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**SERVITUDE AND CAPTIVITY IN THE COMMON LAW  
OF MASTER-SERVANT: JUDICIAL INTERPRETATIONS  
OF THE THIRTEENTH AMENDMENT’S LABOR VISION  
IMMEDIATELY AFTER ITS ENACTMENT**

Lea VanderVelde\*

In the nineteenth century, the American common law of master and servant was a system of subordination principles designed to command and capture the labor of workers.<sup>1</sup> Blackstone’s *Commentaries on the Laws of England* was the received common law in the United States, from the early days of the Republic through the settlement of new states in the American West.<sup>2</sup> Blackstone’s Chapter Fourteen, entitled “Of Master and Servant,” organized the legal rules into a system of subordination as formal inequality.<sup>3</sup> Blackstone’s entire chapter used slavery as its foundation,<sup>4</sup> rather than partnership or voluntary free labor. Even though the common law is celebrated for its flexibility and its potential to make iterative changes—“work itself pure,” as some legal philosophers sometimes describe it<sup>5</sup>—Blackstone’s formal inequality remained relatively unaffected during the early Republic.

Against this feudal common-law backdrop, Reconstruction egalitarianism injected a breath of fresh air—an opportunity to redefine the relationship of working people to their employers. An egalitarian, leveling ethos held sway as Reconstruction brought about a revolution in basic rights.<sup>6</sup> This was an opportunity to revise

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<sup>1</sup> KAREN ORREN, *BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES 160–208* (1991); ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350–1870*, at 15–54 (1991); CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 232–58* (1993).

<sup>2</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Univ. Chi. Press 1979) (1765).

<sup>3</sup> *Id.* at 410–20.

<sup>4</sup> *Id.*

<sup>5</sup> 12 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH COMMON LAW 551* (1938). This notion has had amazing staying power. See ANITA BERNSTEIN, *THE COMMON LAW OF THE BODY* (2018).

<sup>6</sup> See *infra* Part II. Bruce Ackerman calls these “constitutional moments.” 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS 160* (1998). During the congressional debates, Congressman William H. Wadsworth of Kentucky remarked: “I did not mean it in any offensive sense. But if this is not a revolution I do not know what is.” CONG. GLOBE, 38th Cong., 1st Sess. 340 (1864).

the formal inequality of the common-law doctrine, as successive constitutional amendments and national reconstruction reset the law in fundamental ways. Because creating parity between working people and their employers was one of Reconstruction's objectives, there were opportunities to revise master-servant legal doctrine in a more balanced direction.<sup>7</sup> With the Thirteenth Amendment's enactment, all workers were recognized as having a constitutional right to quit employment and leave their employers.<sup>8</sup> But more reforms—new work-related laws—were needed as the freedmen transitioned to a free labor system in a climate in which the defeated masters sought to maintain their positions of dominance over their former slaves. It should be noted that the Thirteenth Amendment was targeted to eliminate two forms of oppression: both racial domination and labor exploitation under slavery.<sup>9</sup> The Southern state legislatures moved quickly to enact statutes called “Black Codes” to maintain their pre-war practices. Many of these were directed at race but others framed labor practices.<sup>10</sup>

In a series of speeches over several months, members of Congress decried these subordinating laws as Southern states revised their legislation. Often this new subordinating legislation was handily borrowed from similar aspects of common-law doctrine.<sup>11</sup> For example, one state legislated that hereafter African-American workers would be referred to as “servants.”<sup>12</sup> The abolition of slavery and involuntary servitude, and the reconstruction of labor systems in the Southern states, should have been an event of major reorganization in nineteenth-century master-servant law.

Yet, master-servant law survived Reconstruction,<sup>13</sup> and American law continues to bear its imprint to this day.<sup>14</sup> So why did master-servant law survive? Or more particularly, why did the Reconstruction reforms fail to revise master-servant law? The answer seems to be found in a combination of factors. The federal courts basically ignored the Thirteenth Amendment, and they tightened the Fourteenth Amendment to a much

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<sup>7</sup> See *infra* Part II.

<sup>8</sup> See U.S. CONST. amend. XIII, § 1; James Pope, *What's Different about the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189, 191 (2011); Lea VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PENN. L. REV. 437, 438 (1989) [hereinafter VanderVelde, *Labor Vision*].

<sup>9</sup> Pope, *supra* note 8, at 192.

<sup>10</sup> VanderVelde, *Labor Vision*, *supra* note 8, at 487–88.

<sup>11</sup> *Id.* at 488–89.

<sup>12</sup> CONG. GLOBE, 39th Cong., 1st Sess. (remarks of Sen. Wilson citing new legislation in the southern states, such as South Carolina and Georgia; followed by remarks of Sen. Sumner describing objectionable new laws in Alabama and Mississippi).

<sup>13</sup> Christopher Tomlins, *Subordination, Authority, Law: Subjects in Labor History*, 47 INT'L LAB. & WORKING CLASS HIST. 56, 70 (1995) (“Slavery’s abolition, for example, did not bring about the obliteration of master and servant law. If anything, by liberating master/servant’s application to hirelings from the inhibiting impediment of an obvious (and damaging) comparison it actually strengthened master and servant law.”).

<sup>14</sup> See, e.g., RESTATEMENT OF THE LAW EMPLOYMENT LAW § 2 (AM. L. INST. 2015) [hereinafter RESTATEMENT] (containing many aspects of master-servant law).

narrower field of application than the text actually provided.<sup>15</sup> State courts, on the other hand, have the major duty to revise the common law, but in order to do so, cases must be brought to them. Procedurally, the common law specified the types of writs available to plaintiffs, and while masters had several types of causes of action to bring regarding their interests in their servants, servants did not. Blackstone's chapter on master and servant would be cited again and again, especially whenever there was no clear basis on which to decide a case. And employee-plaintiffs had little recourse under master-servant doctrine. Moreover, working people were not in a favored position to bring their grievances to courts because they rarely had the legal resources to argue for expansions of their labor rights. The sole right of action workers could use to defeat their masters' overreaching was the writ of habeas corpus, and habeas corpus could do no more than see that the worker was released physically from his master's captivity.

This Article first takes a closer look at Blackstone's chapter on master and servant.<sup>16</sup> Second, it examines the anti-subordination agenda of the Reconstruction Congress, which abolished involuntary servitude and engaged in structuring a free labor system—a republican system of labor—to replace the slave labor system and to bring the freedmen into parity with their former masters.<sup>17</sup> Third, this Article looks at how the courts interpreted the Thirteenth Amendment's scope in the years immediately after its enactment.<sup>18</sup> This Part demonstrates that the federal courts effectively closed off the path to develop the Thirteenth Amendment as an *economic* right by limiting the universe of rights to consist of only those that were *civil* or *social* rights. This Part also demonstrates how state courts viewed the Thirteenth Amendment quite differently, and analogized more broadly or narrowly, depending upon whether the court was in a Northern free state or a former slave state.<sup>19</sup> Northern states were more willing to see the Thirteenth Amendment as a broad charter of labor freedom, while former slave states read the Amendment so narrowly as to limit its scope to merely abolishing the technical, legal status of chattel slavery.

#### I. AMERICA'S RECEIVED COMMON LAW: BLACKSTONE'S *COMMENTARIES ON THE LAWS OF ENGLAND*

Reconstruction's effect upon work relations must be set within the larger historical framework of the common law of master-servant law. This law dictated subordinating relationships through all of the relationships of private life from a master's slaves, to his hired workers, and to his wife and children.<sup>20</sup>

One magisterial work, Blackstone's *Commentaries on the Laws of England* provided the received common law in the United States. Chancellor Kent's *Commentaries*

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<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part II.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> See *infra* Section III.B.

<sup>20</sup> BLACKSTONE, *supra* note 2, at 410–20.

were also influential,<sup>21</sup> but the legal doctrines stated in Blackstone's *Commentaries* became synonymous with the common-law rules for most judges and attorneys. The *Commentaries* were routinely consulted to determine what the common law was on the antebellum frontier as the nation expanded. The Territorial Ordinances, like the Northwest Ordinance, included provisions that the common law be the law in the territories,<sup>22</sup> and for most territorial courts that meant resorting to Blackstone's work when legal questions arose. Once territories became states, state constitutions also routinely required that the law of the state be the common law.<sup>23</sup>

Blackstone's Chapter Fourteen, entitled "Of Master and Servant" organized the legal rules into a system of formal inequality that subordinated servant to master.<sup>24</sup> This subordination was structured to authorize masters' exclusive legally enforceable privileges to command the lives of their servants and also provided masters with legal actions to constrain their servants—that is, command and captivity.<sup>25</sup> In turn, servants had almost no legally enforceable actions against their masters.<sup>26</sup> One example dramatizes the asymmetry. Blackstone stated that masters could lawfully inflict corporal punishment on their servants, yet servants could never strike their masters.<sup>27</sup> This particularly graphic legal asymmetry authorized the dominant actor to strike the subordinate and forbade the subordinate from fighting back.

Moreover, Blackstone constructed the servant's legal status on the foundational platform of slaves' total domination by their masters, rather than on the foundation of equal contracting parties.<sup>28</sup> As slavery was the platform of Blackstone's taxonomy, all other service relations were described as status modifications built upon this base of absolute subjugation.<sup>29</sup> Ironically, Blackstone chose slavery as his platform despite acknowledging that slavery as such did not exist in England.<sup>30</sup> The full,

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<sup>21</sup> CHANCELLOR JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (1826–1830) (1st ed. 1826).

<sup>22</sup> Northwest Territorial Ordinance of 1787, § 4 ("There shall be . . . a court [which] shall have a common law jurisdiction. . .").

<sup>23</sup> See generally GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* (2004).

<sup>24</sup> BLACKSTONE, *supra* note 2, at 410–20.

<sup>25</sup> *Id.*

<sup>26</sup> See, e.g., *id.* at 416.

<sup>27</sup> See Lea VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727 (2016) [hereinafter VanderVelde, *The Last Legally Beaten Servant*].

<sup>28</sup> See BLACKSTONE, *supra* note 2, at 418. Compelled labor had long been regarded as permissible in England under The Statute of Laborers and Artifices. See generally MARC LINDER, *THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW: A HISTORICAL PERSPECTIVE* (1989).

<sup>29</sup> See BLACKSTONE, *supra* note 2, at 413–15.

<sup>30</sup> *Id.* at 411. Notably, Blackstone's first edition contained a passage critical of slavery's legitimacy that is not present in later editions. Blackstone's first edition states that when a slave arrived in Britain, he became a free man, which was conditioned in later editions, as "possibly he became a free man." Wilfrid Prest believes that Blackstone's change may have been

horrendous complexity of slave law came not from Blackstone, but from places in the New World—like the American South.

Yet despite conceding that slavery was not legal in England, Blackstone was comfortable stating that workers—referred to only by their first names in his text—could be held to perpetual lifetime service:

[W]ith regard to any right which the master may have acquired, by contract or the like, to the perpetual service of John or Thomas, this will remain exactly . . . as before: for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term.<sup>31</sup>

One early American commentator, St. George Tucker, attempted to untangle the anti-republican nature of Blackstone's treatise. His attention, however, was focused on matters of inheritance, such as primogenitor, and differences between a monarchy and a federal system.<sup>32</sup> He did not comment upon the hierarchies built into master-servant law.<sup>33</sup> Tucker, a resident of Virginia, where slavery was legal, did not discuss the ways that slavery was inconsistent with republican forms of government. Such a discussion would have undermined his own state's law.<sup>34</sup> To the contrary, Tucker devoted an entire chapter of his book to explaining the laws of slavery in Virginia.<sup>35</sup>

Not only was Blackstone's *Commentaries* the source of common-law doctrine most often used in courts, it was also the training book for lawyers reading law. As Timothy Walker wrote in 1837, "There is no work on American Law, at all suitable for a first book; and we are compelled, for want of such a work, to commence with Blackstone's *Commentaries on English law*, to learn the rudiments of *American law*."<sup>36</sup> Moreover, Blackstone's doctrine of master and servant became embedded in all later treatises on the subject as well. Almost all early-nineteenth-century treatises structured their content around the chapter.<sup>37</sup> Still, Blackstone's chapter continued to

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influenced by his conversations with abolitionist Granville Sharp, but the letters between the men have vanished. See WILFRID PREST, *LAWS AND LETTERS IN THE EIGHTEENTH CENTURY* 250–52 (2008).

<sup>31</sup> BLACKSTONE, *supra* note 2, at 412–13.

<sup>32</sup> 1 BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA (St. George Tucker ed., Phila., Birch & Small 1803) [hereinafter TUCKER'S BLACKSTONE].

<sup>33</sup> *See id.*

<sup>34</sup> *See id.*

<sup>35</sup> *Id.* at app. 79–139.

<sup>36</sup> TIMOTHY WALKER, *INTRODUCTION TO AMERICAN LAW: DESIGNED AS A FIRST BOOK FOR STUDENTS* 3 (1844).

<sup>37</sup> For further explanation of this idea, see VanderVelde, *The Last Legally Beaten Servant*, *supra* note 27. Only James Schouler, influenced by Republicanism, deliberately chose to organize his chapter differently, without slavery as its basis. See Lea VanderVelde, *The*



have broader appeal than did specialized treatises. With its seemingly encyclopedic breadth, Blackstone's *Commentaries* provided an answer to almost everything.

By the time of Reconstruction, Blackstone's template for master-servant rules had been altered slightly. Specifically, a master's right to chastise his servant physically had become limited to situations where the master was a ship captain, or his servants were slaves, and in some settings masters were permitted to chastise free, African American workers who were not slaves.<sup>38</sup> In addition, Blackstone's legal rule for a servant's term of employment had altered. Blackstone maintained that general hirings were to last for one year.<sup>39</sup> This rule effectively protected workers in agricultural settings from being let go without material support during seasons when there was little work for them to do. But by Reconstruction, agriculture was no longer the primary employment sector in the United States,<sup>40</sup> so customary rules had evolved in different work situations displacing Blackstone's rule. Domestic servants, for example, were hired by the month,<sup>41</sup> and other employees' expectations could be based on their pay period, whether they were paid by the day, the week, or the month.<sup>42</sup>

The Reconstruction Congress was aware of Blackstone's significant influence on the American common law. To some, Blackstone was a mythical figure of authoritative significance.<sup>43</sup> To others, he was the butt of a joke told and repeated in successive congresses. Congressman Lyman Trumbull of Illinois recounted:

I remember the Senator once told an anecdote in this body which ran something like this: that on some occasion a justice of the peace had made a very extraordinary decision, and the attorney adversary to whom the decision had been made took up a volume of Blackstone and read it to the justice of the peace, showing that his decision was in direct conflict with the law as laid down in

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Anti-Republican Origins of the At-Will Doctrine (unpublished manuscript) (on file with author) [hereinafter VanderVelde, *The Anti-Republican Origins*].

<sup>38</sup> VanderVelde, *The Last Legally Beaten Servant*, *supra* note 27, at 766–67, 777–80. Black codes enacted in the Southern states during Reconstruction would seek to preserve this practice by expressly legalizing the whipping of free blacks. *Id.* at 775–77.

<sup>39</sup> BLACKSTONE, *supra* note 2, at 415.

<sup>40</sup> See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877*, at 125 (1988) (discussing the decline of agriculture in the South during Reconstruction).

<sup>41</sup> JAMES SCHOULER, *A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT* 607 (Boston, Little, Brown & Co., 2d ed. 1874) [hereinafter SCHOULER, *DOMESTIC RELATIONS*].

<sup>42</sup> *Id.* See VanderVelde, *The Anti-Republican Origins*, *supra* note 37.

<sup>43</sup> See CONG. GLOBE, 38th Cong., 1st Sess. 717 (1865) (statement of Sen. Grimes) (“Is there a man here that ever read Blackstone, or that understands the rudiments of the English language, or that knows anything about logic, that does not know . . . a negative pregnant”). Another congressman stated, “It is not necessary to trouble the Senate by reading what Blackstone says on the subject.” *Id.* at 720 (statement of Sen. Johnson).

Blackstone's Commentaries. The justice replied that that was no authority for him. "No," said the lawyer; "I did not read it with the view of changing your opinion, but simply to show what a fool old Blackstone was."<sup>44</sup>

This joke was popular among congressmen; speakers riffed different variations of the venerated English legal authority being called the "old fool."<sup>45</sup> But while Blackstone could be joked about when courts chose not to follow him, as the joke also revealed, attorneys trained in Blackstone could be expected to introduce the *Commentaries* in litigation and would attempt to invoke its authority when the rules favored their cause. Thus, Blackstone would be reintroduced to courts over and over again.

Blackstone laid out the four great relations of private life in Chapters Fourteen through Seventeen: "Of Master and Servant," "Of Husband and Wife," "Of Parent and Child," and "Of Guardian and Ward."<sup>46</sup> Each of these relations had one dominant and one subservient party. With the sequential and parallel ordering of these chapters, the hierarchical structure of these various relations buttressed each other. Discussions of corporal punishment, runaways, and damages accruing to the master for another's interference with his servant ran through the treatments of all four of these "domestic relations" like common themes.<sup>47</sup> In each of these relations, the dominant party had disproportionate control over the subservient one.

These features of Blackstone's ordering in Chapter Fourteen were explicitly acknowledged by Senator Charles Sumner: "[T]he slave was always regarded, legally and politically, as a part of the family of his master, according to the nomenclature of Blackstone's Commentaries, which were much read at the time, where master and servant were grouped with husband and wife, parent and child . . ."<sup>48</sup> As slavery and subordination were embedded in the structure of the common law in this way, numerous congressmen sought to de-tangle the ban on slavery—the foundational base of Blackstone's structure—from the other controlling aspects of

<sup>44</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2056 (1866).

<sup>45</sup> The next session of Congress, Congressman Dumont emphasized that the reason the judge ruled Blackstone not to be precedent was because "it was a British book and not law in this country. The attorney, however, insisted on reading it, not as the law, but that the court might see what an old simpleton and block head Blackstone was." CONG. GLOBE, 39th Cong., 2d Sess. app. 164 (1867). The following Congress, Senator Morrill alluded to the common joke stating:

I am aware that the opinion of the Senate is adverse to that which I entertain; and pretty much all I desire is to do what the lawyer said he wanted to do after the court had decided against him—"I only want to show what a fool Blackstone was."

CONG. GLOBE, 40th Cong., 2d Sess. 164 (1867).

<sup>46</sup> BLACKSTONE, *supra* note 2, at 410–34.

<sup>47</sup> For example, Blackstone stated that husbands could exercise over their wives "domestic chastisement, in the same moderation that a man is allowed to correct his servants or children . . ." *Id.* at 444.

<sup>48</sup> CONG. GLOBE, 39th Cong., 1st Sess. 682 (1866) (statement of Sen. Sumner).



the set of domestic relations.<sup>49</sup> Once the base was abolished, how much did the resulting structure change? What was the new foundational base? This sometimes entailed distinguishing the duration of service—that is, perpetual lifetime bondage of slaves to apprentices’ bound for a term of years. And this sometimes entailed contrasting owning a man to owning a man’s services.<sup>50</sup>

When the Southern states began to adopt codes governing labor, Southern legislatures were particularly drawn to features of command and capture that had been legitimated in Blackstone’s *Commentaries*. For example, when Southern states adopted codes that followed a rule of forfeiture of pay if workers left before the end of a term, codes that prohibited workers from moving, without permission, from one employer to another, and codes that decreed that African American workers would thereafter be called “servants”—they were borrowing from the blueprint of Blackstone’s version of master-servant doctrine.<sup>51</sup> The Reconstruction Congress took critical notice of how oppressive these rules were in a series of speeches.<sup>52</sup>

## II. HOW THE RADICAL REPUBLICANS’ ANTI-SUBORDINATION AGENDA CHALLENGED THE MASTER-SERVANT HIERARCHY

The “Radical Republicans”<sup>53</sup> sought not merely to release the slaves and destroy the “peculiar institution” that existed in the South,<sup>54</sup> but also to end all forms of captive labor, bring workers into parity with their employers, and ensure they were free from their influence.<sup>55</sup> These things, they believed, were essential, not only for the freedmen’s benefit but also for the nation, in order to issue into existence the kind of republic that was the nation’s true promise.<sup>56</sup> Simply abolishing slavery was insufficient to that task, because the nation and its democratic institutions had been corrupted by the oligarchical slave power since its founding.<sup>57</sup> Radical change—to return to the Republic’s roots—was necessary to reverse this corruption, to put the nation back on the right track, and to move it forward to fulfill its promise. To that end, the Reconstruction Congress pursued a multifaceted program of initiatives—by enacting both federal statutes and constitutional amendment—on a broadly based anti-subordination

<sup>49</sup> See VanderVelde, *Labor Vision*, *supra* note 8, at 451–85.

<sup>50</sup> See *infra* notes 133–36 and accompanying text.

<sup>51</sup> See VanderVelde, *Labor Vision*, *supra* note 8.

<sup>52</sup> See *supra* note 12; see also VanderVelde, *Labor Vision*, *supra* note 8 (examining speeches made during the Reconstruction Congress condemning new statutes Southern states were passing that attempted to maintain the captivity and subordination of freedmen).

<sup>53</sup> The label “Radical Republicans” was self-given to demonstrate the level of change this group sought to effect with respect to abolition and civil rights.

<sup>54</sup> CONG. GLOBE, 39th Cong., 2d Sess. 41 (1866) (statement of Sen. Willey).

<sup>55</sup> See *infra* Section II.A.

<sup>56</sup> See *infra* Part II.

<sup>57</sup> 3 HENRY WILSON, HISTORY OF THE RISE AND FALL OF THE SLAVE POWER IN AMERICA 443 (Boston & New York, Houghton, Mifflin & Co., 7th ed. 1877).

agenda.<sup>58</sup> These measures sought to protect the freedmen, legislate nationally, and engage in thorough-going revision of the laws of the District of Columbia.<sup>59</sup>

The Reconstruction Congress considered slavery inconsistent with republican forms of government. As early as 1864, soon after the Emancipation Proclamation, slavery was criticized as “an unrepublican system of labor.”<sup>60</sup> In some ways, this engagement with identifying the anti-republican rules in a system of labor can be seen as taking St. George Tucker’s critique of the anti-republican features of Blackstone a step further. Tucker only identified those anti-republican portions of Blackstone that concerned government.<sup>61</sup> The Reconstruction Congress went further to identify those aspects of hierarchy in master-servant law that undermined a republican form of government.

Slavery undermined the traditional republican ideals, because owning a slave simultaneously amplified the master’s power in the Republic, creating a sort of aristocracy, just as it oppressed the slave.<sup>62</sup> Achieving a truly republican form of government meant that these classes had to be leveled, and working people had to be autonomous from their employers’ overreaching control. “Let the voting masses of any country be composed of an independent yeomanry the majority of whom are freeholders of moderate yet sufficient estate, let them be fairly schooled, intelligent, each one bearing a fair share of the responsibilities of the Government . . . .”<sup>63</sup> The Republicans sought to make freedmen “masters of their time, their labor, and themselves.”<sup>64</sup>

Congress was unanimous in concluding that labor could no longer be compelled in the United States because of the adoption of the Thirteenth Amendment.<sup>65</sup> By banning involuntary servitude, even labor under contract could not be compelled by courts. Workers had a constitutional right to quit.<sup>66</sup> Workers under signed contracts could not be required to continue to work against their will.<sup>67</sup> Workers could no

<sup>58</sup> Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 277–94 (2010) [hereinafter Zietlow, *Free at Last*].

<sup>59</sup> See *infra* Section II.B.

<sup>60</sup> CONG. GLOBE, 38th Cong., 1st Sess. 810 (1864) (statement of Rep. Scofield).

<sup>61</sup> See *supra* text accompanying notes 32–35.

<sup>62</sup> See Zietlow, *Free at Last*, *supra* note 58, at 274.

<sup>63</sup> CONG. GLOBE, 38th Cong., 1st Sess. 2948 (1864) (statement of Rep. Shannon).

<sup>64</sup> CONG. GLOBE, 38th Cong., 2d Sess. app. 98 (1865) (statement of Rep. G. Clay Smith).

<sup>65</sup> See Rebecca E. Zietlow, *A Positive Right to Free Labor*, 39 SEATTLE U. L. REV. 859, 877 (2016) [hereinafter Zietlow, *Positive Right*].

<sup>66</sup> See U.S. CONST. amend. XIII, § 1; Pope, *supra* note 8; VanderVelde, *Labor Vision*, *supra* note 8, at 496 n.224.

<sup>67</sup> Even Senator Cowan, who consistently advocated the most restrictive interpretations of the Thirteenth Amendment, concurred in this interpretation. CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866). Cowan took as a basic assumption that employees could not be ordered specifically to perform their labor contracts. He conceded:

Now, we are told the most impossible things in the world. . . . [W]e are told gravely that the Legislature of Louisiana . . . have provided that . . . the laborer is to be at the mercy of the hirer. How? Has the Legislature

longer be held to labor. The fugitive-servant clause of the Old Constitution had been overwritten.<sup>68</sup> Workers could quit their jobs lawfully; they did not need to escape to avoid oppression.

This left open the possibility, of course, that workers under contract could be sued for damages if they did quit.<sup>69</sup> Congress was a bit more ambivalent on that question. Almost everyone realized that it was simply impractical to attempt to obtain damages from someone who labored for his existence if he exercised his constitutional right to quit.<sup>70</sup> But the key question in terms of a republican system of free labor was whether these employees could be pursued at all. The more radical voices suggested they could not.<sup>71</sup>

#### *A. The Critique of Other “Unrepublican” Systems of Labor*

Congress had a chance to address this issue subsequently in considering two labor systems based upon debt that were also considered “unrepublican.” First, Congress considered the system of peonage that had grown in the Territory of New Mexico, and a system of obtaining laborers from Europe. Second, Congress considered labor immigration laws. Several large capital interests, including railroads, trafficked in immigrants who were brought to the United States from Europe on paid passage and then held to labor.

The discussion of peonage in New Mexico led to the passage of the Anti-Peonage Act. In this discussion, the majority concluded that debt could not be leveraged to compel labor.<sup>72</sup> Under this system, white settlers held Native Americans to labor through a practice of lending them money, goods, or credit and then holding them to work off their debt.<sup>73</sup> Most of these workers were held as domestic servants.<sup>74</sup> As Congress advanced the Anti-Peonage Act, reports in this system from New Mexico claimed that the pre-arranged debt rendered the servitude voluntary—in fact, the writer called it “voluntary, voluntary.”<sup>75</sup> One senator, citing his own debts, felt that

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of Louisiana declared that a contract for the performance of labor can be specifically performed, and that you can compel specific performance in her courts? If she has such a law (and that is the only way I know by which the laborer can be put at the mercy of the hirer in a contract for labor; it is the only possible and conceivable way apart from slavery) such law is *clearly void*, and there is no possible difficulty in obtaining a remedy for it anywhere and everywhere.

*Id.* (emphasis added).

<sup>68</sup> U.S. CONST. art. IV, § 2.

<sup>69</sup> See CONG. GLOBE, 39th Cong., 1st Sess. 4043 (1866).

<sup>70</sup> See Horace G. Wood’s complaint about this problem at HORACE G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT, ch. 4, § 135 (1st ed. 1877).

<sup>71</sup> See *infra* notes 81–94 and accompanying text.

<sup>72</sup> See CONG. GLOBE, 39th Cong., 2d Sess. 1571–72 (1867).

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* (“[T]hey were generally remaining in the families of their masters . . .”).

<sup>75</sup> *Id.* (field report from New Mexico).

this form of debt servitude was outside acceptable the scope of the Thirteenth Amendment's terms.<sup>76</sup> Other senators were adamant, however, that this violated the Thirteenth Amendment, and the measure passed. Senator Henry Wilson, for example, insisted that even if occasionally the servitude was "voluntary," it was "forcible" nonetheless and therefore invidious.<sup>77</sup>

The issue of debt servitude surfaced again later when Congress considered a statute on immigration regulating the obligation of redemptioners to repay monies advanced to them.<sup>78</sup> The statute in question had been on the books before the Thirteenth Amendment was enacted. It attempted to secure enforcement of labor contracts made abroad with foreign workers who sought to come to America.<sup>79</sup> Railroads were in the practice of sending agents to Europe in search of workers, signing them into labor contracts, bringing them to American shores, and then transporting them west where they would work for the railroad.<sup>80</sup> Fearing that these workers would abandon their labor contracts after arriving in the United States, these employers sought additional legal measures to ensure that they could pursue the working men wherever they went.<sup>81</sup> In some ways, this immigration statute encompassed both the historic practice of redemptioner immigration<sup>82</sup> and the fugitive-servant clause that the Thirteenth Amendment had overwritten.<sup>83</sup>

The Senate debate over this statute was contentious. Senator Wilson quickly analogized the measure to slavery calling it "a kind of slave trade."<sup>84</sup> Several other senators also condemned the measure,<sup>85</sup> stating that it "smack[ed] so nearly of that trade which was African, and was forbidden in the Constitution of the United States."<sup>86</sup> One senator called it:

more monstrous . . . in character than the negro slavery that we have abolished. . . . [T]hese plans, cunningly devised, by which capital is to seize labor, by which labor is to be turned up in its vise and held as if poverty were a crime, I am utterly opposed to, for they are repugnant to my sense, and all the conceptions I have of what is right among men.<sup>87</sup>

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<sup>76</sup> *Id.* (statement of Sen. Davis).

<sup>77</sup> *See id.* (statement of Sen. Wilson).

<sup>78</sup> CONG. GLOBE, 39th Cong, 1st Sess. 4040–44 (1866).

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 4040–41.

<sup>81</sup> *See id.*

<sup>82</sup> *See* KARL FREDERICK GEISER, REDEMPTIONERS AND SERVANTS IN THE COLONY AND COMMONWEALTH OF PENNSYLVANIA (2010).

<sup>83</sup> *See* U.S. CONST. art. IV, § 2, cl. 3; *id.* amend. XIII.

<sup>84</sup> CONG. GLOBE, 39th Cong., 1st Sess. 4041 (1866).

<sup>85</sup> *Id.* at 4040–43 (statements of Senators Howe, Morrill, Conness, and Cowan).

<sup>86</sup> *Id.* at 4040 (statement of Sen. Morrill).

<sup>87</sup> *Id.* at 4043 (statement of Sen. Conness).

Another senator stated that it was “so closely allied to the Coolie business that the committee was astonished that the Senate ever gave it a moment’s consideration.”<sup>88</sup>

Yet, one senator claimed that it was for the benefit of the immigrants,<sup>89</sup> to which another quickly replied that the same had been said about slavery.<sup>90</sup> The senators debated whether this constituted a lien on the man’s *services* or a “mortgage on the man himself.”<sup>91</sup> One defender of the provision stated that “there is no slavery about it except the slavery that exists in the case of any man who gets in debt for any sum, and whose debts by the law of the place where he may be are made an encumbrance upon any real estate that he may have.”<sup>92</sup> But, of course, these immigrants had no real estate, only their prospects to perform labor.

In the end, the statute failed.<sup>93</sup> The overall sentiment of Congress weighed against the notion of holding a huge debt over an impoverished man in such a way as to obligate him to continue to work when that work was involuntarily done.<sup>94</sup> This was a direct repudiation of employers attempts to recapture their workers.

Thus, the Thirteenth Amendment guaranteed the right to quit. Free men should be able to quit work for any reason that they found oppressive or objectionable.<sup>95</sup>

#### *B. The Reconstruction Congress’s Efforts to Bring Freedmen and Other Working People to Parity with Their Employers*

The same leveling anti-subordination spirit animated Congress’s many progressive reforms.<sup>96</sup> Since Congress exercised plenary authority over the common law in

<sup>88</sup> *Id.* at 4040 (statement of Sen. Morrill); *id.* at 4041 (“Another objection, it is said, is—‘that the workman may be harshly treated, and so justified in running away.’ Somebody, he imagines, will raise that objection. He answers that—‘The workman has some security in the fact that it is for the interest of every employer to treat him well, that he may not run away.’ I supposed we had got through with that kind of argument long ago, especially when we emancipated the slaves.”).

<sup>89</sup> *Id.* at 4042–43 (statement of Sen. Johnson).

<sup>90</sup> *Id.* at 4043.

<sup>91</sup> *Id.* at 4042 (statement of Sen. Howe).

<sup>92</sup> *Id.* (statement of Sen. Johnson).

<sup>93</sup> *See id.* at 4044.

<sup>94</sup> *See id.* at 4042–43 (“Mr. Howe: There is only one way of enforcing it, and that is specifically against the man. Mr. Johnson: To make him labor? Mr. Howe: Yes; make him labor. It means that or it means nothing. . . . I think that this law has stood on the statute-book too long. I therefore favor . . . repeal[ing] this act instead of enlarging it.”).

<sup>95</sup> SCHOULER, DOMESTIC RELATIONS, *supra* note 41, at 754–55. *See also infra* Section III.B.1 (explaining *Ford v. Jerman*, in which a departing working woman was not expected to explain the reasons why she quit).

<sup>96</sup> Many of these reforms paved the way for the abolition of slavery. For discussion on the reforms implemented in the District of Columbia, see KATE MASUR, AN EXAMPLE FOR ALL THE LAND: EMANCIPATION AND THE STRUGGLE OVER EQUALITY IN WASHINGTON, D.C. (2010); and Lea VanderVelde, *Henry Wilson: Cobbler of the Frayed Constitution, Strategist*

the District of Columbia, it could unquestionably reform any subordinating aspects of the common law in that jurisdiction.<sup>97</sup> In this expansive set of enactments one can get a sense of the Radicals' thinking about how the received common law should be reformed. Congressmen regularly saw themselves as moving beyond the status quo in reforms. They saw themselves as taking the lead which states could then follow.<sup>98</sup> Sometimes, they were conscious that they were as engaging in experiments that might or might not be successful.<sup>99</sup>

This reform agenda was very broad, but it was almost always leveling. For example, in discussing the pay structure for federal employees, one congressmen stated, "I want either that the wages of labor shall be leveled up or that the pay of public officers shall be leveled down."<sup>100</sup> More often than not, Congress introduced laws that raised the stature of lesser individuals. Specifically, Congress passed legislation that brought greater parity to married women, tenants, debtors, and, finally, their own federal employees and contractors.<sup>101</sup> As common-law hierarchy had subordinated married women to their husbands under the doctrine of coverture, Congress enacted the Married Women's Property Reform in the District of Columbia to rectify this.<sup>102</sup> Congress also reformed the District's landlord-tenant law to provide tenants with some notice to quit before eviction and to eliminate the status of tenancy at will.<sup>103</sup> Congress reformed Bankruptcy law to give more protection to debtors.<sup>104</sup> As a major war-time employer, Congress enacted substantial pay raises for federal employees,<sup>105</sup> and, finally, applying its authority to regulate the employment relationship directly, Congress enacted an Eight-hour day law for all federal workers.<sup>106</sup>

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*of the Thirteenth Amendment*, 15 GEO. J.L. & PUB. POL'Y 173, 203–08 (2017) [hereinafter VanderVelde, *Henry Wilson*].

<sup>97</sup> VanderVelde, *Henry Wilson*, *supra* note 96, at 205.

<sup>98</sup> *Id.* at 206.

<sup>99</sup> *See id.*

<sup>100</sup> CONG. GLOBE, 40th Cong., 2d Sess. 2890 (1868) (statement of Rep. Lawrence) ("The mechanics and laborers of the United States do not receive a compensation at all proportionate to that which is paid for official services.").

<sup>101</sup> *See supra* notes 97–100 and accompanying text.

<sup>102</sup> CONG. GLOBE, 40th Cong., 2d Sess. 2162 (1868) (Married Women's Property Reform introduced); CONG. GLOBE, 40th Cong., 3d Sess. 1709 (1869) (reform passed).

<sup>103</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1772 (1866). Bill (S. No. 138) regulated proceedings in cases between landlord and tenants in the District of Columbia:

That a tenancy at will shall not arise or be created without an express contract or letting to that effect; and all estates at will may be determined by a notice, in writing, to quit of thirty days, delivered to the tenant in hand or to some person of proper age upon the premises, or in the absence of such tenant or person then such notice may be served by affixing the same to a conspicuous part of the premises, where it may be conveniently read.

*Id.*

<sup>104</sup> CONG. GLOBE, 40th Cong., 1st Sess.

<sup>105</sup> CONG. GLOBE, 40th Cong., 3d Sess.

<sup>106</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1969 (1866).



The Eight-hour day law was a measure that stipulated that eight hours was to be the legal work day in all federal workshops.<sup>107</sup> Though the law deemed that employees could not be required to work longer than eight hours, no one seemed to be clear about how this durational limit would affect wages.<sup>108</sup> Would employees be paid the same as they had before when working longer days?<sup>109</sup> Some congressmen thought that healthy, well-rested workers could accomplish the same amount of work in eight hours as tired workers could do in ten.<sup>110</sup>

This was conceived as an experiment that the federal government could afford to undertake.<sup>111</sup> Like other reform measures, Congress's justification for an eight-hour day was tied to creating a healthy republic.<sup>112</sup> To free workers from their employers' demands would allow them to develop themselves as independent citizens.<sup>113</sup> Working persons needed adequate time away from the workshop to develop the autonomy and skills necessary to participate in republican governance.<sup>114</sup> Representative Cole stated, "the residue of the time . . . would well be devoted to the improvement of the mind and social faculties; and all American citizens should be enabled to devote

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<sup>107</sup> For excellent accounts of how the management of time was a concern of labor movements, see ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* (2015); BENJAMIN KLINE HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORT HOURS FOR THE RIGHT TO WORK* (1988); and DAVID R. ROEDIGER & PHILLIP S. FONER, *OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE DAY* (1989). The Eight-hour day was advanced by political arguments of workingmens' organizations, many of whom sent supporting petitions to Congress. See Zietlow, *Positive Right*, *supra* note 65, at 872–73.

<sup>108</sup> See CONG. GLOBE, 40th Cong., 2nd Sess. 3425 (1868).

<sup>109</sup> *Id.* at 3424–29.

<sup>110</sup> *Id.* at 3424 (statement of Sen. Conness).

<sup>111</sup> *Id.* at 3425 (statement of Sen. Morton).

<sup>112</sup> *Id.* at 3426 (statement of Sen. Wilson).

<sup>113</sup> *Id.* at 3425 (statement of Sen. Stewart):

There might be greater comfort given to the workingman; there might be an improvement in the condition of society; and if there should be an approximate amount of labor, something near the same amount as now, the other good results might be sufficient to justify the adoption of the reform. I have no idea but that taking the term of years through which men labor, an individual will, in the course of his life, accomplish more with eight hours a day than he will with ten hours a day labor. I think he will live longer, so that in the course of his natural life he will do more work if he works eight hours a day regularly than he will if he works ten hours. If you put the value of men on the amount of labor they can do in the course of their natural lives I think men will be more valuable who work eight hours a day than if they work ten hours a day. I think they will accomplish more in the course of their natural lives; they will not wear out so soon, and if there is any object in prolonging human life and increasing the aggregate of human happiness the argument would be in favor of this bill.

*Id.*

<sup>114</sup> See *id.*

some portion of their time to the cultivation of the intellect.”<sup>115</sup> Cole then moved from worker welfare to national welfare:

Our Republic stands upon the intelligence of the people; it has no other foundation; and unless the people are provided by law with some protection against the requirement which is now put upon them by the exorbitant demands of capitalists, they will not be so well prepared to perform the duties of American citizenship.<sup>116</sup>

Although Senator Henry Wilson, a leader of the Radical Republicans,<sup>117</sup> supported the Eight-hour day law, he believed that other matters were more pressing for laboring men.<sup>118</sup> Wilson said, “Whatever tends to dignify manual labor or to lighten its burdens, to increase its rewards or enlarge its knowledge, should receive our sympathies and command our support.”<sup>119</sup> However, the eight-hour day measure would only effect several hundred federal workers, while of greater concern were the laboring men in the “tens of thousands . . . who [had] been dismissed from employment for voting according to their convictions.”<sup>120</sup>

Congress had no direct authority to revise state law. That had been a major objection to passing the Thirteenth Amendment in the first place because slavery was governed by state law. Yet, in abolishing slavery, the federal government had done exactly that: it had cut deeply and directly into states’ authority to design their own common law, both in regard to property and master-servant relationships. Congress had abolished the slave states’ basis of legalized slavery and all that related to that base.<sup>121</sup> Could Congress have regulated unfair treatment of employees? That would depend upon how carefully the statute was drafted. Congress had authority under Section Two of the Thirteenth Amendment to regulate any employment practice that threatened to reduce individuals to slavery or involuntary servitude.<sup>122</sup> Presumably then, Congress had authority to set minimally acceptable working terms and conditions. There was some discussion about how far congressional authority extended to regulate private employers throughout the nation.<sup>123</sup> But, in any case, Congress did not do so.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> For a discussion of the influential role Senator Wilson had during his time in Congress, see VanderVelde, *Henry Wilson*, *supra* note 96.

<sup>118</sup> See CONG. GLOBE, 40th Cong., 2d Sess. 3425–26 (1868).

<sup>119</sup> *Id.* at 3426.

<sup>120</sup> *Id.* at 2804 (“There are committees here from several States begging money; and I am writing to my friends to contribute money to keep men from starvation. Humanity and everything that can appeal to the human heart, and the feelings of every man who respects the laboring men of the country, should impel us to pass these reconstruction measures, and let those people have governments that will protect them at the earliest moment.”).

<sup>121</sup> Pope, *supra* note 8, at 190–97.

<sup>122</sup> U.S. CONST. amend. XIII, § 2.

<sup>123</sup> CONG. GLOBE, 39th Cong., 1st Sess. 414 (1866) (statement of Sen. Saulsbury) (“What earthly power, I would ask the Senator from Massachusetts, has the Congress of the United

When congressmen like Senator Henry Wilson expressed deep concern about freedmen being dismissed from their jobs for exercising their right to vote,<sup>124</sup> Republicans moved to address the problem by the less controversial avenues through which Congress could exert its authority: enacting an additional constitutional amendment specifically to enlarge suffrage, reforming election practices,<sup>125</sup> and authorizing the Freedmen's Bureau to ensure employment practices were just and fair.<sup>126</sup>

### *C. Reconciling Free Labor with Master-Servant Doctrine*

Free labor, as the antithesis of involuntary servitude and slavery, is a concept of considerable ambiguity.<sup>127</sup> Within its range of meanings, the concept served the interests of both workers and some entrepreneurs.<sup>128</sup> Freedom, of course, can mean both “free from” and “free to.”<sup>129</sup> At its most limited interpretation, free labor meant simply to be “free from” working under some form of compulsion.<sup>130</sup> A broader notion guaranteed that working people could enjoy a certain sphere of independence to be “free to” pursue their lives and livelihoods without obstacles of caste, class, or oligarchy in their way.<sup>131</sup> This broader notion of a nation comprised of independent working people distinguished the Radical Republicans and labor republicanism from others favoring abolition.<sup>132</sup>

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States to regulate the compensation which a private citizen of the United States, in any of the States or Territories of the Union, may choose to make to any other private citizen for services rendered? . . . Has it come to this, that the powers of this Government have become so enlarged that it can enter into all the private transactions of life . . . regulate the prices of wages throughout the United States?”).

<sup>124</sup> CONG. GLOBE, 40th Cong., 2d Sess. 2804 (1868).

<sup>125</sup> See VanderVelde, *Henry Wilson*, *supra* note 96, at 176–78.

<sup>126</sup> CONG. GLOBE, 39th Cong., 1st Sess. 415 (1866).

<sup>127</sup> See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 768; see also VICTORIA C. HATTAM, *LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES* (1993); MARK A. LAUSE, *FREE LABOR: THE CIVIL WAR AND THE MAKING OF AN AMERICAN WORKING CLASS* (2015).

<sup>128</sup> Forbath, *supra* note 127, at 776.

<sup>129</sup> See *infra* notes 130–32 and accompanying text.

<sup>130</sup> Pope, *supra* note 8, at 192 (“Today, Thirteenth Amendment rights claims generally fall into one of two categories: rights to be free from certain forms of race discrimination, conceptualized as ‘badges and incidents of slavery,’ and rights of labor freedom, analyzed under the involuntary servitude clause.”).

<sup>131</sup> William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 20, 61 (1999) (discussing the right one has to sell their labor).

<sup>132</sup> W.E.B. Dubois recognized this distinction:

[T]wo movements—Labor-Free Soil, and Abolition, exhibited fundamental divergence instead of becoming one great party of free labor and free land. The Free Soilers stressed the difficulties of even the free laborer getting hold of the land and getting work in the great congestion which immigration had brought; and the abolitionists stressed the moral wrong of slavery.

Two factors help delineate the tension between the labor vision and master-servant law. The first—the historical factor—concerned that period of time when congressmen turned their attention to the ways that labor systems built on master-servant law impeded the nation from becoming a Republic of free and equal working men.<sup>133</sup> During this discussion, the labor vision was also advanced by political arguments of working men’s organizations in the Eight-hour day movement,<sup>134</sup> as well as in the letters of Union soldiers engaged in fighting the war.<sup>135</sup> The Radicals’ vision was not universally shared, of course, but as a group the Radicals led the reforms. They were the relevant lawmaking congressional leaders of the efforts to reform the Constitution.<sup>136</sup> Their vision encompassed some of the loftiest aims for the nation. Thus, theirs is the unfinished agenda of Reconstruction. Considering the various voices in Congress at that crucial time, it seems that more attention was paid to the most progressive among them than to the more reluctant, recalcitrant voices. They led the efforts to overturn President Johnson’s vetoes and garnered the majority of votes.

The second factor—the analytical—addresses the juridical common-law structure of master and servant and its construction upon the basis of slavery in a hierarchical frame which accorded rights and privileges asymmetrically in favor of masters.<sup>137</sup> The structure of master-servant law was premised upon a framework of inherently property-like rights that masters held in the services of their employees.<sup>138</sup> This structure ran across the *Commentaries*. Husbands similarly held property-like rights in their wives, and fathers had property-like rights in their daughters’ and sons’ services. As abolition vanquished property interests in human beings, did it also vanquish property interests in a man’s services? There were several property-like privileges encased in master-servant concepts. These included writs of enticement<sup>139</sup> and seduction,<sup>140</sup> the unreciprocated duty of loyalty, and the doctrine of contract of the entirety<sup>141</sup>—all

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W.E.B. DUBOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860–1880*, at 18 (1935).

<sup>133</sup> See *supra* Part II.

<sup>134</sup> GOUREVITCH, *supra* note 107, at 98–100.

<sup>135</sup> See LAUSE, *supra* note 127.

<sup>136</sup> DAVID MONTGOMERY, *BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICAN 1862–1872*, at 72 (noting that the Radicals had provided the leaders and congressional floor leaders for the four decisive war measures).

<sup>137</sup> See *supra* Part I.

<sup>138</sup> See *supra* Part I.

<sup>139</sup> See Lea S. VanderVelde, *The Gendered Origins of the Lumley Doctrine: Binding Men’s Consciences and Women’s Fidelity*, 101 YALE L.J. 775 (1992) [hereinafter VanderVelde, *Gendered Origins*]; Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 STAN. L. REV. 87 (1993).

<sup>140</sup> See Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996) [hereinafter VanderVelde, *Legal Ways*].

<sup>141</sup> Robert W. Gordon, *Britton v. Turner: A Signpost on the Crooked Road to “Freedom” in the Employment Contract*, in *CONTRACT STORIES* 23 (Douglas Baird ed., 2007).

of which allowed employers to keep their employees captive by curtailing the latter's mobility to move on, after employers could no longer compel them to work.

These privileges were not only property-like; in fact, Blackstone referred to services as *property*.<sup>142</sup> He premised the master's enticement action upon the fact that the master "owned" his servant's services: "The reason and foundation upon which all this doctrine is built, seem to be *the property that every man has in the service of his domestics*; acquired by the contract of hiring, and purchased by giving them wages."<sup>143</sup> These privileges were asymmetrical in that there was no corresponding counterpart accorded to employees. Employees did not acquire *property* in their jobs. Nor could employees sue employers for hiring employees who might take their jobs.<sup>144</sup> Despite vaulted pronouncements of freedom in the concept of "liberty of contract," and the oft-cited need for mutuality in contractual relations, these legal rules—rules that permitted employers to constrain their employees' actions through contractual capture of their services—imposed no reciprocal set of obligations to which employees could hold their employers.<sup>145</sup>

What is the difference between owning a man and owning his services if his services occupy a considerable extent of his life? Is a person actually a free laborer, free from his employer, if his services are owned? These asymmetrical common-law actions survived Reconstruction,<sup>146</sup> and to the extent that they did, master-servant law was never fully "de-chattelized."

### III. HOW THE LABOR VISION LOST GROUND IN THE COURTS

In the late 1870s, as the engine of Reconstruction was slowing, there were several legal developments that would impede, if not destroy, further development of the jurisprudence of the Thirteenth Amendment. First was the anti-republican labor decisions of the United States Supreme Court;<sup>147</sup> second, the exultation of a formalistic contract theory in legal jurisprudence,<sup>148</sup> and third, the racist, regressive legal developments, such as Jim Crow laws, and other racially illiberal Court opinions that set back economic and social opportunities and reforms for African Americans in contravention of the Reconstruction's promises.<sup>149</sup>

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<sup>142</sup> BLACKSTONE, *supra* note 2, at 417.

<sup>143</sup> *Id.* (emphasis added).

<sup>144</sup> See VanderVelde, *Gendered Origins*, *supra* note 139.

<sup>145</sup> See *supra* Part I.

<sup>146</sup> See, for example, duty of loyalty in the American Law Institute. RESTATEMENT, *supra* note 14. On the writ of seduction, see VanderVelde, *Legal Ways*, *supra* note 140. On negative specific performance, see VanderVelde, *Gendered Origins*, *supra* note 139, at 775.

<sup>147</sup> See *infra* Section III.A.

<sup>148</sup> See *infra* notes 164–65 and accompanying text. The employment at will doctrine emerged at this time. For its history, see VanderVelde, *The Anti-Republican Origins*, *supra* note 37.

<sup>149</sup> See *infra* Section III.B.

*A. Cramped and Limiting Rulings in the United States Supreme Court*

The narrative of how the Supreme Court shut down the promise of Reconstruction by miserly interpretations in a series of cases—*The Slaughter-House Cases*,<sup>150</sup> *Bradwell*,<sup>151</sup> *Cruikshank*,<sup>152</sup> *Robertson*,<sup>153</sup> and *Plessy*<sup>154</sup>—is well known.<sup>155</sup> Concomitantly, the Court effectively destroyed the prospect of recognizing a positive right to free labor in its jurisprudence.<sup>156</sup> The majority’s interpretations were clearly antithetical to the Radicals’ view of Reconstruction. From the perspective of the Radical Republicans, the Court got it wrong.<sup>157</sup>

Justice Bradley took the lead in creating a jurisprudence in authoring *The Civil Rights Cases*.<sup>158</sup> In striking down the Civil Rights Act of 1875, a law that would have permitted African Americans the social rights of access to places of public accommodation, Justice Bradley neatly divided all legal rights into two categories: civil

<sup>150</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>151</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

<sup>152</sup> *United States v. Cruikshank*, 92 U.S. 542 (1875). For discussion of *Cruikshank*, see James Gray Pope, *Snubbed Landmark: Why United States v. Cruikshank (1876) Belongs at the Heart of the American Constitutional Canon*, 49 HARV. C.R.-C.L. L. REV. 385 (2014).

<sup>153</sup> *Robertson v. Baldwin*, 165 U.S. 275 (1897).

<sup>154</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>155</sup> Professor Justin Collings provides the following account:

The process began with the Slaughter-House Cases, in which a five-Justice majority held that the Thirteenth Amendment banned only slavery itself and close analogues; that the Equal Protection clause forbade de jure discrimination against blacks, but not much else; and that the Privileges or Immunities Clause guaranteed only the privileges and immunities of national citizenship, which on the Court’s telling, were few and flimsy.

Justin Collings, *The Supreme Court and the Memory of Evil*, 71 STAN. L. REV. 265, 271 (2019). For discussion of *Plessy v. Ferguson*, see James W. Fox Jr., *Doctrinal Myths and the Management of Cognitive Dissonance: Race, Law, and the Supreme Court’s Doctrinal Support of Jim Crow*, 34 STETSON L. REV. 293 (2005). See also Civil Rights Act of 1875, ch. 114, 18 Stat. 335; *The Civil Rights Cases*, 109 U.S. 3 (1883).

<sup>156</sup> Forbath, *supra* note 127, at 773. In the *Slaughter-House Cases*, the majority opinion indicated that there was some breadth for interpretation of the Thirteenth Amendment, but never charted a course for doing so. 83 U.S. (16 Wall.) 36, 54 (1873). The decision effectively shut off workingmen’s rights from even the application of a balancing test when they challenged legislation denying them the right to continue to ply their trade.

<sup>157</sup> See FONER, *supra* note 40, at 530. Yet, even in these reform-ending Court decisions, there were dissents that sounded the familiar notes of the Republicans’ labor vision. See, e.g., *The Slaughter-House Cases*, 83 U.S. at 83–111 (Field, J., dissenting); Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 678 (2014). William Forbath has analyzed how Justice Stephen Field’s dissent in the *Slaughter-House Cases* resounded the vision of free labor. Forbath, *supra* note 127, at 772–800.

<sup>158</sup> *The Civil Rights Cases*, 109 U.S. 3 (1883).



and social.<sup>159</sup> Those legal rights that were civil rights were subject to congressional authority while those that were social were not.

There was no place in this division for the recognition of socio-economic rights. Where would a positive right to free labor fit? Where would the right to be free from labor exploitation fit?

Justice Bradley could not find the Civil Rights Act grounded in the Thirteenth Amendment. And he described the Amendment so narrowly as to only apply to citizenship rather than to private actions. He wrote:

[In 1866,] Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the *social* rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.<sup>160</sup>

In Bradley's categorical dichotomy, a right would be a civil right only to the extent that it pertained to citizenship and consequently entailed state action.<sup>161</sup> This ignored the significance of the Thirteenth Amendment in revising labor systems completely and hence limited Bradley's focus to the Fourteenth Amendment. Adjusting the relative rights of masters and servants would not be recognized as within the Reconstruction Congress's authority at all.<sup>162</sup> By this means, the Court declared the Civil Rights Act of 1875 unconstitutional because it regulated a social right—a kind of right which in Justice Bradley's characterization Congress could not legally regulate.<sup>163</sup>

The right to engage in free labor, however, was an economic right.<sup>164</sup> The Reconstruction Congress considered it foundational to the nation becoming a republic of laborers. But it did not fit in Bradley's civil/social dichotomy. By dividing the universe of rights into this dichotomy, it sucked all the air out of the notion that there might be yet another kind of right, an economic right legitimate for Congress's exercise of authority under the Thirteenth Amendment. The only economic rights

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<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 22 (italics added). In this formulation, Bradley implied that the distinction between freedom and slavery was a simple matter to decide. *See id.*

<sup>161</sup> *See id.* at 11.

<sup>162</sup> An enactment would represent a social right, in Bradley's view, if it mandated some kind of social interchange that one of the parties preferred not to engage in. Social rights then, seemingly, were rights to disassociate from others, rather than rights to associate with others—for example, to form a union.

<sup>163</sup> *See The Civil Rights Cases*, 109 U.S. at 3 (ruling the Civil Rights Act of 1875 unconstitutional).

<sup>164</sup> For the right to engage in free labor as a positive and economic right, see *supra* note 148 (discussing the dissenters in the *Slaughter-House Cases*); see also Zietlow, *Positive Right*, *supra* note 65, at 879.

suitable for recognition then seemed to be limited to the right to hold property and to make contracts—those guaranteed by Congress in the Civil Rights Statute of 1866.<sup>165</sup> Thus, the Supreme Court took the direction of closing down Reconstruction rather than continuing or extending it.

What the nineteenth-century contract terminology failed to acknowledge was that contracts made between people generally tend to replicate their power positions. Persons without decent options agree to contracts that cede more of the benefits—and perhaps many more of their rights—than they would ever willingly relinquish if they had more options or leverage in the negotiation. To the extent that the Reconstruction Congress's objective was to create a republican society of equals to replace the oligarchical, autocratic society of slavemasters, contracts are hardly the right instrument to achieve this goal. Contracts—that is, contract doctrine and terminology—cannot move society to the republican ideal. The contractarian ideal, popular as it may have seemed, was in tension with the pathway to a republic of true equals.<sup>166</sup> If the starting point is inequality, liberty of contract cannot be the corrective. Moreover, some contracts are so oppressive that they cannot be insulated from intervention by the principle of contractual liberty.<sup>167</sup>

### *B. State Courts Provide Some Contradictory Interpretations*

Since master-servant doctrine is a part of a state's common law, state legislatures and state courts are the most appropriate entity to revise it. State legislatures did take

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<sup>165</sup> See Zietlow, *Positive Right*, *supra* note 65, at 879.

<sup>166</sup> *Id.* For discussion on the role of contract language as a beacon of hope, see AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

<sup>167</sup> To make the connection more clearly: If one has true liberty of contract, is a person free to contract himself into involuntary servitude, or even slavery for a time? The Thirteenth Amendment's strict prohibition on involuntary servitude dictates that those circumstances *shall not exist* so such an arrangement cannot be created by contract. At least one American court actually heard such a case and deemed this impermissible. *Nelson v. Smithpeter*, 42 Tenn. 13 (1865), considered the interesting question. Enslaved women Susan and Lucinda were given the following Hobson's choice in their master's will: they could be freed and removed to another country, presumably under the Colonization Society's auspices, or they could remain in the state if they agreed to remain enslaved. *Id.* at 13–14. Many states required manumitted slaves to leave the state, leaving voluntary re-enslavement as the only means to remain near one's ancestral home and other family members. See JUDITH KELLER SCHAFER, *BECOMING FREE, REMAINING FREE: MANUMISSION AND ENSLAVEMENT IN NEW ORLEANS, 1846–1862* (2003). So remaining enslaved may have been the only way they could live near their family members. Lucinda died leaving a son and Susan to choose to remain, becoming a slave of the state, such that the sheriff hired Susan and Lucinda's son out for work and confiscated their wages. *Nelson*, 42 Tenn. at 14. After the Thirteenth Amendment, their status was less clear, and heirs sought to revoke parts of the will suggesting that technically their status was one of "voluntary servitude." *Id.* Since the ban on involuntary servitude and slavery is absolute in the Amendment, the Court declared them not only free, but entitled to the wages they had earned while being hired out. *Id.* at 14–15.

up the work of enacting labor laws in the late nineteenth century, though courts were striking them down as not within the states' police powers.<sup>168</sup>

Although state courts are charged with revising the common law of master and servant, they cannot take the initiative to revise the common law on their own. It can only be revised on a case-by-case basis *if* there is a case brought before the court of record. Few employees have the means to access the courts if it requires hiring a lawyer. In the nineteenth century, cases brought by employees against their employers were extremely rare. Even when workers' interests were at stake, for example, in the development of the at-will rule, the cases tended to be contests between employers and third parties; workers were not even represented.<sup>169</sup>

Much of this inertia can be attributed to workers' inability to access the courts (and lawyers). But Blackstone's asymmetrical Chapter Fourteen tilted the scales structurally. It accorded several causes of actions to employers to go to court to retain control and capture of their employees, but it did not accord employees reciprocal causes of action to bring against their employers for their grievances, such as employer abuse or attempts at overreaching the bounds of legitimate workplace control. So among the universe of the nineteenth century cases in state courts utilizing master-servant doctrine, only a tiny fraction are lawsuits brought by employees.

Nonetheless, in the years immediately after the Thirteenth Amendment was enacted, state courts rendered inconsistent decisions concerning the Amendment's effect on state common law.

Given its simplicity, breadth, and phrasing as an absolute, the Thirteenth Amendment was invoked in a diverse variety of cases involving the interests of freedmen, free blacks, and free men and women of all races in their working, social, and political lives.<sup>170</sup> Some cases attempted to push out the envelope of liberties afforded to people of color and women to the full extent of the liberties enjoyed by white men.<sup>171</sup> Some cases attempted to settle the score in pre-abolition financial situations

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<sup>168</sup> See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>169</sup> See, e.g., *Payne v. W. & Atl. Ry. Co.*, 81 Tenn. 507 (1884); VanderVelde, *The Anti-Republican Origins*, *supra* note 37.

<sup>170</sup> See, e.g., *Van Valkenburg v. Brown*, 43 Cal. 43 (1872) (pressing for the ability of white women to vote in California); *Handy v. Clark*, 9 Del. (4 Houst.) 16 (1869) (pressing for the competency of African Americans to testify in court proceedings involving whites); *Cory v. Carter*, 48 Ind. 327 (1874) (pressing for the ability of African American children to be admitted to all-white public schools); *Smith v. Moody*, 26 Ind. 299 (1866) (discussing the effect of the Amendment on the ability of an African American, who had previously been free, to sue in court); *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867) (analyzing the effect of the Thirteenth Amendment upon a bequest directed at abolishing slavery); *Williams v. Johnson*, 30 Md. 500 (1869) (evaluating abolition's effect on a trover lawsuit regarding the value of a Black man); *Brittle v. People*, 2 Neb. 198 (1873) (pressing for the ability of an African American man to serve on jury panel).

<sup>171</sup> See *supra* note 170.

in which a slave had been collateral for a debt, and that person was now free.<sup>172</sup> A few dealt directly with circumstances of labor capture.<sup>173</sup>

The interpretive inconsistency of different state courts is particularly glaring in the short duration between the time—when Congress finally passed the Thirteenth Amendment—and the enactment of the Civil Rights Acts and the Fourteenth Amendment.<sup>174</sup> With two major congressional enactments occurring so quickly after its passage, the Thirteenth Amendment seemed to be left in the background of doctrinal development as the later congressional enactments took center stage.<sup>175</sup>

While the Fourteenth Amendment was detailed and applied to state action, the Thirteenth Amendment was blunt, broad, and crossed the public-private divide.<sup>176</sup> It applied to private actors as well as to state action.<sup>177</sup> Arguments in civil-, social-, and economic-rights cases consequently gravitated to the more detailed Fourteenth Amendment.<sup>178</sup> The Thirteenth Amendment was often treated as simply a make-weight argument and examined only superficially.<sup>179</sup>

Yet, the Fourteenth Amendment did not overwrite the Thirteenth, as for example, the Thirteenth overwrote Article Four's fugitive-servant clause.<sup>180</sup> It amplified it with regard to the dimensions of specific kinds of state action. The Fourteenth Amendment could not overwrite the Thirteenth because the Thirteenth had a much broader scope of application. The Thirteenth did not depend upon the existence of an offensive, unconstitutional state statute or executive order. It declared that the state of slavery and involuntary servitude "shall not exist."<sup>181</sup> As James Pope writes, this should have placed an affirmative duty on federal and state governments to root out these systems.<sup>182</sup>

<sup>172</sup> See, e.g., *Jacoway v. Denton*, 25 Ark. 625 (1869); *Coward v. Thompson*, 44 Tenn. 442 (1867).

<sup>173</sup> *Brown v. State*, 23 Md. 503 (1865); *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865); *Nelson v. Smithpeter*, 42 Tenn. 13 (1865).

<sup>174</sup> The Civil Rights Act of 1866 was passed April 9, 1866, after both houses of Congress overrode President Johnson's veto just fourteen months after the Thirteenth Amendment cleared the House on the second attempt. The Fourteenth Amendment was passed by Congress on June 13, 1866, and ratified on July 28, 1868.

<sup>175</sup> For a discussion of the unique nature of the Thirteenth Amendment, see Pope, *supra* note 8.

<sup>176</sup> Compare U.S. CONST. amend. XIV, § 1 ("No State shall make . . . nor shall any State deprive . . ."), with *id.* amend. XIII, § 1 ("[S]lavery . . . shall [not] exist within the United States . . .").

<sup>177</sup> See *id.* amend. XIV, § 1.

<sup>178</sup> See Zietlow, *Positive Right*, *supra* note 65, at 895 (discussing how Congress invoked its authority under the Fourteenth Amendment, rather than the Thirteenth Amendment, during the debates prior to the passage of the Civil Rights Act of 1964).

<sup>179</sup> See *id.* at 887 (discussing how the Thirteenth Amendment was not invoked per se but rather comparisons to slavery were used to argue for better working conditions).

<sup>180</sup> U.S. CONST. art. 4, § 2.

<sup>181</sup> U.S. CONST. amend. XIII.

<sup>182</sup> Pope, *supra* note 8.

Among the state cases invoking the Thirteenth Amendment.<sup>183</sup> The political dynamics usually presented a litigant using the Amendment as a defense against some penalty, whether it be an injunction, a criminal penalty, a forfeiture, or an unwanted obligation, like rent service.<sup>184</sup> This meant that from the very beginning, the Thirteenth Amendment was used to play defense rather than offense. As such, its effect in reforming state common law would need to await the occasion of an employer engaging in overreaching, in order for the subordination principles of the received common law to be challenged in court and removed. Otherwise inertia favored the maintenance of the received common law. So, for the most part, the state courts failed to develop an affirmative right to engage in free labor. State courts seemed reluctant to reconsider master-servant rules under the lights that had been shown upon the hierarchical system by the Reconstruction Congress. State courts were rarely presented with circumstances where the employer's disproportionate control over their employees could be perceived as affecting the nation as a fully functioning republic.<sup>185</sup>

So how far was the Thirteenth Amendment expected to extend? One scholar argues that Congress intended it to raise the working conditions in the South only as high as the standard of master-servant law existing in the North at the time.<sup>186</sup> But that does not seem true to the Reconstruction debates. Congress saw itself and the country as continually moving forward.<sup>187</sup>

An example of one of the more creative arguments was raised in an 1864 New York case involving rent service.<sup>188</sup> The litigant sought to get out of an obligation to perform a day's service, and deliver an annual tribute of wheat and chickens as the price or consideration of a seventy-year-old conveyance in fee.<sup>189</sup> The appellant's lawyer argued:

[W]hether we have, in this State, an institution of servitude; and, if so, whether it is a relic of the past soon to wear out, or a thing just beginning life and vigor, fitted to grow and expand to an indefinite extent; whether it came from the feudal contrivances used for the oppression of labor in the Old World or is one of our own: and, if the latter, by what malign influences it was

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<sup>183</sup> See *supra* note 170.

<sup>184</sup> For examples of such instances, see cases cited *supra* notes 170, 172–73.

<sup>185</sup> The most prominent example though is *Payne v. Western & Atlantic R. Co.*, 81 Tenn. 507 (1884). See VanderVelde, *The Anti-Republican Origins*, *supra* note 37.

<sup>186</sup> PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* (2011).

<sup>187</sup> See VanderVelde, *Labor Vision*, *supra* note 8, at 504.

<sup>188</sup> ALBANY J. MUNSELL, *SLAVERY, OR INVOLUNTARY SERVITUDE: DOES IT LEGALLY EXIST IN THE STATE OF NEW YORK? POINTS ON ARGUMENT IN COURT OF APPEALS. OPINIONS IN COURT OF APPEALS* (1864).

<sup>189</sup> *Id.* at 4.

generated and nourished, and is now sustained in the midst of our free institutions.<sup>190</sup>

The impassioned lawyer continued, “[t]he manner in which you [decide] will determine your lot, whether you are to be classed as freemen or marked as slaves.”<sup>191</sup> Although the rent-service obligation was relatively slight, the attorney pressed for the principle that involuntary servitude, even for a day, should not be permitted to exist.<sup>192</sup>

Other real property cases similarly invoked the “servitude” language of the Thirteenth Amendment to seek the removal of “servitudes that run with the land” (a kind of property estate). The issue was considered again in the 1866 New York Supreme Court case of *Tyler v. Heidorn*.<sup>193</sup> In that case, another land owner challenged his annual obligation to provide wheat to the successors of the dominant estate.<sup>194</sup> The court refused to recognize this no-longer-voluntary obligation to produce wheat as an involuntary servitude prohibited by the Thirteenth Amendment by distinguishing it as a land servitude rather than a personal one.<sup>195</sup> The court concluded:

If the doctrine contended for be well founded, it sweeps away *all* contracts, so far as respects their *obligation* upon all persons except the original parties thereto. . . . [N]o parties can ever be bound by the contracts of others, although they may enjoy the property, in regard to which the contract is made. . . . [C]onsequences so sweeping and destructive could not have been intended or anticipated by the authors or approvers of this amendment to the constitution.<sup>196</sup>

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<sup>190</sup> *Id.* at 3. “Free institutions” was often the marker for Republican arguments.

<sup>191</sup> *Id.* at 13. “It is like declaring a man to be free, and then attempting to show that he is a person held to service, by citing cases where slaves have been so held.” *Id.* at 12.

<sup>192</sup> *Id.* at 4 (“But, by the same rule, if the owner of lands should covenant to serve three hundred and sixty-five days in the year . . .”). This case has some parallels to the early twentieth century case of *Miller v. Clary*, 103 N.E. 1114 (N.Y. 1913), in which the New York court struck down an affirmative covenant failing to hold that it ran with the land because “[t]he evil and lasting effect . . . would compel all persons who might thereafter become the owners . . . to forever pump and supply water . . .” *Id.* at 1117. The court did enforce an obligation on the servient estate by converting an affirmative covenant into a negative covenant to accept the dominant estate owner’s right to enter and get his own water. *Id.* Some commentators on this famous case have read it as consistent with the prudential understanding that to require continued “forever” exertion was tantamount to involuntary servitude.

<sup>193</sup> 46 Barb. 439 (N.Y. App. Div. 1866).

<sup>194</sup> *Id.* at 442.

<sup>195</sup> *Id.* at 457–59.

<sup>196</sup> *Id.* at 457–58. Yet, fifty years later in the early-twentieth-century case of *Miller*, 103 N.E. 1114, the court struck down an affirmative covenant as failing to run with the land. *See supra* note 192.



The prospect that the entire system of servitudes that ran with the land would collapse was too much for the court to bear. Personal servitudes were different, but this was not a personal servitude in the court's eyes; it was a species of real property.<sup>197</sup>

To see how contemporary court's viewed the newly enacted Amendment in labor situations, it is useful to consider two other cases from 1865: one case from a free state (Pennsylvania), that applied the Thirteenth Amendment broadly as a shield,<sup>198</sup> and the other from a former slave state (Maryland), that interpreted the Amendment so narrowly as not to apply to a statute that compelled African American youth to labor bound in apprenticeships.<sup>199</sup>

In both cases, the state courts attempted to work out how the constitutional decree affected their respective laws of master and servant.<sup>200</sup> In the Pennsylvania case, the judge viewed the Thirteenth Amendment as redressing the balance of rights between employees and their employers by broadly analogizing subordination principles to mitigated forms of slavery.<sup>201</sup> In the Maryland case, however, the judge failed to analogize at all. In fact, the judge interpreted the Amendment's language as only applying to persons legally recognized as slaves, not further.<sup>202</sup> Thus the contemporary expectations for the Thirteenth Amendment in the very year of its passage depended upon whom you consulted: a judge from a free state or a judge from a former slave state; a Radical Republican or a Conservative one; a former master or a freedman. The key distinction between interpretations by the Pennsylvania and Maryland judges was their willingness to analogize subordinating aspects of master-servant law to involuntary servitude, or even slavery, just as the issue had divided Radical Republicans from conservative Congressmen.<sup>203</sup>

### 1. The State of Pennsylvania

In the example of the Pennsylvania case of *Ford v. Jermon*,<sup>204</sup> a Philadelphia judge refused to enjoin a departing actress from performing at a rival theater.<sup>205</sup> The actress, Mrs. Jermon, had contracted to perform a play, and decided, for her own unstated reasons, not to go through with the performance; she quit and sought employment elsewhere.<sup>206</sup> Most congressmen at that time agreed that, at the very least, the Thirteenth Amendment guaranteed the right to quit a labor contract.<sup>207</sup> Mrs.

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<sup>197</sup> *Tyler*, 46 Barb. at 457–58.

<sup>198</sup> *See infra* Section III.B.1.

<sup>199</sup> *See infra* Section III.B.2.

<sup>200</sup> *See infra* Sections III.B.1, 2.

<sup>201</sup> *See infra* Section III.1.

<sup>202</sup> *See infra* Section III.B.2.

<sup>203</sup> *See supra* text accompanying notes 71–95.

<sup>204</sup> 6 Phila. 6 (Dist. Ct. 1865).

<sup>205</sup> *Id.* at 7.

<sup>206</sup> *Id.* at 6.

<sup>207</sup> Even Senator Cowan, who advocated a very limited scope for the Thirteenth Amendment,

Jermon's contract even contained clauses providing that she would not appear at any competing venue for the season's duration.<sup>208</sup> The theater owner, Ford, sought to enjoin her from performing for a competitor.<sup>209</sup>

Judge Hare viewed the request for an injunction as an attempt to keep Mrs. Jermon captive by forcing her back to her employer in order to earn her living.<sup>210</sup> He saw a mitigated form of slavery in that attempt at indirect compulsion:

We are asked to say that Mrs. Jermon shall not play at all, unless she will consent to play for the complainant; are we also to declare that she shall not sing? [S]hall not earn her bread by writing or by her needle? To debar her from one pursuit would be vain and futile, unless she were also excluded from others, that might, so far as we can tell, be more profitable.<sup>211</sup>

Embedded in this argument was judicial recognition of the significance of earning one's bread by one's chosen trade.<sup>212</sup> Judge Hare questioned why the actress should be compelled indirectly to come to terms with a theater owner for whom she now refused to work.<sup>213</sup> He rhetorically questioned to what lengths the court should go in holding her to a contract that prevented her from earning money to sustain herself.<sup>214</sup> The emphasis here was not on the court's powerlessness to enforce such an order, but on the underlying importance of ensuring an employee's right to quit and pursue her trade elsewhere. Finally, Judge Hare articulated the free-labor principle in terms of slavery itself:

Is it not obvious that a contract for personal services thus enforced would be *but a mitigated form of slavery*, in which the party would have lost the right to dispose of himself as a free agent, and be, for a greater or less length of time, subject to the control of another?<sup>215</sup>

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conceded that it gave workers a right to quit. VanderVelde, *Labor Vision*, *supra* note 8, at 489 n.224.

<sup>208</sup> *Ford*, 6 Phila. at 6.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 7.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 6–7.

<sup>214</sup> *Id.* at 7. Judge Hare also predicted that forcing employees back to their employers would spread to other types of trades: “Are such decrees to be made solely with reference to actors, or shall lawyers be held to their clients, mechanics to their employers, and servants to their masters, by the same process?” *Id.*

<sup>215</sup> *Id.* (emphasis added).

Judge Hare suggested this cause of action was slave-like.<sup>216</sup> To call the employer's request for injunction "a mitigated form of slavery" thus connected the Thirteenth Amendment, then being ratified by the states, to his interpretation of the state's common law.<sup>217</sup>

The case did not present the opportunity to challenge the separate writ of enticement should Ford have attempted to sue any theater that Mrs. Jermon had run off to. But the gist of the argument—"that Mrs. Jermon shall not play at all, unless she will consent to play for the complainant"—seems to dictate the conclusion.<sup>218</sup> This is consistent with Republican thinking. As Congressman Bundy stated "Why, sir, we not only owe to all conditions of men the boon of personal freedom, but we owe to them access to the means for their living."<sup>219</sup> Unfortunately, the progeny of this case was limited by the later introduction of the British case, *Lumley v. Wagner*,<sup>220</sup> which found its way into the American common law through the footnotes of treatises like Blackstone.<sup>221</sup>

## 2. The State of Maryland, the Loyal Slave State

The same year that a Pennsylvania court made the connection between the subordinating aspects of master-servant law and the Thirteenth Amendment's labor vision, a few hundred miles away, a Maryland court seemed blind to the involuntary servitude imposed upon young African Americans in the form of a state system for indenturing of free blacks.<sup>222</sup> Technically, the 1865 case in Maryland operated in a double twilight zone that year. The case occurred after the Thirteenth Amendment was passed by Congress, but before it had been ratified by the states. The basic provisions of the Amendment were in place in Maryland, however, because by this time, Maryland, acting quickly, had already amended its state constitution in accordance with the language of the Thirteenth Amendment (and modeled it, as the Amendment itself was, on the language of the Northwest Ordinance).<sup>223</sup> Thus, while the Amendment was on the national table awaiting ratification by a sufficient number of states, the identical language was already in effect in Maryland under the state constitution.<sup>224</sup>

In *Brown v. State*,<sup>225</sup> the Maryland court affirmed a conviction of criminal enticement brought against a woman who urged a free young black man to leave his

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<sup>216</sup> *See id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> CONG. GLOBE, 39th Cong., 2d Sess. 297 (1867).

<sup>220</sup> 64 E.R. 1209 (1852).

<sup>221</sup> For a full account of this development, see VanderVelde, *Gendered Origins*, *supra* note 139.

<sup>222</sup> *See infra* Section III.B.2.

<sup>223</sup> *Brown v. State*, 23 Md. 503, 504 (1865).

<sup>224</sup> *Id.* at 504, 507–08.

<sup>225</sup> 23 Md. 503 (1865).

master.<sup>226</sup> It is quite likely that the woman, Adeline Brown, was the boy's mother, since they shared the same last name. The State prosecuted Adeline for encouraging her son to enjoy his new freedom that had been announced by the state's constitutional amendment.<sup>227</sup> In her defense, her attorney urged that she could not be convicted of criminal enticement for encouraging young George Brown to quit his master because George was now free to quit.<sup>228</sup> Her attorney argued that George's indenture was void because the state system for indenturing young free blacks had been invalidated by the state's constitutional reform abolishing slavery and involuntary servitude.<sup>229</sup>

Surprisingly, the Maryland Court of Appeals failed to see any connection at all between the statutory practice of indenturing young African Americans and the constitutional amendment, and thus upheld the woman's conviction.<sup>230</sup>

To establish the legitimacy of indenture systems, not surprisingly, the State's attorney cited Blackstone's *Commentaries*.<sup>231</sup> Blackstone's Chapter Fourteen, "Of Master and Servant," described the legitimacy of apprenticeship programs for white persons: "[A]ll the features claimed to be objectionable in the negro apprentice system in this State prevail. Indeed, the most of them prevail in the white apprentice system of this State."<sup>232</sup> Given this circumstance, the Thirteenth Amendment language would ban both systems of indenture.

The court rejected the argument that the system indenturing free blacks was a form of racial slavery by stating simply that in Maryland there were well-known distinctions between the two statuses—slaves and free blacks.<sup>233</sup> The court reasoned that free black persons had disabilities, such as subjection to indenture, but they were in the category of free black persons—not "slaves"—so the amendment did not apply to them.<sup>234</sup> Hence, according to the court slavery's abolition had no effect at all on free Blacks or black indenture because each was designated a separate status category. This ruling negated even the intersection of the two objectives of the Thirteenth Amendment's purpose, because: 1) this statute applied exclusively to African Americans; and 2) it bound individuals to compulsory labor.<sup>235</sup> The separate legal categories proved enough of a distinction for the court to overlook the obvious connection. The court

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<sup>226</sup> *Id.* at 505–06.

<sup>227</sup> *See id.*

<sup>228</sup> *See id.* at 506.

<sup>229</sup> *Id.* at 508–09.

<sup>230</sup> *Id.* at 511–12.

<sup>231</sup> *Id.* at 504. The State's attorney also cited James Kent's *Commentaries on American Law* which refer to Blackstone. *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 508.

<sup>234</sup> *Id.* ("It is very clear that the words *slavery* and *slaves*, used in these clauses of the Constitution, cannot be applied to a *free negro* apprenticed under the law as contained in the Code. The terms *slaves* and *free negroes* were or are well known in our legislation and jurisprudence, and they describe two distinct classes of our African population.").

<sup>235</sup> *See id.*

could not perceive that the Maryland statute was sufficiently slave-like or tantamount to slavery to fall by virtue of Maryland's constitutional amendment.<sup>236</sup>

Nor did the Maryland court see the system as violating the second prohibitory clause, "involuntary servitude."<sup>237</sup> In fact, it read the phrase as not actually banning anything, but instead as merely legitimating the practice of convict labor.<sup>238</sup> The court turned the exception inside-out by saying that the term, "involuntary servitude" was included in the amendment only to expressly legitimate an exception—that is, authorizing prisoners to be assigned to hard labor when duly convicted of crime.<sup>239</sup> The court could not see the senselessness of this argument. If the first phrase did all the work of banning slavery, the second phrase "involuntary servitude" was unnecessary. Those convicted of a crime could be sentenced to hard labor in many states at the time. Finally, the court failed to see that a state system of indenturing that was designed to set black persons—and only black persons<sup>240</sup>—to labor was "special legislation."<sup>241</sup> Instead, the court described the compulsory system as beneficial to those involuntarily indentured, much as slavery had once been described as beneficial to its victims.

The Fourteenth Amendment's equal protection provision had not yet been enacted at that time. Nonetheless, the Reconstruction Congress took note of this Maryland ruling, and condemned it immediately. Congressman Elliot stated:

I think the jurisdiction of the [Freedmen's] bureau should be extended to Maryland as soon as possible. . . . At the same place, in November, 1865, a colored woman was sentenced to be sold

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<sup>236</sup> *Id.* at 511–12.

<sup>237</sup> *Id.* at 508–09.

<sup>238</sup> *See id.*

<sup>239</sup> *Id.* at 508–09 ("Nor can it be successfully maintained that the phrase *involuntary servitude*, embraces the condition of the negro apprentice in Maryland, bound out in compliance with the terms and requirements of our law. . . . The exception annexed to it explains it. The labor imposed upon one convicted of crime, is involuntary servitude. Without the exception, a sentence to hard labor in a penitentiary would be prohibited by the Constitution, though the offender might be deprived of his liberty by simple confinement there.").

<sup>240</sup> David S. Bogen, *From Racial Discrimination to Separate but Equal: The Common Law Impact of the Thirteenth Amendment*, 38 OHIO N.U. L. REV. 117, 118 n.17 (2011) ("Maryland apprenticeship laws authorized state officials to make the children work for masters until the age of twenty-one. White apprenticeship was a personal mentorship in which apprenticeship was a choice; the apprentice had a right to an education, and could not be assigned to others. African-Americans did not have such rights in their indentures and were even described as the property and interest of the master." (citations omitted)).

<sup>241</sup> *Brown*, 23 Md. at 511–12 ("Besides, the sections of the Code relating to or ranged under the title of negro apprentices, cannot be denominated a special law. They are part and parcel of a general law found in the volume of the Code embracing the Public General Laws of the State, and can no more be regarded a special law, because applicable to one class of our population, than those sections which relate to white apprentices. We, therefore, do not consider that there is any inconsistency in this respect with this provision of the Constitution, which would operate a repeal of those sections.").

for two years for persuading her children to leave their former master, to whom they were apprenticed. The children had secured places to work, and their wages for the year would have amounted to \$400.<sup>242</sup>

This may well have been Adeline Brown. Another Congressman added:

Tell me, oh, tell me not, then, of four million black people having been emancipated from chattel slavery when by this act you impose a cruel legal slavery in its most odious forms . . .<sup>243</sup>

Two years after the decision in Adeline Brown's case, the ruling was overturned in a ruling on a habeas corpus petition brought by another indentured black person.<sup>244</sup> The judge in that case was Radical Republican and United States Supreme Court Justice Salmon P. Chase, sitting in federal circuit cases. Chase wrote, "The alleged apprenticeship in the present case is involuntary servitude, within the meaning of these words in the amendment," and ordered that the petitioner, Elizabeth Turner, be discharged from the master to whom she had been indentured.<sup>245</sup>

The particular system under which George Brown and Elizabeth Turner had been indentured was designed for free black youth. But other states were slower to realize that involuntary apprenticeship violated the Thirteenth Amendment when it applied to white youth as well. In 1869, an Arkansas court reasoned:

Binding children out as apprentices is now right, because it is law. It is said to be for their good; that the master will care for and protect his servant. Should public sentiment change, and better provision be made for the poor, and acts placing children of the State under bonds of indenture to serve a master for fifteen or twenty long years, by law be declared a restraint upon natural liberty, and an involuntary servitude for that great number of years, and a crime against the law, then courts would adjudge apprenticeships against public policy, a restraint upon natural rights, contrary to law, and void. But no objections which we may now have to placing a bright child for years under a master will allow us to adjudge against such act; and, under our system of government,

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<sup>242</sup> CONG. GLOBE, 39th Cong., 1st Sess. 2777 (1866) (remarks of Rep. Elliot).

<sup>243</sup> CONG. GLOBE, 40th Cong., 1st Sess. 539 (1867) (remarks of Rep. Brooks).

<sup>244</sup> *In re Turner*, 24 F. Cas. 337, 339–40 (Md. 1867) (declaring a similar alleged apprenticeship was involuntary servitude, within the meaning of the Thirteenth Amendment, as well as a violation of "the first section of the civil rights law enacted by congress on April 9, 1866, which assures to all citizens without regard to race or color, 'full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens'").

<sup>245</sup> *Id.*



can a change in policy and future legislative action come back and make void what we are lawfully doing now? Public policy is but the manifested will of the State, and the question is, whether by a change in her will or policy, under our national Constitution, she can destroy a *contract* made under and sanctioned by her former policy.<sup>246</sup>

If the servitude were involuntary, it would seem that it would not matter whether the apprentice was white or black, or under age or a full adult. Yet, the binding out of young people and the poor was much slower to disappear in the United States.<sup>247</sup>

### 3. The State of Indiana

Even by 1865, when Adeline Brown's case was decided, the decision was inconsistent with existing judicial interpretations of the language regarding other statutes indenturing free blacks in regions covered by the Northwest Ordinance.<sup>248</sup> As early as 1821, in the well-known Indiana case, *The Case of Mary Clark, A Woman of Colour*,<sup>249</sup> the Indiana Supreme Court struck down a similar system of indenture of free blacks by utilizing the exact same rhetorical technique of analogy and simile used by Reconstruction Congressmen in considering peonage and redemptioner immigration<sup>250</sup> and by the Pennsylvania court in *Ford v. Jermon*<sup>251</sup>:

[A] covenant for service, if performed at all, must be personally performed under the eye of the master; and might, . . . require a number of years. Such a performance, if enforced by law, would produce a state of *servitude as degrading and demoralizing* in its consequences, *as a state of absolute slavery*; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling *more discordant and irritating than slavery* itself.<sup>252</sup>

Holding the petitioner, Mary Clark, a free African-American woman, to indentured servitude would be “as degrading and demoralizing in its consequences, as a

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<sup>246</sup> *Jacoway v. Denton*, 25 Ark. 625, 633–34 (1869).

<sup>247</sup> See generally Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265 (1992) (detailing American laws that compelled the poor and orphan children to labor).

<sup>248</sup> See *The Case of Mary Clark, A Woman of Colour*, 1 Blackf. 122 (Ind. 1821).

<sup>249</sup> *Id.*

<sup>250</sup> See *supra* Section II.A.

<sup>251</sup> See *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865) (“[A] contract for personal services thus enforced would be but a mitigated form of slavery.”).

<sup>252</sup> *Mary Clark*, 1 Blackf. at 124–25.

state of absolute slavery.”<sup>253</sup> Hence, the indenture system could not stand in the face of the language banning enslavement,<sup>254</sup> let alone “involuntary servitude”<sup>255</sup>:

If a man, contracting to labour for another a day, a month, a year, or a series of years, were . . . compelled to perform the labour, it would either put a stop to all such contracts, or produce in their performance *a state of domination in the one party, and abject humiliation in the other*.<sup>256</sup>

It was exactly the possibility of such domination and abject humiliation that the Reconstruction Congress sought to abolish because it presented an obstacle to the nation becoming a true republic:

A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary either in fact or in law. . . . [H]er application to the Circuit Court to be discharged from the custody of her master, establishes the fact that she *is willing to serve no longer*; and, while this state of the will appears, the law cannot . . . presume that her service is voluntary . . . . The fact then is, that the appellant is in a state of involuntary servitude; and we are bound by the [state] constitution, the supreme law of the land, to discharge her therefrom.<sup>257</sup>

All three of these cases demonstrate the Amendment’s defensive function as a shield rather than guaranteeing an enhanced labor status. But more importantly, these cases suggest a significant difference in interpretation by state courts on the subject of the Amendment’s reach. Free states, on the one hand, such as Pennsylvania and Indiana, adopted a liberal use of the Amendment’s language by analogizing employer overreaching to slavery.<sup>258</sup> Former slave states such as Maryland, on the other hand, refused to construe the Amendment’s language any more broadly than to the tight categorical assignment as a chattel slave.<sup>259</sup> For former slave states, the Amendment spoke only to declaring the status of slavery ended, nothing more.

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<sup>253</sup> *Id.* at 124.

<sup>254</sup> *See id.* at 125.

<sup>255</sup> *Id.* at 123.

<sup>256</sup> *Id.* at 125 (emphasis added).

<sup>257</sup> *Id.* at 125–26. The Indiana Court noted that “[t]he appellant in this case *is of legal age* to regulate her own conduct; she has a right to the exercise of volition; and, having declared her will in respect to the present service, the law has no intendment that can contradict that declaration.” *Id.* (emphasis added). This could distinguish Mary Clark’s situation from young Mr. Brown’s; he may have been under age.

<sup>258</sup> *See id.* at 122; *Ford v. Jermon*, 6 Phila. 6 (Dist. Ct. 1865).

<sup>259</sup> *See Brown v. State*, 23 Md. 503, 508 (1865).

## CONCLUSION

The Thirteenth Amendment's potential to revise master-servant hierarchies, as evidenced by dozens of speeches of Republican leaders in the Reconstruction Congress, came to be snuffed out in the courts by two different restrictive sets of decisions. First, the United States Supreme Court's parsimonious readings of the Amendment left it merely a tombstone of the Civil War. The Court discouraged the development of its jurisprudence by limiting interpretations, much as the Court wiped out the Privileges and Immunities Clause, an entire clause of the Fourteenth Amendment. Second, state courts were never forced to reconsider master and servant doctrine because there were no causes of action recognized at law where employees could attempt to expand the envelope of free labor. Ultimately, the Reconstruction Congress's attempt to dislodge the hierarchy of master-servant was squandered, as the focus on the material working conditions of freedmen came to be overtaken by the Fourteenth Amendment's focus on state action, concerns about suffrage in the Fifteenth Amendment, and Congress's unsuccessful effort to impeach a president. Yet, the Thirteenth Amendment is still there. It may be dormant, but it is essential to freedom under the U.S. Constitution, and should be read in the context of the history of one of the nation's most egalitarian periods of law reform.