788–1850, at 220 (1984).

44. TOMLINS, *supra* note 10, at 156.

45. *Id.* at 157.

By 1872, there were 1,500 trade unions in the United States.[46] National unions, including the Brotherhood of Locomotive Engineers, began forming during the Civil War.[47]

Throughout the antebellum era, workers engaged in strikes and other forms of direct action.[48] They also engaged in politics, attempting to use the state to improve their conditions of work and repealing laws which prohibited workers' "combinations."[49] The issue that galvanized the first labor organizations in the late 1820s was their attempt to limit the length of the working day.[50] In the 1840s and 1850s, labor's first priority continued to be legislation limiting the workday to eight hours.[51] The labor movement achieved some political success before the Civil War. The movement thrived in Massachusetts, electing pro-labor politicians such as the "Nattick cobbler" Senator Henry Wilson.[52] In New York City, Tammany Hall Democrats depended on labor support for their political success.[53] During the War, labor allied with the Radical Republicans,[54] who pushed for labor priorities such as eight-hour workday legislation.[55]

C. Labor Ideology in Antebellum America

Though the strategy and ideology of labor leaders varied, there were a few fundamental tenets that most activists shared. First, the labor movement advocated republicanism: a belief in the liberty, equality, and individual worth of the working man.[56] Labor spokesmen shared a "passionate attachment to equality," a belief in independence and the ability to resist personal and economic coercion, and a commitment to the labor theory of value.[57] Leaders of the labor movement often cited the Declaration of Independence, arguing that the Declaration established individual rights for working people. The 1834 founding Declaration of the Rights of the Trades Union in Boston declared "that it is the right of working

46. CITIZEN WORKER, *supra* note 17, at 139.

47. *Id.* at 173.

48. WILENTZ, *supra* note 43, at 249–50 (female tailors strike).

49. TOMLINS, *supra* note 10, at 158–59.

50. *Id.* at 153.

51. *See* CITIZEN WORKER, *supra* note 17, at 163, 186, 261.

52. *Id.* at 125.

53. *Id.* (workingman's union defeats anti-union bill).

54. *Id.* at 102.

55. *Id.* at 244–45 (New Orleans Reconstruction government reforms), 113–14.

56. STEINFELD, *supra* note 7, at 105 (discussing seventeenth century "contractarian individualism" and republicanism as the new traditions in American life); POLITICS AND IDEOLOGY, *supra* note 42, at 59 (discussing how belief dates back to Tom Paine's republicanism).

57. *See* POLITICS AND IDEOLOGY, *supra* note 42, at 59; WILENTZ, *supra* note 43, at 157–58, 161, 274 (speaking of how labor adds value), 332 (detailing how Tommy Walsh voiced the labor theory of value).

men, and a duty they owe each other, to associate together."[58] New York City Democrat Tommy Walsh, who had strong ties to the labor movement, claimed that the Declaration "guaranteed every person who was willing to labor the right to do so."[59]

Second, from Tom Paine to Jefferson to Lincoln, the main tenet of republican ideology was that "freedom entailed ownership of productive property."[60] They championed the labor theory of value:

> Labour is the sole parrant of all property – the land yealdeth nothing without it, & their is no food, clothing, shelter, vessel, or any nesecary of life but what costs Labour & is generally esteemed valuable according to the Labour it costs.[61]

Republican ideology held that freedom entailed economic independence and ownership of productive property "because such independence was essential to participating freely in the public realm," an ideal which dated back to the American Revolution.[62] Economic independence and independence as a citizen were thus intertwined in the prevailing ideology of the antebellum labor movement.

Labor activists invoked the concept of "wage slavery" to describe the plight of the northern worker.[63] To some, working for wages itself was equivalent to slavery.[64] Because they associated liberty with the ownership of productive property, they considered any worker who depended on another person for his livelihood to be a "wage slave."[65] This reflected the middle-class aspirations of many in the labor movement, who hoped that workers would be able to earn enough to eventually purchase their own business and no longer work for others.[66] Selling one's labor to another was the equivalent of voluntarily entering into slavery, "a day's bondage for a day's wages."[67] Massachusetts Senator Henry

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58. TOMLINS, *supra* note 10, at 159.

59. WILENTZ, *supra* note 43, at 332.

60. William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 768 (1985).

61. TOMLINS, *supra* note 10, at 4 n.1 (citing WILLIAM MANNING, THE KEY OF LIBERTY (1922) (written in 1798)).

62. Forbath, *supra* note 60, at 775; *see also* ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 64 (1995) [hereinafter FREE SOIL].

63. WILENTZ, *supra* note 43, at 332. Tommy Walsh stated that "wage slavery and the tyranny of capital had reduced republican producers to dependent menials." *Id.*

64. CITIZEN WORKER, *supra* note 17, at 25–26, 31; FREE SOIL, *supra* note 62, at 17.

65. *See* CITIZEN WORKER, *supra* note 17, at 30 ("Americans associated liberty with ownership of productive property, the opposite of 'wage slavery.'").

66. FREE SOIL, *supra* note 62, at 17.

67. *See* DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS 1862–1872, at 238–39 (1967) [hereinafter BEYOND EQUALITY] ("[T]he worker, had in effect, deliv-

Wilson made this analogy, arguing that "[t]he 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."[68]

Over time, however, it became increasingly clear that many workers would be wage earners for their entire lives. By 1870, two-thirds of productive workers in the United States were wage earners.[69] The changing nature of work made it difficult to argue that working for wages alone was sufficient to transform a free worker into a "wage slave."[70] Labor reformers saw that workers in northern manufacturing plants were working long hours, under poor conditions. Those who toiled under the worst conditions were "wage slaves."[71] For example, female textile workers in Lowell, Massachusetts began to refer to themselves as "the white slaves of New England" because of the poor wages and conditions in the mills.[72] Labor activists often analogized the condition of northern workers to southern slaves. In February 1836, striking tailors were convicted of conspiracy and used imagery of slavery to protest their conviction. They accused the judge of "an unhallowed attempt to convert the working men of this country to slaves," and issued an anonymous handbill which claimed,

> [A] deadly blow has been struck at your Liberty! The prize for which your fathers fought has been robbed from you! The Freemen of the North are now on a level with slaves of the South! with no other privileges than laboring that drones may fatten on your life-blood![73]

These workers argued that without the right to organizations to improve their conditions, they were no better than slaves.

D. The Antislavery Movement

The antislavery movement predates the United States labor movement. Antislavery activism dates back to the Revolutionary Era, when many of the northern states abolished slavery. In the nineteenth century, the abolitionist movement began to achieve prominence when William Lloyd Garrison began to publish his magazine, *The Liberator*, in 1833.

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ered himself into a day's bondage for a day's wages. Here lay the very essence of the concept of 'wage-slavery.'").

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

69. CITIZEN WORKER, *supra* note 17, at 30.

70. *See id.*

71. *Id.* at 30, 238; WILENTZ, *supra* note 43, at 332 ("No man devoid of all other means of support but that which his labor affords him can be a freeman, under the present state of society. He must be a humble slave of capital.").

72. POLITICS AND IDEOLOGY, *supra* note 42, at 60.

73. WILENTZ, *supra* note 43, at 291.

Garrison condemned slavery on moral grounds, rooted in his religious beliefs.[74] He refused to engage in politics, claiming that the United States government was rotten to the core and that the Constitution was so tainted by slavery that it represented a "covenant with Death" and an "agreement with Hell."[75] In the 1830s, another group of antislavery activists adopted a different strategy, embracing politics as a means to outlaw or limit slavery.[76] Some of these activists disagreed with Garrison's assessment of the constitutionality of slavery. They argued that slavery was unconstitutional and violated fundamental human rights that were protected by the Constitution.[77] They formed political parties based on antislavery principles and sought to elect antislavery candidates.[78] Ultimately, their efforts led to the formation of the Republican Party, and the election of Abraham Lincoln for president and the Republican members of Congress who spearheaded the Reconstruction effort.[79]

Antislavery constitutionalists claimed that the Constitution should be interpreted consistently with the egalitarian principles of the Declaration of Independence and the Northwest Ordinance.[80] They insisted that ambiguities in the Constitution should be resolved consistently with those egalitarian principles.[81] Although their arguments varied, three broad theories of human rights are discernible from the writings and speeches of antislavery constitutionalists. First, many antislavery constitutionalists argued that slavery was illegal because it violated the natural rights of man.[82] Others made a more textually based argument that slavery violated the Due Process Clause of the Fifth Amendment, as well as the Article IV Privileges and Immunities and Guarantee Clauses.[83] Finally, some antislavery constitutionalists advocated a broad egalitarian view

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74. William Lloyd Garrison, *The Constitution: A "Covenant with Death and an Agreement With Hell"*, XII LIBERATOR 71 (1842), *reprinted in* OLIVER JOSEPH THATCHER, THE LIBRARY OF ORIGINAL SOURCES 97 (1907); *see* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 8 (2001).

75. Garrison, *supra* note 74, at 97; *see* VORENBERG, *supra* note 74, at 8.

76. RICHARD H. SEWELL, BALLOTS FOR FREEDOM: ANTISLAVERY POLITICS IN THE UNITED STATES 1837–1860, at 45 (1976).

77. *See* WIECEK, *supra* note 16, at 171.

78. *See* SEWELL, *supra* note 76, at 15.

79. *See id.* at 263.

80. *See* WIECEK, *supra* note 16, at 168.

81. *Id.* at 112.

82. *See* James G. Birney, *Can Congress, Under the Constitution, Abolish Slavery in the States?*, ALBANY PATRIOT, May 12, 19, 20 & 22, 1847, *reprinted in* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 318 (1951); WIECEK, *supra* note 16, at 259–60.

83. *See, e.g.*, WILLIAM GOODELL, VIEWS OF AMERICAN CONSTITUTIONAL LAW, IN ITS BEARING UPON AMERICAN SLAVERY 59 (Books for Libraries Press 1971) (1845) (due process); JOEL TIFFANY, A TREATISE ON THE UNCONSTITUTIONALITY OF AMERICAN SLAVERY 99 (Mnemosyne Publ'g Co. 1969) (1849) (privileges and immunities of citizenship).

of the country, one in which neither race nor class would diminish one's individual rights.[84] These activists opposed northern black codes, which restricted the rights of free blacks. They opposed race discrimination and championed equal rights for blacks.[85]

In 1833, the constitution of the American Anti-Slavery Society (AASS) provided that blacks should, "according to their intellectual and moral worth, share an equality with the whites, of civil and religious privileges," and whites must "encourage their intellectual, moral and religious improvement, and . . . remove public prejudice."[86] In 1835, the Ohio Anti-Slavery Society convention's "Report on the Free Colored People of Ohio" emphasized the importance of education, the right to free labor, the right to testify in court, and freedom of religion.[87] According to the report, laws denying these rights to free blacks in Ohio violated inalienable rights protected by the United States Constitution.[88] "The government under which we live was formed upon the broad and universal principles of equal and inalienable rights, principles which were proclaimed at the first formation, which were incorporated into our compact under which our own state claims a right of membership in the Union."[89] The Anti-Slavery Societies were moral advocacy organizations, and members were divided about whether or not to enter into politics. However, those who left the AASS to form the Liberty Party continued to support equal rights for blacks. In his 1847 treatise, Liberty Party leader and presidential candidate James Gillespie Birney invoked the Declaration of Independence to support his argument that slavery violates the "right to liberty that can never be alienated" by preventing the slave "from pursuing his happiness as he wished to do."[90] According to Birney, slavery thus violates the rule that "governments were instituted among men to secure their rights, not to destroy them."[91] These advocates emphasized that the constitutional protections applied to blacks as well as whites.

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84. *See, e.g.*, Birney, *supra* note 82; GOODELL, *supra* note 83; SEWELL, *supra* note 76, at 95 (describing the Liberty Party platform).

85. *See, e.g.*, Birney, *supra* note 82; GOODELL, *supra* note 83; SEWELL, *supra* note 76, at 95.

86. WIECEK, *supra* note 16, at 168 (citing DECLARATION OF THE ANTI-SLAVERY CONVENTION, ASSEMBLED IN PHILADELPHIA, DEC. 4, 1833, *printed in* PROCEEDINGS OF THE ANTI-SLAVERY CONVENTION 16 (Beaumont and Wallace, Printers)).

87. PROCEEDINGS OF THE OHIO ANTI-SLAVERY CONVENTION. HELD AT PUTNAM, ON THE TWENTY-SECOND, TWENTY-THIRD, AND TWENTY-FOURTH OF APRIL, 1835 (Beaumont and Wallace, Printers).

88. *Id.*

89. *Id.* at 36.

90. Birney, *supra* note 82.

91. *Id.*

Many antislavery activists argued that free blacks were citizens, entitled to the rights of citizenship.[92] The issue arose repeatedly in congressional debates, including, notably, the debate over the admission of Oregon. Representative John Bingham and others opposed the draft Oregon constitution because it would have prohibited free blacks from entering the state and from testifying in court.[93] In a speech before Congress, Bingham claimed that the provisions violated the Privileges and Immunities Clause of Article IV.[94] Bingham articulated an expansive view of the rights of national citizenship, including "[t]he equality of all to the right to live; to the right to know; to argue and to utter, according to conscience; to work and enjoy the product of their toil."[95] On the eve of the Civil War, racial equality had become an important component of the antislavery constitutionalist's ideology.

E. Alliance Between the Labor and Antislavery Movements

Activists in the labor movement engaged in an active dialogue regarding their proper attitudes towards the antislavery movement. Anti-abolitionist riots had included some working class people, as well as wealthier participants, and workers participated in antidraft riots during the war.[96] Some labor activists argued that the abolitionists had their priorities backwards, that improving the conditions of northern workers was necessary before ending southern slavery.[97] An 1850 union publication insisted that "only when workingmen had freed themselves of monopoly" would they "consider the propriety of unfettering those who are better off than to be let loose under the present Competitive System of labor."[98] Similarly, during the 1852 elections, one group of workers argued that it was important "to abolish Wages Slavery before we meddle with Chattel Slavery."[99] They viewed the slavery fight as a struggle between northern and southern capitalists, one that did not concern the working

92. *See, e.g.*, LYSANDER SPOONER, TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY 94 (1860); TIFFANY, *supra* note 83, at 99.

93. *See* REBECCA E. ZIETLOW, ENFORCING EQUALITY: CONGRESS, THE CONSTITUTION, AND THE PROTECTION OF INDIVIDUAL RIGHTS 35–36 (2006).

94. CONG. GLOBE, 35th Cong., 2d Sess. 981, 985 (1859).

95. *Id*.

96. WILENTZ, *supra* note 43, at 265 (discussing Tappan in New York City); Williston H. Lofton, *Abolition and Labor: Reaction of Northern Labor to the Anti-Slavery Appeal, Part II*, 33 J. NEGRO HIST. 249, 273 (1948).

97. Lofton, *supra* note 96, at 262. Most were dissatisfied with their own condition and "felt the need to remedy their ills before turning to the Negro slave." *Id.*

98. WILENTZ, *supra* note 43, at 382 (citing *Brotherhood of the Union*, N.Y. TRIB., Aug. 15, 22, Oct. 8, 1850).

99. *Id.*

class.[100] As noted above, some argued that northern workers were worse off than slaves, justifying workers' abstention from the antislavery effort.[101] Moreover, some workers were simply racist. They feared competition from free blacks if slavery were to end.[102]

While it is true that there were divisions between organized labor and the antislavery movement, it is also undeniable that over time, the labor movement "was increasingly drawn to the antislavery position."[103] In fact, working men and women "played a direct and decisive role in bringing chattel slavery to an end."[104] Despite the barriers to cooperation between the labor and antislavery movements, there was a significant overlap between the two. Some labor activists saw slavery as part of the continuum of exploitative labor practices and viewed the abolition of slavery as an essential step to improve the conditions of workers throughout the country. They argued that the institution of slavery hurt all workers, including white workers, North and South.[105] Together, leaders of the antislavery and labor movements formed a free-labor ideology that was essential to the political success of the antislavery movement and shaped the promise of free labor guaranteed by the Thirteenth Amendment.

In the decade preceding the Civil War, workingmen's organizations became increasingly strident in their opposition to slavery. On March 1, 1854, the Workingmen's League (the Arbeiterbund), a German labor organization, held a public meeting in New York City and declared that they should "protest most emphatically against both black and white slavery."[106] In 1856, several hundred working men in Pittsburgh signed a petition stating, "In another section of our country, exists a practical aristocracy, owning Labor, and made thereby independent of us. With them, Labor is servitude, and Freedom is only compatible with mastership . . . . Low wages for freemen that slaves may be profitable! Is this equality?"[107] At an assembly of New York City workers opposing the Kansas-Nebraska Act in 1856, a man named Hale argued that the working men of America wanted the country to be:

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100. Lofton, *supra* note 96, at 262.

101. *Id.* at 266.

102. SEWELL, *supra* note 76, at 172–73; WILENTZ, *supra* note 43, at 263–64 (stating that most craft workers and white laborers distrusted black workers).

103. NORTHERN LABOR AND ANTISLAVERY: A DOCUMENTARY HISTORY, at x (Philip S. Foner & Herbert Shapiro eds., 1994) [hereinafter NORTHERN LABOR].

104. *Id.* at xi.

105. *See* WILENTZ, *supra* note 43, at 186 (discussing how Thomas Skidmore argued that slavery pitted propertyless whites against enslaved blacks).

106. Lofton, *supra* note 96, at 282 (citing HERMAN SCHLÜTER, LINCOLN, LABOR AND SLAVERY 76 (1913)).

107. NORTHERN LABOR, *supra* note 103, at 243–44 (citing N.Y. TRIB., Oct. 31, 1856).

> [F]ree for your children . . . a place where the honest labourer may labour in the dignity of his own manhood—a labour which shall not be degraded by working side by side with the slave . . . . this fair inheritance of Freedom shall not be drenched by the sweat of the unpaid toil of Slavery . . . .[108]

Additionally, in 1859, the Social Working Man's Association of Cincinnati held an assembly to honor John Brown. They issued a statement claiming that the institution of slavery never had a foundation in justice, but it is the result of force and fraud, "differing in no respect of principle from the early bondage of western Europe, or from the serfdom of Russia, which are condemned by the voice of history against human nature."[109] Slavery conflicted "with the cause for which the fathers of the Republic fought."[110] "That such an interpretation of the constitution as to acknowledge the rightfulness of the existence of slavery is an infamy, and an insult to the fathers of the Republic."[111] Thus, the alliance between the labor and antislavery movement recognized that the fates of workers were interconnected, whether North or South, free or slave.

F. The Free Soil, Free Labor Party

The alliance between labor and antislavery activists led to the first major breakthrough in the success of the political antislavery movement, the Free Soil Party. In the mid-1840s, founders of the Free Soil Party seized on the connection between the plight of northern workers and southern slaves to expand support for the antislavery movement. The Free Soil Party was formed by Liberty Party members who were frustrated by its lack of political success. They were joined by former Democrats and Whigs who were upset at their own parties' positions on slavery.[112] The Free Soil Party sought to appeal to northern workers by emphasizing the link between slavery and the exploitation of northern workers. Free Soilers argued that slavery caused labor to lose its dignity, and pointed out that white workers were indirectly competing with slave labor.[113] Free Soilers insisted that the very existence of slavery in the South enabled employers to act abusively towards their employees in the North, including by engaging in physical abuse. They claimed that slavery had a downward impact on the conditions of work and the wages of

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108. NORTHERN LABOR, *supra* note 103, at 248 (citing NAT'L ANTI-SLAVERY STANDARD, Feb. 25, 1854).

109. *Id.* at 250.

110. *Id.*

111. *Id.*

112. SEWELL, *supra* note 76, at 156; FREE SOIL, *supra* note 62, at 153.

113. *See* SEWELL, *supra* note 76, at 196–97, 201.

free workers.[114] According to Free Soiler Representative Thaddeus Stevens of Pennsylvania, "[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."[115]

Free Soilers spoke to the class consciousness of northern workers, maintaining that the interests of southern aristocratic slaveholders were directly opposed to that of the workers.[116] Representative Francis Kellogg of Michigan expressed this view in 1864 when he said that "[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."[117] The *New York Times* compared slaveholders to feudal barons who would prefer to own all of their employees.[118] The Free Soilers stressed the class-based connection between northern workers and slaves. Former Free Soiler Massachusetts Senator Henry Wilson later explained, "[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 . . . ."[119] Even Republican Ohio Representative John Bingham said in 1857 that workers were entitled to more than "crumbs which fall from their master's table" but would not receive what they deserved as long as slavery existed.[120] Bingham was a moderate who had not been a member of the Free Soil Party. His remarks here illustrate the extensive influence of the Free Soil, Free Labor ideology on prominent members of the Republican Party.

The Free Soil ideology reflected the influence of the labor movement on antislavery advocates and represented a fusion of antislavery and pro-labor views. As Gamaliel Bailey explained: "Free Soilers are opposed to the spirit of caste . . . because it[s] inevitable tendency is to create or perpetuate inequality of natural rights."[121] They argued that labor should be performed not by slaves but by free men.[122] Some Free Soilers viewed the ideal worker through a middle-class lens. They be-

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114. VanderVelde, *supra* note 9, at 442, 470, 474; SEWELL, *supra* note 76, at 157 (discussing the Free Soil platform).

115. VanderVelde, *supra* note 9, at 443.

116. *Id.* at 467.

117. *Id.* at 472 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2955 (1864)).

118. FREE SOIL, *supra* note 62, at 89 (citing N.Y. TIMES, June 10, 1858).

119. CONG. GLOBE, 39th Cong., 1st Sess. 343 (1866).

120. VanderVelde, *supra* note 9, at 461.

121. SEWELL, *supra* note 76, at 176 (citing editorial in NAT'L ERA, June 28, 1849).

122. VanderVelde, *supra* note 9, at 470. Iowa Rep. James Wilson stated, "What member of our great free labor force . . . 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 . . .' with the noble declaration that 'Labor being the sure foundation of the nation's prosperity should be performed by free men . . . .'" CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

lieved in a mobile society where labor would pay off with the goal of economic independence.[123] They championed the dignity and opportunities of free labor, social mobility, and "progress," and they valued materialism, social fluidity, and the "self-made man."[124] These views reflected the republicanism of the early labor movement and were based on their increasingly outdated experience with a primarily agricultural population.[125] Other Free Soilers were more radical and saw an inevitable conflict between capital and labor.[126] They criticized the industrial state and expressed concern for the well-being of wage-earning industrial workers.[127] However, even the Radicals were wary of making class-based arguments. Some were wary of the labor movement because they challenged the Radical tenet "that the triumph of the nation eradicated class."[128]

While the Free Soil Party downplayed the emphasis on black equality championed by their Liberty Party predecessors, some Free Soilers "found slavery a moral evil and shared Liberty notions on race."[129] Many Free Soilers shared a record of advocacy for black equality.[130] Free Soilers in Massachusetts repealed the ban on interracial marriage in 1843.[131] Free Soilers in Ohio and Wisconsin fought against laws that restricted the rights of free blacks in their states. Free Soil Party leader Salmon Chase engineered a deal in 1845 to repeal the Ohio Black Laws.[132] When he was in Congress in the 1850s, Chase and others sought to make blacks eligible for homestead grants.[133] Most Free Soilers opposed the right to vote for free blacks, but Free Soilers in Ohio and Wisconsin campaigned in favor of those rights.[134] Free Soilers thus avoided discussing race due to the disagreement within the party. Supporters of the rights of free

123. FREE SOIL, *supra* note 62, at 16–17.

124. POLITICS AND IDEOLOGY, *supra* note 42, at 48.

125. FREE SOIL, *supra* note 62, at 31–32.

126. FREE SOIL, *supra* note 62, at 18 (discussing the rhetoric of Jacksonian Democrats); VanderVelde, *supra* note 9, at 471 (citing CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (statement of Rep. Thomas Shannon) ("[Slavery] makes the many subject to the few, makes the laborer the mere tool of the capitalist, and centralizes the political power of the nation."); POLITICS AND IDEOLOGY, *supra* note 42, at 57 (enumerating two movements which criticized capitalist labor relations in antebellum United States—labor movement and pro-slavery southerners).

127. VanderVelde, *supra* note 9, at 473 (finding that the repeated phrase regarding the laborer's "right to the fruits of one's labor" was also a critique of the industrial state).

128. CITIZEN WORKER, *supra* note 17, at 232 (discussing how Radicals were wary of labor organizations).

129. SEWELL, *supra* note 76, at 160.

130. SEWELL, *supra* note 76, at 176, 330–32; FREE SOIL, *supra* note 62, at 281 (outlining how the Western Reserve of Ohio always elected officials who opposed states' black laws).

131. SEWELL, *supra* note 76, at 183.

132. *Id.* at 177–79, 180–81.

133. *Id.* at 185.

134. *Id.* at 177–79, 180–81, 334–35.

blacks believed that this approach would be more effective at attracting political support, especially the working class vote, to the antislavery cause.[135]

G. A Positive Right to Free Labor in Antebellum America

What does learning about the labor movements and the Free Soilers tell us about the meaning of free labor in the antebellum era? First, "free labor" was the antithesis to slavery and involuntary servitude. Neither slaves, peons, nor indentured servants were considered to be free workers, even if they had initially entered into their employment relationships voluntarily. According to historian Christopher Tomlins, "To the antebellum labor movement, free labor ideally meant economic independence through the ownership of productive property, or proprietorship,"[136] or at the very least, "a far more substantive conception of contractual freedom for the wage laborer than the abstract formalism of mere self-ownership would allow."[137] To antislavery men, "free labor" entailed "working because of incentive instead of coercion, labor with education, skill, the desire for advancement, and also the freedom to move from job to job according to the changing demands of the marketplace."[138] Free labor required some degree of autonomy so that the worker would have as much control as possible over his own life, including the ability to limit the hours of his workday.[139] Free labor included mobility, the ability to leave one's employer at will, and the liberty to contract with one's employer.

Thus, the labor and antislavery movements focused primarily on workers' autonomy and the right to work free of undue coercion. Slaves obviously had no autonomy and no control over their working lives. They were subject to the most arbitrary and cruel forms of control, including corporal punishment. Northern workers were mostly no longer bound to their employers by contracts of indentured servitude. On the other hand, there were fewer opportunities for them to control their working lives in the future by owning their own businesses or serving as artisans. Moreover, industrial workers worked such long hours, in such poor conditions, and for such low pay that many used the metaphor of slavery to describe their lives. By achieving the primary goal of the worker's movement—decreasing the length of their working day—

135. *Id.* at 178–80.
136. TOMLINS, *supra* note 10, at 289.
137. *Id.*
138. POLITICS AND IDEOLOGY, *supra* note 42, at 24.
139. VanderVelde, *supra* note 9, at 438.

workers sought to assert more control over their working and personal lives.

The antislavery and workers movements focused less on the other two prongs of the positive right to free labor: the right to work for a decent wage and the right to be free of discrimination based on immutable characteristics. However, slaves worked for no wages at all, and the freedom of contract would give them the ability to bargain for better wages. Similarly, the freedom from indentured servitude at least theoretically enabled northern workers to leave their jobs if they were not paid sufficient wages. Finally, the focus of some antislavery activists on racial equality paved the way for Reconstruction measures such as the 1866 Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

II. ENFORCING A POSITIVE RIGHT TO FREE LABOR: THE THIRTEENTH AMENDMENT AND CONGRESSIONAL ENFORCEMENT

The Thirteenth Amendment abolished chattel slavery in the United States. This was a truly transformative measure. By declaring that slavery could no longer exist, the Thirteenth Amendment represented a massive seizure of private "property" without compensation and mandated the transformation of the economic systems of all of the southern and border states. But the Thirteenth Amendment's reach extended beyond the institution of chattel slavery. The Amendment abolished not only slavery but also involuntary servitude, promising a broader spectrum of workers' rights. Understood properly, the Amendment represents a positive statement of rights that are enforceable against both state and private actors: the rights of a free person, including a positive right to free labor.

During debates over the Thirteenth Amendment, members of the Thirty-Eighth Congress made it clear that they believed the Amendment represented a broad promise of the rights of the free person, including the rights to liberty and equality for all Americans. For example, Representative Isaac Arnold claimed that the Amendment foretold a "new nation" with liberty and equality before the law as a cornerstone.[140] Representative Godlove Orth said that he believed that the Amendment would be a "practical application of th[e] self-evident truth" in the Declaration of Independence.[141] Another supporter claimed that the Amendment was designed "to accomplish . . . the abolition of slavery in the United States, and the political and social elevation of negroes to all the rights of white men."[142] These members of Congress saw the Thirteenth Amendment as

140. CONG. GLOBE, 38th Cong., 1st Sess. 2989 (1864).
141. CONG. GLOBE, 38th Cong., 2d Sess. 142 (1865).
142. CONG. GLOBE, 38th Cong., 1st Sess. 2987 (1864).

a transformative measure, embodying a broad view of the rights of a free person.

As the debate progressed, supporters of the Thirteenth Amendment revealed a growing sense of egalitarianism.[143] For example, in the summer of 1864, during the debate over the Thirteenth Amendment, Congress enacted a measure guaranteeing equal wages to black and white soldiers.[144] The spirit of egalitarianism pervaded the Congress which acted to enforce the Amendment with civil rights laws and laws directed at protecting workers from undue coercion. The Thirteenth Amendment would establish equal rights nationally, not only in the slaveholding South. Senator Henry Wilson explained that he wanted the former rebels to understand "that Slavery is destroyed, and with its death, the compromises of the Federal Constitution, the laws of Congress, the black laws of the late slave States, and of the free States, and all the political dogmas and ideas upon which this system of slavery depended, must be numbered among the things of the past."[145] Wilson elaborated that the "Dred Scott interpretation of the Constitution from the Supreme Court, under which the negro has no political rights which a white man is bound to respect, goes, with all this other rubbish, into the dumping-ground of slavery."[146] The Thirteenth Amendment nationalized the rights of a free person, including racial equality.

Immediately after the Thirteenth Amendment became law, members of the Thirty-Ninth Congress acted to enforce its provisions. First, Congress sought to abolish race discrimination in all economic transactions with the 1866 Civil Rights Act. Second, Congress established a baseline of rights for workers by enacting the 1867 Anti-Peonage Act and the 1874 Padrone Act. In 1868, the Reconstruction Congress enacted a statute limiting the hours of federal workers to eight hours a day, a central goal of the nascent labor movement. In 1871, Congress passed the Ku Klux Klan Act, which made all federal rights enforceable against state actors and private conspiracies. All of these measures supported a positive right to free labor. These provisions, along with the Anti-Peonage Act, established what Lea VanderVelde calls "minimum standards that laboring men could expect in their employment relations."[147]

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143. *See* VORENBERG, *supra* note 74, at 131.

144. LEONARD L. RICHARDS, WHO FREED THE SLAVES? THE FIGHT OVER THE THIRTEENTH AMENDMENT 105 (2015).

145. Senator Henry Wilson, Address at Celebration by the Colored People's Educational Monument Association in Memory of Abraham Lincoln (July 4, 1865) (internal quotation marks omitted), *available at* https://archive.org/details/celebrationbyc3459nati.

146. *Id.*

147. VanderVelde, *supra* note 9, at 448.

A. The 1866 Civil Rights Act

Immediately after the Thirteenth Amendment became law, Congress used its enforcement power to enact the 1866 Civil Rights Act. The Act prohibits race discrimination in property transactions and guarantees to all people the right to sue, be parties, and give evidence. It guarantees to all people the "full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[148] Thus, the 1866 Act broadly prohibited race discrimination against the newly freed slaves as they exercised their basic civil rights. Congress acted to make those rights enforceable against both state and private actors with the Enforcement Act of 1871, which imposes civil and criminal penalties on state and private actors for conspiracies to prevent a person from exercising "any right or privilege of a citizen of the United States."[149] Thus, the members of the Reconstruction Congress believed that the Thirteenth Amendment empowered them to enact broad measures prohibiting race discrimination and providing potent remedies when those rights were violated. The 1866 Civil Rights Act is well known for its connection to the equality values and citizenship rights expressly protected by the Fourteenth Amendment.[150] Less well known is the Act's link to the positive right to free labor.

The 1866 Civil Rights Act protects the fundamental right to enter into a contract. Indeed, labor contracts were the primary focus of the Act. The southern states had enacted a series of laws known as the Black Codes, restricting the rights of the newly freed slaves. Black Codes required former slaves to sign one-year contracts with their employers (their former masters), prohibited leaving one's employer, and made it a crime to be unemployed.[151] The central goal of these laws was thus to reinstate slavery in all but name by legally requiring Blacks to serve as indentured servants.[152] In 1866, a Black soldier in South Carolina wrote, "I am opposed myself to working under a contract. I am as much at liberty to hire a White man to work as he to hire me. I expect to stay in the South after I am mustered out of service, but not to hire myself to a

148. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, 27 (codified as amended at 42 U.S.C. §§ 1981–1983 (2012)).

149. Enforcement Act of 1871, ch. 22, 17 Stat. 13, 13–15 (codified at 42 U.S.C. § 1985(3)).

150. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS (1986).

151. *See* CITIZEN WORKER, *supra* note 17, at 37.

152. *Id.*; *see also* POLITICS AND IDEOLOGY, *supra* note 42, at 105 (outlining how Southern planters rejected the central premise of free-labor ideology, the opportunity for social mobility of the laborer).

planter."[153] That same year, in January 1866, General Daniels Sickles, commander of the South Carolina district, issued an order invalidating the state's Black Code and issuing his own decree defining "the rights and duties of the employer and of the free laborer respectively."[154] His decree began with the principle that "all laws shall be applicable alike to all the inhabitants," and prohibited the eviction of sharecroppers from their plantations.[155]

A few months later, Congress reinforced Sickles's order. The 1866 Civil Rights Act outlawed the Black Codes' requirement of indentured servitude, guaranteeing to former slaves the right to leave their employers and seek better wages and conditions of work. During debates over the Act, Senator Henry Wilson charged that the Black Codes re-created master-servant law, and he supported the 1866 Civil Rights Act to nullify the contractual requirements of the Black Codes.[156] The 1866 Act sought to transform former slaves into free workers. As Senator Lyman Trumbull explained,

> The policy of the States where slavery has existed has been to legislate in its interest; and out of deference to slavery, which was tolerated by the Constitution of the United States, even some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints upon liberty. When slavery goes, all this system of legislation, devised in the interest of slavery and for the purpose of degrading the colored race, of keeping the negro in ignorance, of blotting out from his very soul the light of reason, if that were possible, that he might not think, but know only, like the ox, to labor, goes with it.[157]

While the Act was directed primarily at the southern states, it extended the positive right to free labor to all workers.

B. The Anti-Peonage Acts

The Reconstruction Congress enacted other legislation to protect the rights of workers throughout the nation by abolishing peonage and involuntary servitude. The Reconstruction Congress explicitly addressed the rights of workers in a series of statutes prohibiting slavery, involun-

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153. CITIZEN WORKER, *supra* note 17, at 37 (citing GERALD D. JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882, at 73 (1986)); *see also* POLITICS AND IDEOLOGY, *supra* note 42, at 108 (discussing how many freedmen resisted growing the "slave crop" cotton, and preferred growing their own crops).

154. CITIZEN WORKER, *supra* note 17, at 85.

155. *Id.*

156. VanderVelde, *supra* note 9, at 489.

157. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (during discussion of the Freedmen's Bureau Bill).

tary servitude, and peonage.[158] These statutes revealed a vision of free labor that extended well beyond merely abolishing chattel slavery and were aimed primarily at exploitative labor practices in the North and the territories.

The 1867 Anti-Peonage Act prohibited all servitude, both involuntary and voluntary.[159] The Act conveyed authority on the United States military power to "reclaim from peonage" women and children being held in that condition "in the territory adjacent to their homes" and on the Navajo reservation.[160] This Act was targeted primarily not at the former slave states, but at peonage in the territory of New Mexico. Introduced by Senator Charles Sumner, the Act responded to reports that the U.S. Army was directly aiding a system of peonage that exploited Mexicans and Indians in the New Mexican territory.[161] Congress "easily adopted" the Act "and made it clear that the Act's coverage stretched well beyond protecting former black slaves."[162] The Act's language swept broadly, banning "the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or in obligation, or otherwise."[163] Thus, the members of the Thirty-Ninth Congress, many of whom had voted to approve the Thirteenth Amendment, believed that the Amendment gave them the power to prevent exploitative employment practices well beyond the institution of chattel slavery.[164]

The undue coercion prong of the positive right to free labor is also evident in another statute that Congress enacted in 1874, the twilight of the Reconstruction Era. Known as the Padrone Act, this law prohibited the exploitative practice of bringing children from Italy to large American cities, isolating them, and paying them meager wages for exploitative work.[165] The Act clearly extended its protection far beyond African American freed slaves to the immigrants who were then flocking to the

158. *See, e.g.*, Slave Kidnapping Statute, ch. 86, 14 Stat. 50 (1866) (codified as amended at 18 U.S.C. § 1583 (2012)); Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994 (2012)); H.R.J. Res. 83, 40th Cong. (1868) (being a joint resolution to remove Navajo women and children from peonage); Act of June 23, 1874, ch. 464, 18 Stat. 251 (1874) (codified as amended at 18 U.S.C. § 1584) (being an act to protect foreign persons from involuntary servitude).

159. *See* Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607 (2012).

160. H.R.J. Res. 83, 40th Cong. (1868).

161. Soifer, *supra* note 159, at 1616.

162. *Id.*

163. Anti-Peonage Act, ch. 187, 14 Stat. 546, 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994); *see* Soifer, *supra* note 159, at 1617.

164. *See* Soifer, *supra* note 159.

165. Act of June 23, 1874, ch. 464, 18 Stat. 251 (1874) (codified as amended at 18 U.S.C. § 1584); *see* Rebecca E. Zietlow, *Free At Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 291 (2010).

country to serve as industrial workers. These statutes established a baseline of rights for all workers.

The concern about undue coercion is also reflected in an 1868 statute that limited the workday of federal workers to eight hours a day.[166] Throughout the antebellum era, limiting the hours of work was the chief political priority of the nascent labor movement. The issue that galvanized the first labor organizations in the late 1820s was their attempt to limit length of the working day.[167] In the 1840s and 1850s, labor's first priority continued to be legislation limiting the workday to eight hours.[168] Labor spokesmen had argued that the eight-hour work restriction would help to prevent "wage slavery."[169] During the Civil War, labor allied with the Radical Republicans,[170] who pushed for labor priorities such as eight-hour workday legislation.

In April 1866, Illinois Representative Ebon Ingersoll offered a resolution "to lighten as much as possible the burdens upon the laboring classes" by limiting a day's work in the District of Columbia to eight hours a day.[171] The measure passed the House of Representatives,[172] but it did not pass in the Senate. The following year, Indiana Representative and longtime antislavery advocate George Julian introduced a bill to limit the working day of all federal employees to eight hours.[173] The measure passed and was referred to the Senate for debate.[174] Speaking in favor of the Act, Senator Conness explained, "I am very proud to say that many years of my life have been spent in severe toil," and praised the workers who had fought for the Union cause.[175] Conness explained that he supported the eight-hour limit because it would "[g]ive [workers] time to think."[176] Senator Cole agreed that "all American citizens should be ena-

166. *See* BEYOND EQUALITY, supra note 67, at 234.

167. TOMLINS, *supra* note 10, at 153.

168. BEYOND EQUALITY, *supra* note 67, at 163, 186 (discussing it as a National Labor Union priority), 261 (outlining how 1866 fall election labor reformers urged radicals (who had done well) to add eight-hour workday to their program, as well as late-1860s rioting workers in Chicago demanding eight-hour law for federal employees).

169. *Id.* at 238–39, 179 (showing how eight-hour workday movement goal was to make workers "masters of our own time"), 238 (discussing Massachusetts bootmaker who said that working only eight hours made him feel "full of life and enjoyment" because "the man is no longer a *Slave*, but a man"). "The struggle for shorter hours, in other words, was seen as a fight for the liberty of the worker." *Id.* at 238. Fincher's Trade Review masthead said "Eight Hours: A Legal Day's Work for Freemen." *Id.*

170. *Id.* at 102.

171. CONG. GLOBE, 39th Cong., 1st Sess. 1969 (1866).

172. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2118 (1866).

173. CONG. GLOBE, 40th Cong., 1st Sess. 105 (1867).

174. *Id.*

175. *Id.* at 412.

176. *Id.* at 413.

bled to devote some portion of their time to the cultivation of the intellect."[177] Senator Fessenden replied that "intellectual development had better be left to the individual."[178] In voting for the Act, however, Congress supported worker autonomy and self-actualization. As Senator Henry Wilson explained, "In this matter of manual labor I look only to the rights and interests of labor. In this country and in this age, as in other countries and in other ages, capital needs no champion; it will take care of itself, and will secure, if not the lion's share, at least its full share of profits in all departments of industry."[179]

Finally, members of the Reconstruction Congress were concerned about the wages that all workers were earning. Most obviously, slaves had not been paid wages, and Free Soilers spoke often about the depressing effect that slaves had on the wages of free workers.[180] They discussed the rights of freed people to change employers and set their own wages.[181] During the debate over the 1867 Anti-Peonage Act, Senator Henry Wilson pointed out that workers in the part of New Mexico where there was no peonage were paid higher wages than those in areas where peonage was predominant.[182] For example, Representative Ingersoll argued that workers had a right to "enjoy the rewards of his own labor,"[183] and Senator Henry Wilson claimed that workers had the right to "name the wages for which he will work."[184] Their vision of a positive right to free labor encompassed a decent wage.[185]

C. A Positive Right to Free Labor in the Reconstruction Congress

The Thirteenth Amendment and statutes enforcing that Amendment took the antislavery and pro-labor ideology of the antebellum era and established it as law. The Reconstruction Congress did not want merely to outlaw slavery. They sought to prevent former slave owners from replacing slavery with a slightly milder form of involuntary labor, and to prevent northern workers from being subjected to similar conditions. The 1866 Civil Rights Act sought to override laws imposing indentured servitude on freed slaves. The Anti-Peonage Acts outlawed involuntary labor

177. CONG. GLOBE, 40th Cong., 2d Sess. 3425 (1868).

178. *Id.* at 3427.

179. *Id.* at 3426.

180. *See* FREE SOIL, *supra* note 62, at 43.

181. *See* James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1507 (2010) [hereinafter Pope, *Contract*].

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

183. CONG. GLOBE, 38th Cong., 1st Sess. 2990 (1864).

184. CONG. GLOBE, 39th Cong., 1st Sess. 1160 (1866).

185. *See* Pope, *Contract*, *supra* note 181, at 1536 ("[A] minimum wage regulation might be not only permissible, but required under the Amendment.").

throughout the country. The prohibition of even "voluntary" peonage in the 1867 Act indicates that the Reconstruction Era Congress wanted to protect workers from exploitative practices even if the worker chose to accept the exploitative job.[186] This paternalistic attitude reflects the broader free-labor ideology of many in that Congress who wanted to legislate to improve the conditions of work in general. Their primary goal was to prevent labor practices that were unduly coercive. However, members of the Reconstruction Congress also sought to increase wages and establish racial equality in the fundamental right of workers, the right to contract.

The 1866 Civil Rights Act enforces all three prongs of the positive right to free labor. First, it empowered black workers to escape the unduly coercive conditions of labor to which they were subjected even after the end of slavery. Second, it enabled black workers to bargain for better wages and conditions of work. Without Black Codes and vagrancy laws, blacks could use the "labor shortage" to their economic advantage, and consequently, wages rose for southern blacks from 1867–1873, the period in which Reconstruction was enforced in the South.[187] Finally, the 1866 Civil Rights Act outlawed race discrimination in contracts, including employment contracts, and guaranteed equality of the law to all people regardless of race. Thus, the 1866 Civil Rights Act, the very first Act of Congress using its Thirteenth Amendment enforcement power, established a positive right to free labor for freed slaves and all other workers in the United States.

The Anti-Peonage Acts prohibited peonage throughout the country, establishing a protective baseline for workers throughout the nation. James Gray Pope has argued that the 1867 Anti-Peonage Act is evidence that "what mattered was not whether the laborer chose servitude, but whether the resulting condition was degrading to workers and employers."[188] Pope claims that "[t]he existence of freedom was to be tested not by individual worker consent, but by whether freedom was operating to produce fair conditions."[189] There is ample evidence to support this broad view of the right to free labor. Speaking in favor of the Act, Senator Buckalew argued that Congress should outlaw voluntary peonage because the terms of debt service were "always exceedingly unfavorable

186. *See* Soifer, *supra* note 159 (describing Congress's paternalistic attitude towards freed slaves as choice of freedom of labor over freedom of contract); Pope, *Contract*, *supra* note 181, at 1482–83.

187. *See* POLITICS AND IDEOLOGY, *supra* note 42, at 118.

188. Pope, *Contract*, *supra* note 181, at 1486.

189. *Id.* at 1486–87 (citing CONG. GLOBE, 39th Cong., 2d Sess. 1571 (1867)). Senator Wilson explained that in areas where peonage had been eliminated, such as New Mexico, "peons who once worked for two or three dollars a month are now able to command respectable wages." *Id.*

to" the laborer.[190] This critique of the New Mexico peonage system echoed the Free Labor critique of slavery's negative impact on workers as a whole. It also revealed Congress's willingness to address the conditions of labor when they were "exceedingly unfavorable."

Also notable is the concern that the members of the Reconstruction Congress expressed about the impact of an individual decision on the collective rights of workers as a whole. As Pope points out,

> [T]he condition of involuntary servitude harmed not only the laborers themselves, but also society as a whole. On this view, the point of the prohibition was not to endow individuals with inalienable rights, but to prevent a relation of domination and subjugation that would conflict with the health of the Republic.[191]

Similarly, Avi Soifer has argued that members of the Reconstruction Congress believed that the government had an affirmative duty to protect the newly freed slaves, including protecting their right to be free of unduly exploitative employment practices.[192] This affirmative duty differentiates a positive right to free labor from other constitutional rights, which impose negative limitations on government action.

III. EXPANDING ON A POSITIVE RIGHT TO FREE LABOR: THE NEW DEAL ERA AND THE CIVIL RIGHTS SECTION

In the late nineteenth century, the promise of Reconstruction waned and Jim Crow laws dominated the southern states. Tragically, the convict leasing system evolved into inhumane employment practices akin to chattel slavery.[193] In the North, African Americans suffered from race discrimination, which excluded them from many employment opportunities.[194] The predominant rights movement of the era was the labor movement, which advocated the right to organize into a union, engage in collective bargaining, and strike.[195] The labor movement successfully lobbied for protections for workers to increase their wages and improve their working conditions. However, those New Deal protections did not remedy the race discrimination that existed throughout the country but was endemic in the Jim Crow South.[196] Under President Franklin Roose-

190. CONG. GLOBE, 39th Cong., 2d Sess. 1572 (1867).

191. Pope, *Contract*, *supra* note 181, at 1492.

192. *See* Soifer, *supra* note 159, at 1612.

193. *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008).

194. *See generally* MARTHA BIONDI, TO STAND AND FIGHT: THE STRUGGLE FOR CIVIL RIGHTS IN POSTWAR NEW YORK CITY (2003); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007).

195. *See* GOLUBOFF, *supra* note 194, at 10.

196. BIONDI, *supra* note 194.

velt, the Department of Justice engaged in a litigation campaign to address the racial and economic exploitation of black workers in the South.[197] Through statutes and court victories, advocates for a positive right to free labor sought to enforce its promise.

In 1938, President Roosevelt's solicitor general Robert Jackson said, "[The] liberal movement of the present is concerning itself more with economic rights and privileges than with political rights and privileges."[198] In the 1944 case of *Pollock v. Williams*, interpreting the Anti-Peonage Act, then-Justice Robert Jackson articulated a test for determining whether an employment practice violated the prohibition against involuntary servitude.[199] According to Justice Jackson, "when the master can compel and the laborer cannot escape the obligation to go on, there is no power below to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."[200] This New Deal Era standard is a promise of empowerment to workers to combat exploitative practices of employers.[201] It is consistent with the meaning of the Thirteenth Amendment, the Free Labor vision that animated the Reconstruction Era supporters of that Amendment, and the positive right to free labor.

A. The Labor Movement's "Constitution of Freedom"

In the late nineteenth and early twentieth century, prominent leaders of the labor movement developed a theory of constitutional rights for working people, including the right to organize into unions and bargain collectively, based in the First and Thirteenth Amendments. They argued that working without the right to organize and bargain collectively was tantamount to slavery, in violation of the Thirteenth Amendment.[202] Those leaders invoked the radical wing of the antebellum free labor movement and its theory of wage slavery. Many of the workers who embraced the Thirteenth Amendment were former slaves, or sons of former slaves, who worked as mine workers in West Virginia.[203] But white labor leaders, including the American Federation of Labor leader Samuel Gompers, also embraced the promise of freedom in the Amendment.[204]

197. GOLUBOFF, *supra* note 194, at 10.

198. *Id.* at 27.

199. Pollock v. Williams, 322 U.S. 4 (1944).

200. *Id.* at 18.

201. *See* Pope, *Contract*, *supra* note 181, at 1502 (arguing that *Pollock* sets the correct standard for evaluating claims under the Involuntary Servitude Clause); Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 576–77 (1951).

202. *See* James Gray Pope, *Labor's Constitution of Freedom*, 106 YALE L.J. 941, 995 (1997).

203. *Id.* at 981.

204. *Id.* at 962.

They argued that the Amendment protected the freedom of workers to control their own lives.[205] That freedom, they claimed, included the collective rights needed to increase workers' bargaining power with employers to improve wages and conditions of work.[206]

At the turn of the century, Mr. Gompers claimed that the Thirteenth Amendment protected the workers' right to strike and blocked the state from enacting legislation that limited this right.[207] Gompers insisted that the workers' right to strike was the best protection against slavery.[208] In the 1930s, International Seamen's Union president Andrew Furuseth also argued that the Thirteenth Amendment protected the right to strike, and asked Congress to base legislation protecting the right to organize, and to strike, in its power to enforce the Thirteenth Amendment.[209] These labor leaders framed the positive right to free labor as the right to organize with other workers to achieve better wages and working conditions.

Lacking legal training, most workers in the early twentieth century did not invoke the Thirteenth Amendment per se. However, they used images of slavery and freedom to advocate for better wages and working conditions. In the streets of Toledo, Ohio, workers at the Auto-Lite factory went on strike to assert what they believed was their fundamental right to belong to a union.[210] The Toledo Auto-Lite workers joined millions of other workers who went on strike in the early 1930s to assert the right to join a union.[211] Those workers also demanded equal pay for equal work, an end to job discrimination based on age, race, or sex, and a requirement that job decisions be made based on seniority rather than favoritism.[212] Auto-Lite workers explained that they were striking against "wage slavery": the deplorable conditions of work and the way that their employers treated them.[213] Their arguments were typical of those voiced by thousands of striking workers throughout the country demanding the right to organize. These workers struck to enforce their positive right to free labor.

At the outset of the Auto-Lite strike, Floyd Bosser, president of Federal Labor Union Local 18384, encouraged the Auto-Lite workers "to

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205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1001.

209. *See* James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 24–25 (2002).

210. Rebecca E. Zietlow & James Grey Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against "Wage Slavery,"* 38 U. TOL. L. REV. 839 (2006).

211. LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939, at 252 (1990).

212. *Id.* at 315.

213. Zietlow & Pope, *supra* note 210, at 843.

strike against a condition that threatened to make of them mere serfs and slaves whose bodies were going to be ground into profits."[214] The workers agreed. Their chief complaints were the foremen's arbitrary and abusive use of power against them and their lack of autonomy on the job.[215] They recalled taking the streetcar to work only to be told that they were not needed, and working at the mercy of the foreman's whims.[216] Auto-Lite workers complained of being denied any breaks while on the job and not being allowed to eat, smoke, or use the bathroom.[217] They described being subjected to dangerous working conditions, with the danger increased by the "speed-up system."[218] They said they felt like they were being treated like "animals," and they demanded the right to be treated "human being[s] again."[219] Thus, the Auto-Lite workers echoed concerns of lack of autonomy, poor wages, and poor conditions, similar to the earlier industrial workers a century before. As members of Congress debated the National Labor Relations Act in Washington, supporters of the Act referred to the Toledo strike to bolster their cause.[220]

At the same time that Auto-Lite workers were striking, black workers in the South voiced their own complaints about their working conditions and lack of autonomy.[221] Landlords often used violence to keep their tenant farmers compliant and cheated the workers out of their earnings.[222] If the tenant farmers sought to leave their jobs, local officials used vagrancy laws to round up workers and return them to their employers.[223] Southern domestic and agricultural workers wrote letters to the federal government asking for help. The Federal Bureau of Investigation (FBI) transcribed many of their letters into official complaints. In their letters, black workers used terms like "slavery," "peonage," and "involuntary servitude" to describe their plights.[224] They sought both racial and economic justice, and some of them formed their own organizations to advocate for their rights.[225] African American Henry Huff was a lawyer with one such organization, the Workers Defense League. Huff wrote to President Franklin Roosevelt, asking the President to abolish

214. *Id.* at 847 n.48 (citing *Auto Strike Settlements Believed Near*, TOLEDO BLADE, May 11, 1934, at 2).
215. *Id.* at 843.
216. *Id.*
217. *Id.*
218. *Id.* at 848.
219. *Id.* at 840.
220. ZIETLOW, *supra* note 93.
221. GOLUBOFF, *supra* note 194, at 51.
222. *Id.* at 60.
223. *Id.* at 69.
224. *Id.* at 51.
225. *Id.* at 52.

"for all time to come . . . that new form of slavery known as peonage, which entered the back door as the Proclamation of immortal Lincoln drove chattel slavery out of the front door."[226] During World War II, Huff crusaded with the Abolish Peonage Committee.[227] In the North, black workers were relegated to lower paying jobs due to race discrimination.[228] Although they complained of race discrimination, the primary concern of northern black workers was their lack of access to well-paying jobs.[229] Suffering from racial and economic exploitation, these workers also sought a positive right to free labor.

Eventually the labor movement convinced members of the New Deal Congress that the right to organize and bargain collectively was a fundamental right meriting federal protection.[230] During debates over the National Labor Relations Act, supporters of the bill invoked the Reconstruction Era and labor's theory of constitutional rights.[231] The Act's sponsor, New York Senator Richard Wagner, called the federal law establishing the right to organize a "veritable charter of freedom of contract" and argued that without the right to bargain collectively, "there would be slavery by contract."[232] That particular Congress also enacted the Fair Labor Standards Act, which established a federal minimum wage and regulated the hours of workers. Similarly, the National Labor Relations Act and the Fair Labor Standards Act greatly expanded the rights of workers consistent with the positive right to free labor. The right to organize empowered workers to combat undue coercion in the workplace and to advocate for higher wages.

However, those New Deal measures contained exceptions for agricultural and domestic workers, precisely the workers whose jobs most closely resembled those of the former slaves and (not coincidentally) who were most likely to be workers of color. Those exemptions were necessary to win the votes of segregationist Democrats whom Roosevelt relied upon for support.[233] Southern Democrats understood that the federal laws would undermine the Jim Crow system, a system that relied to a large degree on the exploitation of black farm workers.[234] Thus, the

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226. *Id.* at 56.

227. *Id.* at 132.

228. *Id.* at 85.

229. *Id.* at 107 ("Although race runs through these complaints, the central goal of these letter writers was simply work.").

230. *See* ZIETLOW, *supra* note 93, at 63.

231. *Id.* at 75 (citing *National Labor Relation Board: Hearing Before the S. Comm. on Educ. & Labor*, 74th Cong., 1st Sess. (1935)).

232. *National Labor Relation Board: Hearing Before the S. Comm. on Educ. & Labor*, 74th Cong., 1st Sess. (1935).

233. *See* ZIETLOW, *supra* note 93, at 94–95.

234. *Id.*

political success of the positive right to free labor was limited in the New Deal Congress. The black workers who petitioned the FBI were largely overlooked by the New Deal Congress.

B. The Civil Rights Section

Outside of Congress, however, both political actors and courts made significant contributions to achieving racial equality for workers in the New Deal Era. Unions were far from immune from race discrimination, but organized labor also played a crucial role in the civil rights movement.[235] In the 1930s, Congress of Industrial Organizations (CIO) organizers advocated for racial equality.[236] African Americans who became involved in the labor movement also expanded their scope to include the right to racial equality.[237] One of the most prominent early civil rights leaders was A. Phillip Randolph of the Brotherhood of Sleeping Car Porters.[238] In 1941, Randolph convinced President Roosevelt to turn his attention to issues of racial equality by threatening to organize a civil rights march on Washington. In response, Roosevelt created the first Fair Employment Practices Commission (FEPC).[239] While the FEPC investigated complaints of race discrimination in the North, another branch of the Roosevelt Department of Justice, the Civil Rights Section (CRS), was more closely focused on racial subordination in the southern states.[240] Both agencies sought to implement a positive right to free labor.

As illustrated above in *Pollock*, Justice Jackson articulated a broad view of the positive right to free labor. Not coincidentally, Jackson had served as Attorney General under President Franklin Roosevelt at the time that the CRS at the Department of Justice was just beginning its litigation campaign to expand the rights protected by the Thirteenth Amendment and the Anti-Peonage Act.[241] Those Justice Department lawyers sought to fill in the gaps left by the New Deal measures protecting workers and establish a positive right to free labor as a matter of federal civil rights law. Following Jackson, Attorney General Francis Biddle and his staff "took the old, abolitionist, free-labor ideology, transformed it from the *Lochner* era for service in the post–New Deal era, and tried to

235. *See* GOLUBOFF, *supra* note 194, at 97.

236. *See* BIONDI, *supra* note 194, at 22.

237. *See id.* at 17.

238. *Id.* at 4.

239. *Id.*

240. *See* GOLUBOFF, *supra* note 194, at 6.

241. *See* ROBERT K. CARR, FEDERAL PROTECTION OF CIVIL RIGHTS: QUEST FOR A SWORD 80 (1947); GOLUBOFF, *supra* note 194. The CRS section was inaugurated under Jackson's predecessor as Attorney General, Frank Murphy. *See* CARR, *supra*, at 24.

make it constitutionally foundational."[242] The CRS campaign established precedents for protecting the rights of workers against exploitative practices that coincided with racial subordination. Through the 1960s, their contribution to the positive right to free labor remained part of the canon of our civil rights law.

The CRS also sought to integrate labor rights with the right to racial justice by enforcing the anti-peonage statute against employers who were mistreating farmworkers and domestic workers in the South.[243] The CRS made the Thirteenth Amendment's prohibition against involuntary servitude central to their practice and "used the Thirteenth Amendment to extend to some of the most destitute of black workers affirmative New Deal protections for personal security, labor rights, and rights to minimal economic security."[244] At a time when the definition of civil rights was in flux, the CRS fought both economic and racial exploitation.[245] President Roosevelt had made economic security a priority of his administration.

The CRS advocated three expansive interpretations of the Thirteenth Amendment that would enable African Americans to benefit from the concept of positive rights. First, the "New Deal security" of Franklin Roosevelt would include safety and security of the person. Second, they sought to extend the free labor protections of the New Deal to agriculture and domestic workers. Finally, they hoped to expand the New Deal right to economic security to agricultural and domestic workers.[246] Thus, these New Deal Era advocates sought to build on the free labor tradition of the Reconstruction Era to finally bring about a positive right to free labor. They succeeded in some of their prosecutions for the shocking conditions in which black agricultural workers were working in the South. They also convinced Congress to amend the anti-peonage statute to expand its coverage and update its terminology.[247] They argued that the statute would clarify that the Thirteenth Amendment serves "as a basis for a positive, comprehensive federal program—a program defining fundamental civil rights protected by federal machinery against both state and private encroachment."[248]

The CRS's success did have an impact on U.S. civil rights law. As President Harry Truman explained in 1947, "[t]he extension of civil rights today means not protection of the people *against* the Government,

242. GOLUBOFF, *supra* note 194, at 159.

243. *Id.* at 10.

244. *Id.* at 11.

245. *Id.* at 17.

246. *Id.* at 172.

247. *See* Anti-Peonage Act, ch. 187, 14 Stat. 546 (1867) (codified as amended at 18 U.S.C. § 1581 and 42 U.S.C. § 1994 (2012)); GOLUBOFF, *supra* note 194, at 150.

248. CARR, *supra* note 241, at 36.

but protection of the people *by* the Government."[249] The concept of civil rights was changing to a more positive conception, a "new positive liberty."[250] As late as 1951, the House and Senate considered legislation to "bolster the legal tools for eliminating involuntary servitude" and facilitate the prosecution of peonage-like conditions and extend its protection to domestic workers.[251] Through the mid-1960s, constitutional law textbooks included sections on "The Right to the Security of the Person" and "Freedom of Labor."[252] After the early 1950s, however, the CRS stopped focusing on the rights of workers and instead shifted its focus to enforcing the Equal Protection Clause against state-mandated racial discrimination.[253] Anticommunism dampened the enthusiasm of lawyers working to create economic rights for low-wage workers.[254] Over time, the positive right to free labor was removed from the canon of civil rights law, replaced by cases and statutes protecting social equality without economic rights.[255]

IV. POSITIVE RIGHT TO FREE LABOR IN THE SECOND RECONSTRUCTION TO TODAY

Since the 1960s, a positive right to free labor has faded from our civil rights canon. It has been replaced by court enforcement of the Equal Protection Clause, with all its attendant limitations. *Brown v. Board of Education* established "the legal and intellectual framework that continues to dominate how lawyers and laypeople alike think about civil rights."[256] The Supreme Court has held that the Equal Protection Clause does not protect economic rights.[257] Instead, it addresses only intentional discrimination on the basis of immutable characteristics, including race and gender.[258] At the same time, labor rights have taken a beating. The Court has narrowed the protections of the National Labor Relations Act, significantly reducing its effectiveness.[259] Union density in the United

249. GOLUBOFF, *supra* note 194, at 141 (citing President Harry Truman, Speech at the Lincoln Memorial (June 29, 1947)).

250. *Id.* at 152.

251. *Id.* at 166–67.

252. *Id.* at 266–67.

253. *Id.* at 258.

254. *See id.* at 219.

255. *See id.* at 269.

256. *Id.* at 240.

257. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

258. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (gender); Washington v. Davis, 426 U.S. 229 (1976) (race).

259. *See* James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518 (2004).

States has declined to an all-time low.[260] Wages have stagnated, and the gap between rich and poor has increased dramatically in the past forty years. [261] The dormancy of the positive right to free labor has taken its toll.

In the 1960s, courts following the *Brown* ruling and political actors responding to the civil rights movement brought about the Second Reconstruction, an era in which courts and political actors enforced racial equality norms and sought to combat discrimination based on immutable characteristics. While many of these measures furthered aspects of the positive right to free labor, the Thirteenth Amendment played only a minor role in this era. Moreover, notwithstanding the poverty rights movement in the late 1960s, the civil rights victories during this era were largely divorced from the vision of economic justice which animates the positive right to free labor. Federal statutes prohibiting discrimination on the basis of race, gender, disability, and age also followed the *Brown* paradigm—focusing solely on prohibiting discrimination and discounting economic empowerment.[262] While the Second Reconstruction measures achieved significant advances in combatting discrimination based on immutable characteristics, they did little to remedy the economic inequality that plague so many women and people of color in our society. The decline of the positive right to free labor in our civil rights law has coincided with persistent wage gaps based on gender and race, and increasing economic inequality in our society. Recently, public attention has shifted to the plight of the low-wage workers. Now is a great time to revive the positive right to free labor.

A. The 1964 Civil Rights Act

Recently, we celebrated the fiftieth anniversary of the passage of the 1964 Civil Rights Act, one of the most effective civil rights statutes in our nation's history.[263] The statute outlaws race discrimination in places of public accommodation[264] and by recipients of federal funds[265] and includes penalties for discrimination in employment on the basis of race, ethnicity, religion, national origin, and gender.[266] The 1964 Civil Rights

260. *See* SOPHIE Z. LEE, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT 257 (2015).

261. *Id.*

262. *See, e.g.*, Age Discrimination Act of 1975, 42 U.S.C. §§ 6101–6107 (1994); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 330 (codified at 42 U.S.C. ch. 126 (2012)).

263. Civil Rights Act of 1964, 42 U.S.C. § 2000a–2000h (1994).

264. *Id.* §§ 2000a to a-6.

265. *Id.* §§ 2000d to d-7.

266. *Id.* §§ 2000e to e-17.

Act made great strides in ending racial segregation and furthering racial equality in the workplace. What is less widely noted is the role that the labor movement played in achieving the statute's success. The movement behind the Act, and the Act's provisions, reflect the positive right to free labor championed by rights activists since the Reconstruction Era. However, the statute was not based in the Thirteenth Amendment, and the Act's supporters rarely invoked it. Over the decade, the positive right to free labor faded from the dominant paradigm of civil rights, and its promise of economic justice was diminished.

The Civil Rights Act came about due to the activism of the civil rights movement, working with its allies in organized labor.[267] It is indelibly linked in the public mind to the 1963 March on Washington for Jobs and Freedom, and Martin Luther King's "I Have a Dream" speech. In his speech, King evoked not just the image of racial equality, but also of liberty.[268] King's speech celebrated the 100th anniversary of the end of slavery with the Emancipation Proclamation. The final stanza of his speech, "Free at Last" is consistent with this theme. The march was dedicated not only to ending segregation in public places, but also to empowering workers by protecting them against race discrimination and improving their wages and conditions of labor.[269] This was a joint goal of the civil rights and labor movements. The march was originally the idea of none other than lifetime labor activist A. Phillip Randolph, who had dedicated his life to achieving a positive right to free labor since the New Deal Era.[270] Walter Reuther, President of the United Auto Workers, played a central role in organizing the 1963 march, and his staff worked the congressional hallways lobbying for the bill.[271] The march demanded racial equality for workers, affordable housing, and a living wage—a positive right to free labor.

The 1964 Civil Rights Act was rooted in Congress's power to regulate interstate commerce and to enforce the Fourteenth Amendment.[272] Like the 1866 Civil Rights Act, the statute prohibited race discrimination in economic transactions. Given that precedent, it seems clear that Congress could have relied on the Thirteenth Amendment enforcement power. The Thirteenth Amendment would have been particularly appropriate

267. *See* WILLIAM P. JONES, THE MARCH ON WASHINGTON: JOBS, FREEDOM, AND THE FORGOTTEN HISTORY OF CIVIL RIGHTS, at xvii (2013).

268. *Id.* at ix.

269. *Id.* at xix.

270. *Id.* at 163.

271. ROBERT D. LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964, at 53 (1990).

272. *See* ZIETLOW, *supra* note 93, at 112–14.

given the fact that the statute addressed private discrimination.[273] The state action bar to the Fourteenth Amendment was a major concern in congressional debates and the reason why Congress chose to rely on the Commerce Power.[274] Nonetheless, members of Congress did not rely on their power to enforce the Thirteenth Amendment. Instead, they invoked the notion of equal citizenship, protected by the Fourteenth Amendment.[275] It is undeniable that the statute does implement a crucial element of the positive right to free labor—the freedom from race discrimination in employment. That members of Congress failed to invoke the Thirteenth Amendment in the debates over the 1964 Act illustrates the extent to which the Thirteenth Amendment-based New Deal advocacy had faded from the public consciousness by the mid-1960s. The links between the civil rights and labor movements were increasingly attenuated, weakening the positive right to free labor.

B. The Right-Wing Attack on the Positive Right to Free Labor

Immediately after Congress enacted the National Labor Relations Act, conservative forces set out to weaken the statute and undermine workers' rights to organize. In the 1940s, conservatives coined the term "right to work" as the right of an individual employee not to belong to a union.[276] Notwithstanding the Supreme Court's repudiation of *Lochner*, some lower courts agreed with these arguments and issued injunctions against unions based on the right to work.[277] But the "right to work" campaign was far more successful in the political realm. On his radio show, Cecil De Mille campaigned for the "right to work," claiming that it was "endowed by God" and in the Declaration of Independence and Bill of Rights.[278] De Mille called his effort the conservative civil rights movement.[279] De Mille also drew an analogy between closed shops and American slavery, arguing that workers needed a "second emancipation proclamation" against unions.[280] His campaign had a significant impact. In 1947, Congress enacted the Taft-Hartley Act, which prohibited closed shops and allowed states to pass "right to work" statutes.[281]

Congress amended the National Labor Relations Act again in 1950 to authorize union shops (shops in which eligible workers were required

273. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to e-17 (1994).
274. *See* ZIETLOW, *supra* note 93, at 113.
275. *Id.* at 112.
276. LEE, *supra* note 260, at 59.
277. *Id.* at 64.
278. *Id.* at 71.
279. *Id.* at 71.
280. *Id.* at 73.
281. *Id.* at 77. Fourteen states immediately adopted right-to-work statutes. *Id.* at 75.

to join unions). However, the right-to-work movement continued to grow in the 1950s and 1960s. Its leaders framed the right to work as the right to earn a living "with or without union membership," and they claimed that it had constitutional dimensions.[282] By the 1950s, the right-to-work movement had some powerful support, including the investment of General Motors, the National Association of Manufacturers, and other major businesses.[283] Like their union opponents, the National Right to Work Committee raised free speech and free association claims. It called union members "forced followers."[284] This use of language is ironic, since "[i]n right-to-work states, employees who wish to form a union [were] effectively forced to subsidize the provision of union benefits to coworkers who refuse[d] to support the union," including higher wages, better working conditions, and procedural rights under collective bargaining agreements.[285] Thus, "right to work" laws enable employees to be free-riders and strain the resources of the unions.[286] Over the years, the right-to-work campaign has eroded the forces behind the positive right to free labor.

In the 1950s and early 1960s, union membership was at its peak in our nation's history, and labor had political clout.[287] The right-to-work movement sought to exploit a union's obligation to represent its members under the "duty of fair representation" rule to split alliances between labor and the civil rights movement.[288] As early as the New Deal Era, some black lawyers had sought to convince the National Labor Relations Board to refuse to certify unions that discriminated on the basis of race.[289] The National Association of Manufacturers seized on this strategy and sought to make alliances with conservative blacks.[290] It focused on union discrimination to solicit black voters and alienate racial liberals' support for labor.

Other civil rights lawyers sought to use the NLRB to enforce a positive right to free labor. For example, NLRB member Howard Jenkins sought to impose an antidiscrimination mandate on unions without reducing their potential as a means of economic empowerment for black workers.[291] However, the right-to-work movement was more successful

282. *Id.* at 117.

283. *Id.* at 120.

284. *Id.* at 124.

285. Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. SEIU, Local 1000, 98 CORNELL L. REV. 1023, 1032 (2013).

286. *Id.* at 1033.

287. LEE, *supra* note 260, at 115.

288. *Id.* at 104.

289. *See id.* at 12, 21–23.

290. *Id.* at 129.

291. *See id.* at 175.

at breaking up the alliance between organized labor and the civil rights movement, which led to the passage of the 1964 Civil Rights Act. By the 1970s, disputes over affirmative action and union dues had emerged, and the right-to-work movement gained strength. From 1965 to 1971, leading Senators Everett Dirksen and Pete Dominici repeatedly introduced legislation that they called a "laboring man's bill of rights," which included both right to work and antidiscrimination measures.[292] Resisting unions had become a more mainstream business position. The election of Ronald Reagan for president in 1980 was a victory for the New Right, a coalition of Goldwater Republicans and next generation conservatives who strongly supported the "right to work."[293] Indeed, the Supreme Court is currently considering a case, *Friederichs v. California Teachers' Association*, which would constitutionalize the "right to work" under the First Amendment. Since then, the power of unions has declined as have real wages for middle-class and lower income workers.

C. A Positive Right to Free Labor Today

Meanwhile, since the late 1960s, civil rights activists have focused their advocacy primarily on enforcing the Equal Protection Clause of the Fourteenth Amendment and civil rights statutes based on the Equal Protection paradigm. Other rights movements, such as the movement for sex equality, disability rights, and gay rights, have followed suit. These rights movements have achieved significant gains in furthering equality and fighting discrimination on the basis of immutable characteristics. At the same time, our country has been marked by increasing inequality in the economic realm. Without active enforcement of a positive right to free labor, low-wage and middle-class workers have really taken a hit. Real wages have declined since the 1970s for all workers. [294] The gap between wages earned by women and men remains today about the same as it was in the 1970s.[295] On average, people of color earn significantly less than white people, and women of color remain at the bottom of real wages, income, and assets.[296] Union membership is down from the high point of

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292. *Id.* at 177.

293. *Id.* at 241.

294. Drew DeSilver, *For Most Workers, Real Wages Have Barely Budged for Decades*, PEW RES. CENTER (Oct. 9, 2014), http://www.pewresearch.org/fact-tank/2014/10/09/for-most-workers-real-wages-have-barely-budged-for-decades/.

295. *Pay Equity & Discrimination*, INST. FOR WOMEN'S POL'Y RES., http://www.iwpr.org/initiatives/pay-equity-and-discrimination (last visited Mar. 2, 2016); *see also* Ezra Rosser, *Reclaiming Demographics: Women, Poverty, and the Common Interest in Particular Struggles*, 20 AM. U. J. GENDER SOC. POL'Y & L. 767, 767–68 (2012).

296. ARIANE HEGEWISCH & EMILY ELLIS, INST. FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP BY OCCUPATION 2014 AND BY RACE AND ETHNICITY (2015), *available at*

almost 40% in the 1950s to below 10% of the workforce.[297] Low-wage workers often work at jobs where they are subjected to rigid, inflexible, and unpredictable work schedules, depriving them of autonomy and control over their lives.[298] It is time to revitalize the positive right to free labor.

CONCLUSION

A positive right to free labor is best enforced not by courts but by the political branches and the people themselves. From the *Lochner* era to the present day, courts have been hostile to workers' rights.[299] The political branches have been far more effective at bringing about the promise of the positive right to free labor. What measures can be taken today to enforce a positive right to free labor?

First and foremost, it is necessary to reinstate a fair wage for low and middle income workers, including amending the Fair Labor Standards Act to raise the minimum wage. Second, measures are needed to combat undue coercion in the workplace. These include measures to strengthen unions and legislation to regulate the manipulation of workers' schedules. Finally, it is necessary to strengthen the anti-discrimination mandate to include freedom from discrimination based on sexual orientation and sexual identity. Although the Supreme Court has identified a right for same sex couples to marry, the Court applies only the deferential rational basis standard to classifications based on sexual orientation and sexual identity. Moreover, courts have interpreted Title VII not to prohibit discrimination based on sexual orientation. Measures to combat discrimination in the workplace based on sexual orientation and identity, including the Employee Non-Discrimination Act, enforce the third prong of the positive right to free labor. The goal of all of these measures is to move towards a workplace where the workers can live self-actualized lives and realize their potentials without having to sacrifice their identities. They provide only a glimpse of what a positive right to free labor promises in the twentieth century.

As we begin to consider what a positive right to free labor would mean in the twenty-first century, the Thirteenth Amendment is a great place to start. The Amendment provides a positive guarantee of rights which are enforceable against state actors and private individuals. A pos-

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http://www.iwpr.org/publications/pubs/the-gender-wage-gap-by-occupation-2014-and-by-race-and-ethnicity.

297. LEE, *supra* note 260, at 257.

298. *See* Liz Watson & Jennifer E. Swanberg, *Flexible Workplace Solutions for Low-Wage Hourly Workers: A Framework for a National Conversation*, 3 AM. U. LAB. & EMP. L.F. 380, 384 (2013).

299. *See* ZIETLOW, *supra* note 93.

itive right to free labor is based in both liberty and equality. It includes those rights which are necessary to empower workers to advocate for better wages and conditions. Considering the scope and content of a positive right to free labor is a worthy goal for twenty-first-century advocates of workers' rights.