Civilly Dead: The Ideological and Political Struggle over Penal Slavery in The United States Since the 19th Century

by

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"The strongest deterrent to crime… [would be] the long and painful example of a man deprived of his freedom…a beast of burden, repaying with his toil the society he has offended. That intensity of the punishment of lifelong slavery as a substitute for the death penalty possesses that which suffices to deter any determined soul."[1] *– Cesare Beccaria*

[1] Barbara Esposito and Lee Wood, *Prison Slavery* (Silver Spring, Maryland: Joel Lithographic, Inc., 1982), 37.

Introduction

This study will explore the issue of penal slavery, and will furthermore interrogate the degree to which the Democratic and Republican parties support the extension of labor rights to prisoners. Initially, according to prevailing assumptions about U.S. politics, it would seem as though the Democratic tradition would be most likely to support penal labor rights. It has traditionally been the Democratic tradition that has ostensibly represented organized labor and championed "pro-labor" legislation including minimum wage rights, workplace protections, social security, and regulations on business. Furthermore, the Democratic tradition has generally prioritized rehabilitative and anti-incarceration approaches to crime over punitive methods. Meanwhile the contemporary Republican party is best know for favoring legislation restricting labor rights and protections.

Republicans have generally been opposed to increasing the national minimum wage, legislation protecting labor unions, and regulations on business. Furthermore, many of its contemporary members have adopted an approach to crime that emphasizes a punitive rather than rehabilitative approach to crime through harsher sentencing and expanded criminalization, a political strategy generally termed "tough on crime."[2]

Yet, despite these commonplace assumptions there is reason to suspect an unlikely—and even uncomfortable—truth of American history: it is within the tradition of the Republican party that ones finds the greatest political advocacy for labor rights for prisoners, dating as far back as the 19th century. To understand this surprising finding, it

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[2] Charlie Savage, "Trend to Lighten Harsh Sentences Catches On in Conservative States," *The New York Times*, August 13, 2011.

is useful to situation the question of modern inmate labor rights in light of Congressional politics surrounding the passage of the Thirteenth Amendment in 1865.

The Thirteenth Amendment was passed in the wake of the Civil War and is generally regarded as the legislation that fully abolished slavery in the United States. While it may be common knowledge that the Thirteenth Amendment was primarily backed by Northern Republicans and opposed by Southern Democrats, it may be more astonishing that the Thirteenth Amendment did not abolish all forms of slavery. Along with the amendment's celebrated abolition of slavery in the United States is a less-well known "exception clause," which permitted involuntary servitude and slavery as a punishment for a crime. As passed, the amendment read: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[3] What is interesting for the purposes of my discussion is the fact that the exception clause was introduced by Democrats and adamantly opposed by Republicans. Thus while the passage of the Thirteenth Amendment was a major political victory for Republicans, the party still voiced opposition to the exception clause, which maintained the legality of penal slavery. The political debate between Republicans and Democrats over the inclusion of the exception clause in the Thirteenth Amendment thus should not be seen as a product of divergent principles or outlooks, but rather as a manifestation of each party's ideological foundations.

The Ideological and Sociological Foundations of The Republican and Democratic Traditions

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[3] *The Thirteenth Amendment to The United States Constitution*, 1865. (Emphasis Added)

The Republican opposition to the exception clause was primarily rooted in the party's historical critique of slavery, while the Democratic defense of the exception clause and opposition to the Thirteenth Amendment were founded in the party's historical affiliation as the most prominent political defenders of Slavery.

These divergent political attitudes on slavery are most intelligible in light of each tradition's ideological foundations. The Democratic tradition was originally grounded in Master-Slave ideology, while the Republican tradition embraced Free Labor ideology. Master-Slave ideology essentially held that all forms of labor could be characterized as a relationship between master and slave. Thus all labor relationships involved unequal dynamics of power and freedom. The slave was always dependent upon, subservient to, and economically inferior to his master. Proponents of Master-Slave ideology held that unlike the slave, the master maintained complete power and freedom. Alternatively, Free Labor ideology held that all laborers could naturally be characterized as independent contractors. As such, laborers maintained liberty, autonomy and independence. Every individual was thus seen to have the same opportunity for power and freedom. Slavery thus represented the antithesis of Free Labor: a controlled, oppressive, forced labor relationship of dependency. Slavery, according to Free Labor ideology, divorced the laborer from his natural and rightful status as an independent contractor.

These divergent ideological traditions can be elucidated in the context of the conflicting contemporary sociological theories on rights. Within the contemporary discipline arise two opposing theories of rights, one pro-rights and one anti-rights. Counter to a traditionally liberal philosophy of rights, which perceives rights as essential and empowering to the social individual, is a more conservative theoretical position that

seeks to problematize the power dynamics inherent to rights. The former philosophy has an inherent affiliation with Master-Slave ideology, as it prioritizes security and protection over freedom, while the latter is thoroughly representative of the labor vision of Free Labor ideology, which posits ultimate individual liberty as an inherently empowering ideal. One of the most prominent representatives of the anti-rights theory is contemporary feminist sociologist Wendy Brown, whose work draws heavily from the anti-liberal philosophy of the 19th century German philosopher Friedrich Nietzsche.

Brown problematizes the power dynamics inherent in the relationship between the authorities that bestow rights and the subjects who receive them. Generally, Brown holds that rights inherently create social dependence. According to Brown, rights protect individual freedoms rather than promote individual liberties, but only insofar as they are granted and permitted by an external authority. Those who receive rights are thus indebted to the authority which guarantees them: "whether one is dealing with the state, the Mafia, parents, pimps, police, or husbands, the heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector's rules."[4] For Brown, who situates her own thought in a Nietzschean admiration for the sovereign individual who maintains "a consciousness of his own power and freedom," rights are not necessary for individual empowerment and freedom. Brown is very clear about the potential dangers of a pro-rights discourse in this regard:

> Rights are not just defenses against social and political power but are, as an aspect of governmentality, a crucial aspect of power's aperture… they are not simply rules and defenses against power, but can themselves be tactics and vehicles of governance and domination.[5]

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[4] Wendy Brown, *States of Injury : Power and Freedom in Late Modernity* (Princeton, N.J.: Princeton University Press, 1995), 169.
[5] Wendy Brown, "'The Most We Can Hope For...': Human Rights and the Politics of Fatalism," *The South Atlantic Quarterly* 103, no. 2/3 (Spring/Summer 2004): 459.

For Brown, pro-rights discourse "produces a certain kind of subject in need… of protection."[6] In lieu of rights, Brown, like proponents of Free Labor ideology, advocates for individual freedom from external authorities as the most effective means to empowerment.

Charles Tilly, a recently deceased American sociologist, offers a different conception of rights and power. Tilly, writing about the detrimental effect of globalization on labor rights, recognized the power structure inherent in the concept of rights. As he states, rather bluntly: "Without authorities, no rights exist."[7] While Tilly recognizes the power dynamics inherent in a pro-rights discourse, he maintains a belief that labor requires rights from the State as a means of sustaining its existence. Tilly thus maintains that, "labor politics… pivot precisely on demands that the state enforce…rights."[8] There is remarkable affiliation between Tilly's pro-rights theory and Master-Slave ideology, since both posit the inherent dependence of labor on an external authority, whether master or State, to ensure its own subsistence.

While Tilly's theoretical stance on the appropriate politics of the labor movement vis-à-vis the State and rights remains dominant contemporarily, the 19th century Free Labor movement rejected the dependence of labor on external authorities, maintaining a remarkable affiliation with Brown's critique of rights. Free Labor ideology posited that all individuals in the labor process, as independent contractors, shared equal opportunity, liberty, and autonomy. As Tomlins explains, this ideology was founded upon "the promise of both material sufficiency and personal liberty through the successful

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[6] Ibid., 459–460.
[7] Charles Tilly, "Globalization Threatens Labor's Rights," *International Labor and Working-Class History*, no. 47 (April 1, 1995): 4.
[8] Ibid., 14.

reconciliation…of values supportive of economic growth with those embracing a social order of free and independent men."[9] Free Labor thus rejected the need and even appeal of rights guaranteed by an authority external to labor. The major tenets that formed the basis of Free Labor ideology maintained an affiliation with Brown's anti-rights discourse, including, unbridled labor independence, economic freedom from the State, and the inherent power of the labor movement without legislative intervention. Like Brown, Free Labor ideology held that power was achieved primarily through freedom.

This theoretical debate over the relationship between rights, freedom, and power will be a prevalent theme throughout my thesis. Republicans, ranging from 19th century Free Labor ideologists to contemporary party representatives have maintained a political allegiance to Brown's critique of the manner in which rights recognize and reinforce authoritarian power hierarchies rather than promote individual freedom and social empowerment. Alternatively, Democrats, ranging from Master-Slave ideologists in the antebellum South to contemporary party representatives, have remained loyal to a pro-rights discourse, which argues that rights, as guaranteed by external authorities, are the primary means through which natural inequalities can be alleviated and power can be spread equally.

In my first and second chapters, I will discuss the historical background of the contemporary political conflict over penal labor. To do this, I will uncover the manner in which the contemporary political atmosphere concerning inmate labor rights relates to both the ideological conflict between southern Master-Slave ideologists and northern Free Labor ideologists in the antebellum United States, and to the congressional debates

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[9] Christopher L Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge [England]; New York, NY: Cambridge University Press, 1993), 310.

over the Thirteenth Amendment's exception clause, which permits slavery and involuntary servitude as punishments for a crime.

I argue that the labor vision of Free Labor ideology accounted for Northern Republicans' rampant opposition to slavery. Since the cultivation of Free Labor ideology by northern Republicans in the antebellum United States, Republicans have remained the most outspoken critics of slavery as an unnatural, oppressive, and economically unproductive institution. The Republican Party boasted the most prominent political Union leaders in the Civil War, encouraged the passage of the Thirteenth Amendment, and voiced opposition to the Thirteenth Amendment's exception clause. Central to this abolitionist history was the Free Labor ideology tenet that economic freedom rather than material security was the primary means to individual and social empowerment.

Alternatively, I will argue that Democrats' loyalty to Master-Slave ideology served as the fundamental justification behind its anti-abolitionist politics. Accordingly, in the wake of the Confederate defeat in the Civil War, Southern Democrats nearly universally opposed the Thirteenth Amendment, authored and defended the exception clause, and remained steadfast in their loyalty in Master-Slave ideology despite the ideological victory of Free Labor marked by the passage of the Thirteenth Amendment.

After discussing the major political victory of Free Labor ideology marked by the enactment of the Thirteenth Amendment, I will demonstrate through judicial analysis the rapidity with which the Master-Slave vision of labor supplanted that of Free Labor as the nation's dominant political perspective. While courts in the late 19th century acknowledged the Free Labor rationale behind the Thirteenth Amendment, by the turn of the century, the amendment's Free Labor rationale had been supplanted by judicial decisions increasingly characterized by the logic of Master-Slave ideology, and its

embrace of control and dependency in the labor relationship. This was evident in the increasingly narrow interpretation of the Thirteenth Amendment employed by courts during the early 20th century, as well as in cases concerning other statutes that characterized labor as inherently in need of federal protections beyond those provided by the Thirteenth Amendment. Ultimately, I seek to show how this judicial and political ideological shift in the early 20th century paved the way for New Deal legislation in the 1930s, including Social Security, the National Labor Relations Act, and most importantly for my purposes, the Fair Labor Standards Act (FLSA), which most notably, introduced a national minimum wage and overtime pay via the regulation of standard working hours. The logic behind such New Deal legislation was characterized by the Master-Slave prioritization of social security over individual freedom. As Historian Alan Brinkley explains, "virtually all New Dealers agreed that a solution to the nation's greatest problems required the Federal Government to step into the marketplace to protect the interests of the public."[10] With the passage of the FLSA, labor had come under the protection of the Federal Government, further reinforcing the dominant political perspective on the subordinated status of labor. Stemming from this political perception was a national outlook that posited the necessity of the Federal Government's authority as a means of protecting labor, since its prospects were seen to be predicated upon, "some level of authority over the structure and behavior of private capitalist institutions."[11] Thus, by the New Deal era, the Free Labor vision of the Thirteenth Amendment had been replaced by a national call for legislative protection of and security for labor through restrictions on market freedoms.

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[10] Alan Brinkley, *The Rise and Fall of the New Deal Order, 1930-1980*, ed. Steve Fraser and Gary Gerstle (Princeton, N.J.: Princeton University Press, 1989), 89.
[11] Ibid., 87.

The second chapter will end with a discussion of legislation related to penal labor enacted during New Deal era. This legislation greatly restricted the scope and profitability of prison industries and, by association, those of penal labor. These legislative restrictions on penal labor would come to serve as primary justifications for penal slavery in cases beginning in the 1940's concerning the applicability of the FLSA to inmates.

In my third chapter, I will analyze the development of post-FLSA judicial discourse in cases concerning penal labor, and more specifically, the evolution of the judicial rationale for denying minimum wage rights to prisoners. Since the passage of the FLSA, courts from the district level to the Supreme court have articulated that a "normal" employment relationship for the purposes of the FLSA can be determined by the level of control maintained by the employer over the laborer; i.e. the "control test." Given a sufficient level of employer prerogatives of control, surveillance, and oversight, laborers were deemed by courts to be worthy of FLSA coverage. When considering the coverage of prisoners under the FLSA, courts have utilized the voluntary test, a consideration of whether the prisoner had voluntarily entered the labor relationship. The voluntary test should be seen as a judicial concession made by post-FLSA courts to the Thirteenth Amendment. According to the protections provided by the Thirteenth Amendment, all laborers, with the exception of prisoners, *had to* pass the voluntary test, since the amendment prohibited involuntary slavery outside of the penal context. As free market laborers universally passed (and had to pass) the voluntary test, cases concerning FLSA for free market laborers did not explicitly employ the voluntary test. While the voluntary test established whether or not the laborer was a slave, the control test, introduced by the logic behind the FLSA, proceeded to measure the extent to which

the labor relationship resembled that of master and slave. Thus the control test, grounded in Master-Slave ideology, tested the level of slavishness exhibited by those laborers whose labor had already been affirmed as voluntary.

The voluntary test thus preceded the control test in all post-FLSA judicial cases yet was only an implicit concession to the Thirteenth Amendment's mandate that all labor remain voluntary in free market labor cases. However, prisoners, who *could be* excluded from Thirteenth Amendment coverage, had to pass the voluntary test before the control test could be considered. When prisoners have failed to pass the voluntary test, courts have characterized their labor as slavery, which is legally *permitted* although not *required* by the exception clause of the Thirteenth Amendment. The ideological foundations of the judicial rationale for denying inmates FLSA coverage can thus be seen as a result of the dominance of Master-Slave ideology in to the United States' political perception of labor, marked by the passage of New Deal legislation in the 1930's. By the late 20th century, it had become clear that neither Thirteenth Amendment rights nor FLSA coverage would be extended to penal laborers by the courts. Furthermore, any extension of the free market into penal institutions would not arise in the judiciary. These issues thus became a matter of concern for the legislative branch. Importantly, while prisoners could be legally categorized as slaves according to the Thirteenth Amendment, the exception clause did not *require* slavery in prison. Post-FLSA courts thus were not required to characterize penal labor as slavery, but rather chose to do so in a characteristically Master-Slave vein. Thus, the contemporary political conflict over the appropriate labor status of prisoners and the proper role of prison industries in the market hinges upon the permissiveness of the Thirteenth Amendment's exception clause, by which prisoners can be legally classified as free or slave laborers.

In my fourth chapter, I will discuss the manner in which the economic roles of prison industries and penal labor have become contentious political issues that have divided Republicans and Democrats. I argue that the contemporary political divide on these issues directly mirrors the conflicting labor visions of Master-Slave ideology and Free Labor ideology, as well as the congressional debates over the exception clause in the Thirteenth Amendment. Taken in its entirety, my analysis aims to uncover the philosophical foundations of the divergent ideological positions taken by Democrats and Republicans concerning the proper economic role of penal labor. The contemporary relevance and role of New Deal legislative restrictions on commodity production in prisons have become polarizing political issues. Contemporary Republicans, like their political predecessors, Free Labor Republicans of the 19th century, have led the movement to abolish economically restrictive legislation and promote free market production in prisons, including fair wages for prisoners. They thus seek to extend the coverage of the Thirteenth Amendment *and* the FLSA to prisoners. Contemporary Republicans call for the repeal of all legislative restrictions on prison industries and the extension of fair wages to inmate laborers. Since slave labor is not permitted in interstate commerce according to the rationale of the FLSA, contemporary Republicans, whose primary concern should be seen as the expansion of prison industries as a means of promoting the expansion of capital, necessarily advocate for labor rights for prisoners as a means of bringing their labor into the free market realm. Alternatively, contemporary Democrats, like their political predecessors, Southern Democrats of the antebellum South, advocate for enhanced restrictions on prison industry and the addition of prisoners to the list of laborers exempted from FLSA coverage, as the Thirteenth Amendment, in spite of its exception clause, *neither* bars inmate laborers from

rights *nor* grants free labor status to prisoners. Contemporary Democrats are primarily motivated by a political opposition to competition between penal and free market labor. While Democrats are thus not explicitly in favor of penal slavery, they are opposed to the expansion of prison industries and penal labor. Accordingly, if penal slavery is the only means through which competition between penal and free market labor can be avoided, Democrats tend to prefer penal slavery. By uncovering the ideological and historical bases of contemporary political positions on penal labor, I seek to elucidate why the Democratic tradition, a tradition whose political predecessors were the most adamant proponents of slavery, continue to promote the principles of slave relations in the last national institution promulgating its legal existence: the prison. Alternatively, the Republican party's call for the expansion of partnerships between free enterprise and penal institutions, as well as minimum wage for prisoners, is made intelligible in light of the Republican tradition's historical embrace of Free Labor ideology, which provided the basis for its opposition to slavery and fueled its abolitionist vision, which had been legislatively recognized with the passage of the Thirteenth Amendment. However, it seems clear that the primary motivation behind contemporary Republican politics is not a moralistic desire to emancipate penal slaves, but rather the economic desire to incorporate millions of inmate laborers into the free market as a means of promoting the expansion of national industry and capital. Still, regardless of its political motivations, the Republican Party remains the most adamant critics of penal slavery and aim to abolish the last vestige of legalized slavery in the United States.

1. COMPETING IDEOLOGIES IN THE ANTEBELLUM UNITED STATES: MASTER-SLAVE AND FREE LABOR IDEOLOGY

"The world is divided between two philosophies, the one, the philosophy of free trade and universal liberty … the other, that of socialism... The latter is almost universal in free society the former prevails in the slaveholding States of the South."[12] *– George Fitzhugh, 1854.*

The institution of slavery emerged in the United States when the first slave ship arrived on the coast of Virginia in 1619. The ship held about twenty Africans, who would represent the country's first slave laborers.[13] Slavery in the United States and indeed slavery in general can be defined as a system in which slave laborers are perceived as dehumanized 'chattel', which are the lifelong property of their masters. By the 18th century, the institution of slavery had become a dominant force in the U.S. economy. In 1790, there were over 650,000 slaves in the South, representing over ten percent of the U.S. population.[14] With the stark economic contrast between the burgeoning slave population in the South, which influenced the growing reliance of the southern economy on slave labor, and an increasingly capitalistic northern economy grounded in market based labor, a theoretical debate over the proper economic role and status of the laborer inevitably arose. During the 19th century, this debate intensified, eventually dividing prominent social and economic theorists between two distinct and antithetical ideological positions: Master-Slave ideology in the South and Free Labor ideology in the North.

Master-Slave ideology posited that liberty, both in the labor relationship and in broad civil society, had to be limited; that slave labor was the most effective means of

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[12] George Fitzhugh and Hinton Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, ed. Harvey Wish (New York: G.P. Putnam's Sons, 1960), 86.
[13] Lisa Rein, "Mystery of Va.'s First Slaves Is Unlocked 400 Years Later.," *The Washington Post*, September 3, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/09/02/AR2006090201097.html.
[14] Peter J Parish, *Slavery : History and Historians* (New York: Harper & Row, 1989), 18.

promoting social wellbeing; that inequality was the natural condition of mankind; that governmental protections, especially in the economy, were generally necessary for the reproduction of society and specifically for the survival of the naturally weak; and that all labor could be characterized as a relationship between Master and Slave. Social security, rather than individual economic freedom, was thus the primary objective for Master-Slave ideology. Master-Slave ideologists also offered various critiques of Free Labor ideology. For proponents of Master-Slave ideology, Free Labor ideals were corrupt insofar as they believed that full economic freedom would lead to drastic economic inequality, that the Northern laborer was just as, if not more dependent on capital than the slave on his master, and that society would regress into anarchy or plutocracy without guaranteed governmental protection.

Free Labor ideology gained philosophical coherence in the 19th century and represented the theoretical antithesis of Master-Slave ideology. Free Labor ideology, in its purest form, considered all individuals engaged in labor (with the exception of slaves), whether manual laborers, managers, or executive officers, to be equal, autonomous and independent. Each could formally be recognized as an independent contractor. Free Labor ideology thus reworked the two of major tenets of Master-Slave ideology: the natural inequality of mankind and universality of the master-slave labor relationship. Furthermore, individual economic freedom was seen as natural and empowering. Free Labor ideologists opposed economic governmental restrictions and the allocation of "rights" to labor, as they theorized that labor would be best served through independence from authority. Accordingly, many Free Labor ideologists advocated a *laissez-faire* approach to labor, and the market in general. Proponents of Free Labor ideology critiqued the dependency inherent in the master-slave relationship, slavery's

degradation of the laborer, and the threat that slavery posed to free laborers throughout the country.

According to Master-Slave ideology, unqualified liberty of the laborer would lead to the downfall of civil society, as it held that power had to be maintained by masters rather than laborers, as a means of providing for their slaves. This view was antithetical to Free Labor's idealization of the absolute liberty of individual. According to 19th century social theorist and prominent Master-Slave ideologist George Fitzhugh, liberty was antithetical to the social body: "Restrictions of liberty are… necessary to secure the good of the human hive… there is no such thing as *natural human* liberty, because it is unnatural for man to live…without… government of society."[15] Not only did Master-Slave ideology critique liberty on social grounds, but also on the grounds that it degraded the individual. Fitzhugh, in a criticism of Free Labor ideology and its idealization of liberty in the labor relationship, wondered, "how slavery could degrade men lower than universal liberty has done."[16] Liberty, in this sense, posed a threat to social and individual empowerment. In its rejection of ultimate liberty, Master-Slave ideology emphasized man's inherent need for *protection*, specifically governmental protection. 19th century political theorist and Master-Slave ideologist John Calhoun argued in this vein that "liberty must, and ever ought, to yield to protection." Calhoun and other Master-Slave ideologists seemed to agree with Free Labor ideologists that perfect liberty could only arise from equality, but rejected that such equality existed since: "liberty cannot be

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[15] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 139.
[16] Ibid., 65.

perfect without perfect equality."[17] Without perfect equality, the Free Labor ideal of perfect liberty was unrealistic.

Free Labor ideology maintained the opposite perspective on individual liberty, arguing that it was not only the primary means to individual empowerment, but also to social wellbeing. Liberty is not a term with a fixed meaning, and it is thus important to distinguish the type of liberty idealized by Free Labor. Historian Joyce Appleby termed this ideological conception of liberty "the liberal concept of liberty." This concept was grounded in the Hobbesian dictum regarding "men's equal ability to achieve their own ends."[18] The Free Labor vision of liberty proceeded from this principle of equal opportunity, noting that liberty, especially in labor, required the ideal of "individual initiative."[19] Liberty, in this understanding, was not granted by an authority, but rather was natural to each individual.

The competing views on liberty and equality maintained by Master-Slave ideology and Free Labor ideology greatly influenced their respective ideals on the type of economy best suited for social wellbeing. Master-Slave ideology held that slave labor, authoritarian restrictions on the market, and protection of the laborer promoted equality in a naturally unequal society. Free labor ideology, on the other hand, argued that the free market, autonomy of labor, and individualism would produce the greatest social wealth.

The Master-Slave belief in man's natural inequality informed much of the ideology's economic theory. As John Calhoun explained, Master-Slave ideology held

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[17] Eric McKitrick, *Slavery Defended: The Views of The Old South* (Englewood Cliffs, New Jersy: Prentice-Hall, Incorporated, 1963), 10.
[18] Joyce Appleby, *Capitalism and a New Social Order : the Republican Vision of the 1790s* (New York; London: New York university press, 1993), 20.
[19] Ibid., 22.

that mankind was naturally unequal and inevitably subject to external authority: "Men… instead of being born free and equal, are born subject, not only to parental authority, but to the laws and institutions of the country… under whose protection they draw their first breath."[20] Based on its theory of natural inequality, Master-Slave ideology emphasized the need for the protection of the poor and weak by authorities, including both slave masters and the State. According to this view, slaves, as naturally dependent and unequal laborers, had to be protected by their masters. Fitzhugh went as far as to characterize slavery as "the very best form of socialism,"[21] since it relieved laborers of material concerns. Within the institution of slavery, the master had to provide for the means of the slave's survival and perhaps as importantly, for the reproduction of his labor power. Master-Slave ideologists like Fitzhugh, argued that the slave was significantly better off than the northern laborer, since "a consciousness of security, a full comprehension of his position, and the absence of all corroding cares and anxieties, make the slave easy and self-assured in his address."[22] For these thinkers, labor could not survive without guaranteed protections from an external authority. Fitzhugh believed that labor was best served by subjecting itself to external authority: "No association, no efficient combination of labor can be effected till men give up their liberty of action and subject themselves to a common despotic head or ruler."[23] For Master-Slave ideology, then, an association of labor was most effectively achieved through institutionalized slavery rather than free market unionization.

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[20] McKitrick, *Slavery Defended: The Views of The Old South*, 11.
[21] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 59.
[22] Ibid., 65.
[23] Ibid., 78.

Free Labor ideology adamantly rejected that slavery was an egalitarian ideal, and rather idealized *laissez-faire* capitalism and thus the absence of any authoritarian presence in the labor relationship. According to historian Paul Taillon, Free Labor ideologists accomplished this embrace of the free market through their belief in the natural equality of labor by "emphasizing the common identity held to exist among managers and workers as men."[24] Free labor ideology thus eschewed Master-Slave ideology's admiration for the authoritarian protection of the labor. Such protections were unnecessary in light of the natural equality, liberty, and self-ownership maintained by laborers. The relationship between Free Labor's idealization of liberty and its advocacy for the free market should not be understated. As Appleby explains "it is the modern notion of liberty that undergirds the free enterprise system."[25] Since Free Labor held to the tenets of natural equality, as well as equal and ultimate liberty, the ideal of communal wellbeing through the promotion of individualism seemed inevitable. Prior to providing a critique of this notion, Fitzhugh succinctly represented it: "The public good, the welfare of society…is, according to them, best promoted by each man's looking solely to the advancement of his own pecuniary interests." [26] For Free Labor ideology, the social sphere could be most effectively served by the unrestricted freedom and thus empowerment of the individual.

Master-Slave ideology rejected the Free Labor notion that the public good was best served by individualism. Calhoun, like other Master-Slave ideologists, argued that perfect liberty and economic self-interest inevitably exacerbated economic inequality:

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[24] Paul Michel Taillon, *Good, Reliable, White Men : Railroad Brotherhoods, 1877-1917* (Urbana: University of Illinois Press, 2009), 94.
[25] Appleby, *Capitalism and a New Social Order*, 22.
[26] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 55.

> The necessary effect of leaving all free to exert themselves to better their condition, must be a corresponding inequality between those who may possess…advantages in a high degree, and those who may be deficient in them.[27]

Since Master-Slave ideology posited natural inequality between individuals, it argued that the weak would flounder in a free market system. Fitzhugh, in his characteristically dramatic tone, compared the destructiveness of the free market to war: "*Laissez-faire,* free competition begets a war of the wits, which these economists encourage, quite as destructive to the weak, simple and guileless, as the war of the sword."[28] The weak of society, according to this view, had to be protected by an authority as a means of promoting egalitarianism among an inherently unequal species.

Free Labor found such critiques preposterous, as evidenced by its rebuttals, which characterized slavery as a barbaric institution that thrived on exploitation and enforced inequality between individuals. According to William Duane, a 19th century editor of a republican newspaper, slavery was guilty of producing inequalities reminiscent of earlier feudal societies: "The barbarous principles of feudal subjection no where appear but in the deplorable curse entailed upon us by… the slavery of the Africans."[29] Free Labor was not only opposed to the oppressiveness inherent in slavery, but also refuted the claim that the slave system was more effective at providing for society. As Apply explains, Free Labor ideologists focused "upon the prosperity and productivity of a voluntarily integrated economy of free men laboring in their own interest," as a means of "free[ing] themselves from the incubus of human bondage."[30]

Central to these competing economic philosophies and views on liberty were divergent conceptions of the appropriate role of government in the market, specifically

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[27] McKitrick, *Slavery Defended: The Views of The Old South*, 10.
[28] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 55.
[29] Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 102.
[30] Appleby, *Capitalism and a New Social Order*, 102.

regarding whether labor was inherently in need of protection from an external authority. Master-Slave ideology favored strong government and protective measures for labor, while Free Labor ideology rejected governmental presence in the market and the necessity of protections for labor.

Proponents of Master-Slave ideology were very explicit in expressing the overarching value of despotic governmental presence, specifically in the labor relationship. For these thinkers, governmental authority had to maintain limits on individual liberty. Fitzhugh put this dichotomy in very stark terms, arguing that "the world wants good government and a plenty of it – not liberty."[31] Central to this praise of governmental presence was a fear of the subjugation of the weak to the powerful. Historian William Jenkins succinctly summarized this trepidation. According to Jenkins, Master-Slave ideologists believed that "the powerful class would always sacrifice the interests of the weaker. Hence, the power of government must be increased to maintain social order and to secure the rights of individuals." For Master-Slave ideologists, strong governmental presence was especially important as a means of protecting labor. For Fitzhugh, authorities, such as slave masters, were necessary for ensuring the protection and survival of the laboring classes.[32] For Master-Slave ideologists, no system could succeed at protecting labor more effectively than slavery. Responding to Free Labor critiques of the barbarism of slavery, these thinkers emphasized the protective nature of slavery. Fitzhugh argued that what the abolitionist critiques failed to realize was the "the protective influence of slavery," which was ensured since "public opinion unites with self-interest, domestic affection and municipal law to protect the slave. The man who

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[31] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 60.
[32] Ibid., 71.

maltreats the weak and dependent, who abuses his authority over…slaves, is universally detested."[33] Protection of the weak by external authorities was the only means through which egalitarianism could be attained. Fitzhugh continued by noting that he did not necessarily advocate the extension of chattel slavery into the North, but did believe that external protections had to be adopted there as a means of providing for the masses, who "require more of protection, and the masses…require more of control."[34] Master-Slave ideology thus assigned primacy to control and protection rather than independence and liberty in the labor relationship.

Free Labor ideology was adamantly opposed to strong governmental presence, especially in the market, and rejected any inherent need in the laboring class for protection from authority. Intervention in the market would harm, rather than protect the prospects of labor. Appleby notes that central to Free Labor's vision of the labor relationship was "the absence of authoritarian direction."[35] Externally enforced control over and protection of labor, so primary for Master-Slave ideology, were thus antithetical to the labor vision of Free Labor ideology.

For Master-Slave ideologists, the *laissez-faire* economic philosophy inherent in Free Labor ideology created a dangerously hierarchical class structure and was unable to provide for the poor and weak. Stemming from the Master-Slave theory of the natural inequality of individuals was the notion that without protective economic measures, such inequalities would increase. Fitzhugh explained the danger of the free market system according to this rationale: "whether between nations or individuals, the war of free

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[33] Ibid., 82.
[34] Ibid., 154.
[35] Appleby, *Capitalism and a New Social Order*, 102.

trade is constantly widening the relative abilities of the weak and strong."[36] The apathy maintained by Free Labor to those at the bottom of the class structure evidenced the system's promotion of plutocracy. The perceived inability of the Free Labor system to provide for the masses was thus hostile to Master-Slave ideology's idealized vision of slavery as an institution whose most admirable quality was its ability to provide for the poor and weak. Fitzhugh noted this obvious antagonism between *laissez-faire* economics and slavery: " '*Laissez-faire*' and '*Pas trop gouverner*,' are at war with all kinds of slavery, for they in fact assert that individuals and peoples prosper most when governed least."[37]

According to Master-Slave ideology, the labor relationship was necessarily characterized by the dependence of the laborer on a master: just as slaves were dependent on their masters, market laborers were dependent on capital. All laborers were seen as slaves since all laborers were dependent on masters, whether capitalist employers or slave masters. This theory fueled the Master-Slave assertion that market laborers in the north were no freer in the labor relationship than the chattel slaves of the south, as northern laborers were slaves to capital: wage slaves. In a certain respect, then, these thinkers claimed the difference between the southern and northern systems of labor to be exaggerated. In a striking passage, Fitzhugh equated "Slave Society and…Free Society" according to their similar systems of labor dependency, whether it be "slavery to human Masters" or "slavery to Capital."[38] However, Fitzhugh and other Master-Slave ideologists did acknowledge that the major difference between market laborers and slaves was the former's payment for labor *in wages* and the latter's *in kind*. In his defense of the dependence of the laborer, prominent defender of slavery James

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[36] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 50.
[37] Ibid., 47.
[38] Ibid., 104.

Hammond, a politician from South Carolina, explained "slavery is…necessary to the performance of the drudgery so essential to the subsistence of man, and the advance of civilization."[39] Slavery was thus perceived as a historically inevitable labor relationship, as Calhoun argued: "there never has existed a wealthy and civilized society in which one portion of the community did not… live on the labor of the other."[40] Vitally important to the Master Slave theory of labor was its emphasis on the laborer as a dependent in need of the protection of external authority.

Free Labor ideology rejected the notion that labor was necessarily dependent upon external authorities, that such dependency was ideal, and even that the free market economy promoted a hierarchical class structure. Proponents of Free Labor ideology agreed with Master-Slave ideologists that slavery was an institution inherently founded upon relations of labor dependency, yet it was on those grounds that Free-Labor ideologists critiqued southern slavery. As David Montgomery explains, dependence was inherently antithetical to Free Labor thought: "No man should be assigned by law to a position of dependence upon another, went the doctrine of the free-labor system, for that was the essential crime of slavery."[41] Furthermore, Free Labor thought refuted the Master-Slave claim that inequality was inherent to both the free market and slave systems. No one doubted that slavery produced and maintained inequality between slaves and masters. What Free Labor ideologists did question, however, was the inevitability of inequality in the marketplace. As treatise writer James Schouler pointed out in 1874, the Master-Slave accusation of inequality in the marketplace was not compatible with the labor vision of Free Labor, as it was "hostile to the genius of free

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[39] William Jenkins, *Pro-Slavery Thought in The Old South* (Gloucester, Mass.: Peter Smith, 1960), 286.
[40] McKitrick, *Slavery Defended: The Views of The Old South*, 13.
[41] Tomlins, *Law, Labor, and Ideology in the Early American Republic*, 292.

institutions."[42] Thus capital could not be seen as the master of labor. Abraham Lincoln presented the Free Labor theory of labor independence in 1859, when he argued that "labor is prior to, and independent of capital… in fact, capital is the fruit of labor."[43] Labor rather than capital, promoted the expansion of the northern economy. As Tomlins demonstrates, Free Labor rejected the Master-Slave critique of the hierarchical class formation of the North through its "emphasis on social mobility and economic growth."[44] These ideals were promoted as a means of demonstrating the progressive and individually empowering nature of the northern economy. Each individual was seen to be endowed with the ability to rise from wage laborer to capitalist. According to Abraham Lincoln's vision, the North had no class that would "always…remain laborers," since "the man who labored for another last year… this year labors for himself, and next year he will hire others to labor for him."[45]

Whereas Master-Slave ideology characterized all labor relationships to be between free masters and laboring slaves, Free Labor posited voluntary labor as natural and inevitable, barring restrictions from external authority. Slavery was thus regarded as the antithesis of free labor. Whereas Free Labor was characterized by autonomy, independence, and the freedom to voluntarily enter and leave contractual labor relationships, slaves were dependent on their masters for survival, were denied contractual freedom, were physically forced to work, and were legally barred from abandoning their labor. This legal obligation to remain bound in the labor relationship was the primary characteristic of involuntary labor for Free Labor ideologists as "labor

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[42] James Schouler, *A Treatise on the Law of the Domestic Relations*, 2nd ed. (Boston: Little, Brown and Co., n.d.), 599.
[43] Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of The Republican Part Before The Civil War* (New York: Oxford University Press, 1970), 11.
[44] Ibid., 13.
[45] Ibid., 30.

became involuntary the moment a laborer decided to depart and was not permitted to do so – whatever previous agreement he may have made."[46] Whereas Free Labor defined involuntary labor in very clear terms, the ideology was purposefully vague in its definition of the free laborer. Essentially, all forms of labor that were voluntary would fall under this category. Historian Eric Foner explains that Free Labor ideologists "would agree with Horace Greeley that labor included 'useful doing in any capacity or vocation.'[47] Therefore, one needed not distinguish between the factory hand, the manager, the artisan, or even the business owner: all were free laborers with an inherent liberty to contract with one another independently. Furthermore, all forms of involuntary labor were seen as a threat to the Free Labor vision. As Foner explains, proponents of Free Labor ideology held that the southern system of labor promoted the "degradation of labor" because of "the slave's ignorance and lack of incentive, and the laboring white's poverty…and lack of mobility."[48] Thus, for Free Labor, slavery lacked the productivity, economic incentive, and socioeconomic mobility that served to promote the superiority of the northern economy.

The vehement opposition between Free Labor ideology and Master-Slave ideology would come to shape the debate between northern Republicans and southern Democrats concerning the appropriate language of the legislation required to formally abolish slavery after the culmination of the Civil War in 1865.

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[46] Robert J Steinfeld, *The Invention of Free Labor : the Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill: University of North Carolina Press, 1991), 147.
[47] Foner, *Free Soil, Free Labor, Free Men: The Ideology of The Republican Part Before The Civil War*, 15.
[48] Eric Foner, *Reconstruction : America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988), 50.

2. IDEOLOGICAL CLASHES IN THE LEGISLATURE AND JUDICIARY: CONGRESSIONAL DEBATES OVER THE THIRTEENTH AMENDMENT AND THE EVOLUTION OF JUDICIAL INTERPETATIONS OF LABOR CULMINATING IN THE RISE OF THE NEW DEAL ERA

Congressional Debates over The Thirteenth Amendment and Its Exception Clause

In 1865, in the wake of Abraham Lincoln's emancipation proclamation and the culmination of the Civil War, the United States lacked a formal legislative prohibition of slavery. In that year, Congress passed the Thirteenth Amendment to the United States Constitution. The amendment abolished slavery and involuntary servitude in the country and bestowed Congress with the authority to enforce such prohibitions. Although the Thirteenth Amendment was critical in steering the nation out of its slaveholding past, the process was slow, and the amendment did not prohibit slavery outright, since it permitted the institution to exist as a punishment for a crime. The amendment effectively criminalized slavery and involuntary servitude in the United States, *except* as punishment for a criminal offence. The full text of the amendment read: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within the United States, or any place subject to their jurisdiction."[49] Although contemporarily, the amendment is often seen as the first legislative step to the full abolition of slavery in the country, it essentially provided for the constitutional protection of penal slavery. While private ownership of slaves was outlawed, the State was permitted to continue the institution of slavery within the penal context. As Historians Barbara Esposito and Lee Wood emphasize, the Thirteenth Amendment did not abolish slavery on a national scale, but "merely transferred

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[49] *The Thirteenth Amendment to The United States Constitution.* (Emphasis Added)

ownership of the slave to the State."[50] Generally, Congressional deliberation over the language of the Thirteenth Amendment was characterized by heated debate over the extent to which the amendment ought to limit or potentially abolish slavery in the United States. This debate was of utmost importance since it was characterized by opposing political discourses founded in Free Labor and Master-Slave ideologies respectively.

Congressional debate over the exception clause of the Thirteenth Amendment generally pitted southern Democrats, set on preserving coerced labor as a means of aiding the struggling southern Economy, against northern Republicans eager to fully abolish slavery and the threat they believed it posed to free laborers throughout the country. Organized labor, siding with Republicans over the removal of the exception clause held a twofold opposition to prison slavery: "By denying the protections of labor and citizenship rights, slavery creates misery for both bonded and free workers by depressing all prices and wages."[51] On the other side, southern Democrats saw the exception clause as a benefit to a southern economy which had not only been ravaged by the Civil War, but also stood to lose its most important economic resource: slave labor. The convict-lease system of penal labor that developed from the exception clause evidenced the southern Democrats' unyielding urge to maintain institutionalized slavery. According to Historian Alexander Lichtenstein, the convict-lease system "operated… as a system of labor recruitment, control, and exploitation particularly suited to the political economy of a post-emancipation society."[52] Although the Thirteenth Amendment

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[50] Steinfeld, *The Invention of Free Labor*, 102.
[51] Ibid., 129.
[52] Alexander C Lichtenstein, *Twice the Work of Free Labor : the Political Economy of Convict Labor in the New South* (London; New York: Verso, 1996), 3.

abolished all non-penal forms of slavery, it did not divorce southern Democrats' from their philosophical embrace of Master-Slave ideology.

Unsurprisingly, it had been a southern Democrat who first proposed a version of the constitutional amendment to abolish slavery containing the exception clause. In 1864, Democratic Senator and former slave holder, John Henderson from Missouri, proposed a resolution to amend the constitution that read: "Slavery nor involuntary servitude, *except as a punishment for crime*, shall exist in the United States."[53] On the opposing side of the political spectrum, Free Labor Republicans maintained that "the degradation of one worker was the degradation of all working people."[54] Alternatively, southern Democrats, having lost the Civil War, and recognizing the inevitable outlaw of slavery, aimed to preserve as much legally viable forced labor as possible during reconstruction. As Lichtenstein explains, the exception clause prioritized the criminal justice system as a viable institution for the preservation of slavery, since it "served as a prime means of racial control and labor exploitation in the New South."[55] Lichtenstein effectively demonstrates the extent to which longer and harsher prison sentences for African-Americans served as a means of preserving the racial hierarchy in the South through the continuation of slave labor for convicted ex-slaves, via the amplification of the convict-lease system. Leasing proved to be a highly effective economic measure, as it sought to "end the necessity for state support for the penitentiary in a period of fiscal limitations." The economic self-sufficiency of prisons in the South after the passage of the Thirteenth Amendment was largely a product of increasingly strict criminal

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[53] Esposito and Wood, *Prison Slavery*, 93. [Emphasis Added]
[54] Lea Vandervelde, "The Labor Vision of The Thirteenth Amendment," *University of Pennsylvania Law Review* (December 1, 1989): 445.
[55] Lichtenstein, *Twice the Work of Free Labor*, 18.

legislation, which served to bolster the percentage of inmates, especially ex-slaves, whose labor could be used freely.[56] Between the years of 1871 and 1888, the percentage of black convicts increased by 93% while the percentage of white convicts increased by a mere 7%.[57]

Charles Sumner, a Republican Senator from Massachusetts was among those to most vocally criticize the exception clause in the Thirteenth Amendment. Sumner's critique of the exception clause was fueled by his passionate alignment with Free Labor ideology. Sumner saw Free Labor and slavery as antithetical. Furthermore, for Sumner, as for most Free Labor ideologists, slavery and free labor could be regarded as the *only* forms of labor. Either the laborer maintained full control over the conditions of his labor and reserved the right to quit at will or his labor was physically coerced and involuntary, and his survival was fully dependent on his master. Furthermore, Sumner believed that slavery and free labor could not coexist, as: "free labor" would be eliminated by "deadly contact with slave labor."[58] Ideologically grounded in such Free Labor tenets, Sumner believed that if slavery were to continue in any context, whether on plantations or in prison, free labor would remain threatened. Sumner opposed slavery regardless of location, purpose, or rationale, as demonstrated in an 1863 speech he delivered, addressing the need for a constitutional amendment *completely* prohibiting slavery: "So long as a single slave continues anywhere beneath the flag of the republic, I am unwilling to rest… For well I know… how little slavery it takes to make a Slave

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[56] Ibid., 58.
[57] Ibid., 60.
[58] Jeremiah Chaplin and J.D. Chaplin, *Life of Charles Sumner* (Boston: D. Lothrop & Co., 1874), 277.

State."[59] While Sumner certainly opposed slavery on moral and religious grounds, his most passionate concern was over dangers that slavery posed to the ideals of Free Labor.

Sumner was vehemently opposed to Senator Henderson's version of the Thirteenth Amendment, as it perpetuated the legality of slavery, albeit slavery that was restricted to convicts. Sumner openly criticized the exception clause: "I venture to doubt the expediency of perpetuating in the Constitution language which… seems to imply 'slavery or involuntary servitude' may be provided 'for punishment of a crime.' "[60] Stemming from this opposition to Henderson's exception clause, Senator Sumner drafted and submitted an amendment, which would have abolished slavery *even* as a punishment for crime. Sumner's proposed amendment read: "Everywhere within the limits of the United States, and of each state or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."[61] Sumner's version of the amendment is not only important because it aimed to abolish slavery outright, but also because it was characterized by the Free Labor tenet of equality between laborers, whether employees or employers. Free Labor Republicans unanimously idealized equality between laborers and their employers. As legal scholar Lea Vandervelde explains, during the debates over the Thirteenth Amendment, Republican members of Congress' "rhetoric oscillated between claims that laborers were already innately equal to their employers and claims that, although such was not the case, the laborers deserved to be treated as equals and that the government should act to assure such treatment."[62] Sumner's idealization of the equality of laborers before the law was thus highly

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[59] Ibid., 385.
[60] Esposito and Wood, *Prison Slavery*, 95.
[61] Esposito and Wood, *Prison Slavery*, 93.
[62] Vandervelde, "The Labor Vision of The Thirteenth Amendment," 459–460.

characteristic of Free Labor's belief in egalitarianism in labor. Still, the Thirteenth Amendment, despite the inclusion of the exception clause, must be seen as a significant victory for proponents of Free Labor Ideology. As Vandervelde demonstrates through her analysis of the ideological foundations of the Thirteenth Amendment: "the thirteenth amendment was a milestone in the elimination of racial oppression, but it was also a milestone in the elimination of labor subjugation."[63]

Ultimately, the version of the Thirteenth Amendment that Congress ratified in 1865 was linguistically related to the resolution proposed by Senator Henderson. Importantly, even with the exception clause, the language of the amendment was discursively aligned with Free Labor ideology through its strict dichotomization of slavery/involuntary labor and all other forms of labor. Just as Free Labor ideology categorized labor according to a duality, slave and free, the language of the Thirteenth Amendment protected the nationally guaranteed status of the laborer as independent and autonomous through its prohibition of involuntary labor. According to A.C. Downey, a 19th century Republican state Senator, the passage of the amendment secured "the right to live, to be free and to enjoy the fruit's of one's labor."[64] Despite its discursive alignment with Free Labor ideology, however, the exception clause within the Thirteenth Amendment was antithetical to the ideological demands of Free Labor Republicans. As Vandervelde explains, for Free Labor ideologists, any form of slavery degraded free labor by "direct competition with slave labor in the South, and… by associating all the industrious efforts of workers with those of the degraded slaves."[65] Slavery, whether in

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[63] Ibid., 495.

[64] Michael Vorenberg, "Final Freedom : the Civil War, the Abolition of Slavery, and the Thirteenth Amendment", 2001, 220.

[65] Vandervelde, "The Labor Vision of The Thirteenth Amendment," 466.

prison or on southern plantations endangered the autonomous and independent status of the free laborer.

Although the version of the Thirteenth Amendment that was eventually ratified by Congress was linguistically aligned with the version proposed by a south Democrat, Senator Henderson, it marked an enormous victory for northern Free Labor Republicans' labor vision of equality, liberty, and autonomy as the nationally recognized characteristics of labor. The final vote on the amendment demonstrated the partisan divide it represented. In the Senate, all 30 Republicans voted in favor of the amendment, while five of nine Democrats voted against it. Similarly, in the final vote taken by House of Representatives, all 86 Republicans voted in favor of the amendment, while only 8 out of 73 Democrats voted similarly.[66] In 1865, the ideological divide between Free Labor Republicans and Master-Slave Democrats had been settled legislatively in a landmark victory for Free Labor ideals. As evidenced by its near unanimous opposition to the Thirteenth Amendment, the Democratic Party was far from conceding its perception of the mass of national laborers as subordinate dependents in need of authoritarian protections.

Despite this landmark legislative victory for Free Labor ideology, the exception clause, originally included in the amendment as a means of bolstering the economy of the post-emancipation south, would have serious consequences on the development of prison industries, inmate rights, and penal slavery. To most Republicans, the exception clause may have seemed like a minor concession. In reality, the stakes were high and obscure, as the clause would lead to centuries of heated political and judicial debate over institutionalized slavery in prisons.

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[66] Vorenberg, "Final Freedom," 252.

The Evolution of Judicial Interpretations of The Thirteenth Amendment and The Contours of Involuntary Servitude

With the passage of the Thirteenth Amendment in 1865, courts were first asked to consider how to appropriately interpret the amendment's exception clause. The first U.S. court to articulate and defend the slave status of inmate laborers convened in 1871, in the case of Ruffin v. The Commonwealth. In the case, the Supreme Court of Virginia considered whether a prisoner who committed a crime outside of the confines of the prison could be tried by a jury of individuals selected from the locale of the prison, rather than from the locale of the crime.[67] While working on the Chesapeake and Ohio Railroad outside of the prison in which he was incarcerated, Woody Ruffin, a convicted felon, killed a guard in an attempt to escape. Ruffin was tried and convicted of first-degree murder by a jury selected from the town in which the prison was located, rather than a jury from the county in which the crime was committed. Although generally, citizens are to be tried by a jury of their peers from the jurisdiction in which they committed a crime, the court reasoned that prisoners do not retain such rights upon incarceration. While the case did not primarily concern penal labor, the court, in its opinion, typified Master-Slave ideology in its categorization of prisoners as slaves unworthy of rights. Free Labor ideology opposed slavery in all its forms, whereas Master-Slave ideology sought to legally maintain the institution of slavery to the greatest of its ability. The Ruffin decision was characteristic of the labor vision of Master-Slave ideology in this regard. Judge Christian, articulating the opinion of the court,

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[67] The Sixth Amendment to the United States Constitution states that jury trials must take place in the district in which a crime was committed: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law" (Sixth Amendment to the United States Constitution)

emphasized that the legal rights of a prisoner cannot be equated to those of free citizens. According to Christian, the prisoner was a slave of the State, and as such, had sacrificed all civil rights:

> During his term of service in the penitentiary…is in a state of penal servitude to the State. He has, … not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is…the slave of the State. He is civiliter mortuus… The bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead…[prisoners] are the slaves of the State undergoing punishment for heinous crimes committed against the laws of the land… He is for the time being a slave, in a condition of penal servitude to the State, and subject to such laws and regulations as the State may choose to prescribe.[68]

Although Free Labor Republicans had conceded the exception clause of the Thirteenth Amendment to Master-Slave Democrats in 1865, they certainly would have felt uncomfortable with the *Ruffin* decision. Free Labor found slavery, in whatever context it was found, to be a social evil. As the 19th century Republican Senator William Seward explained in 1856, the institution of slavery was "morally unjust, politically unwise, and socially pernicious… in every community where it exists."[69] Certainly, for Seward and other Free Labor Republicans, the penal community was no exception to this dictum. It is important to recognize that the exception clause did not legally *require* the *Ruffin* court to characterize prisoners as slaves, but only *permitted* it to do so. Thus, had the Ruffin court been ideologically aligned with Free Labor, it would not have used the exception clause as a constitutional justification for penal slavery.

Through a discursive analysis of early court rulings addressing Thirteenth Amendment coverage outside of the penal context, it becomes clear that the initial judiciary interpretation of the amendment's purpose recognized its Free Labor ramifications. According to the dominant judicial rationale of the era immediately

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[68] Judge Christian, *Ruffin V. The Commonwealth*, 62 Va., 11 (Supreme Court of Virginia 1871).
[69] Foner, *Free Soil, Free Labor, Free Men: The Ideology of The Republican Part Before The Civil War*, 40.

following its enactment, the Thirteenth Amendment did not only abolish the specific labor relation of African slaves to their masters, but also all involuntary and controlled labor relationships. In the landmark 1896 Supreme Court case that upheld segregation, Plessy v. Ferguson, Justice Brown's opinion recognized the Free Labor foundations of the Thirteenth Amendment. Brown defined the scope of involuntary servitude expansively:

> Slavery implies involuntary servitude -- a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services.[70]

Brown extended the definition of involuntary servitude beyond chattel slavery, emphasizing that the types of labor relationships abolished by the Thirteenth Amendment were those characterized by control and dependence. The Supreme Court interpreted the reach of the Thirteenth Amendment similarly in 1905, in Clyatt v. United States. The court was asked to consider whether the defendant, Samuel Clyatt, had been responsible for holding two men in a state of peonage. Clyatt had forced the men to work for him, without contract or payment, as a means of paying back a debt. Accordingly, the court first had to address how peonage was to be appropriately defined. The court, following Free Labor ideology and its primary concern for worker autonomy and independence, explained that peonage could be voluntary or involuntary, and was most easily distinguished as forced compulsory labor: "peonage… is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced."[71] Forced labor, whether economically rewarded or contractually required, was thus seen as antithetical to the goals of the

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[70] Justice Brown, *Plessy V. Ferguson*, 163 U.S., 218 (Supreme Court of The United States 1896).
[71] Justice Brewer, *Clyatt V. United States*, 197 U.S., 15 (Supreme Court of The United States 1905).

Thirteenth Amendment. The decisions in *Clyatt* and *Brown* also represented a major rejection of Master-Slave ideology, which considered all labor to be dependent and involuntary.

By 1916, the Supreme Court had ceased to interpret the scope of the Thirteenth Amendment expansively. In the case of Butler v. Perry, the court reverted to a more conservative interpretation of the forms of involuntary servitude that the amendment was originally intended to abolish. In the case, Butler, a free U.S. citizen, challenged a conviction that found him guilty of not abiding by a law in Florida requiring able-bodied men over the age of 21 to work for a six days per year on the State's public roads, when called upon by the state. Although his labor was forced, the court found Butler to be neither a slave nor an involuntary servant, as it employed an interpretation of the Thirteenth Amendment that proved to be significantly adverse to Free Labor ideology. By 1916, then, the original purpose behind the amendment — eliminating labor subjugation, had faded into irrelevance. The *Butler* court found the language of the Thirteenth Amendment to be exclusively pertinent to slavery and involuntary servitude resembling that of Africans in the antebellum United States; i.e. chattel slavery. According to Justice Reynolds, presenting the opinion of the court, "the term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."[72] The *Butler* court thus clearly represented a shift away from the original intention of the Thirteenth Amendment as a protection of labor autonomy and independence. In its opinion, *Butler* had essentially ignored judicial precedent on Thirteenth Amendment interpretation, such as the 1873 Supreme Court *Slaughter House*

[72] Justice McReynolds, *Butler V. Perry*, 240 U.S., 332 (Supreme Court of The United States 1916).

Cases, in which Justice Miller held that the term servitude had to be interpreted expansively, as the Thirteenth Amendment was originally "intended to prohibit all forms of involuntary slavery, of whatever class or name."[73] Continuing its radical opinion, the *Butler* court exemplified the Master-Slave foundations of its discourse by focusing on the State's inherent right to control the labor of its citizens:

> A State has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation. This is a part of the duty which he owes to the public.[74]

For Free Labor ideologists, forced labor, regardless of the context, was by definition involuntary servitude. Furthermore, Free Labor adamantly opposed any notion of State authority over labor. The *Butler* court, by associating labor with the concept of duty, especially without the right to quit, employed judicial language and judgment deeply hostile to the Free Labor intentions of the Thirteenth Amendment. Most offensive to the Free Labor vision was the court's contention that forced labor was not a "deprivation of either liberty or property."[75] Free Labor ideologists would have cringed. For such thinkers, labor was the individual's most essential and dear property, and as such, his natural liberty was contingent upon his liberty in labor.

In 1926, The Supreme Court, continuing this judicial trend of Master-Slave reasoning established 10 years prior in *Butler*, reasoned that control was the primary characteristic that distinguished employees from independent contractors. In Metcalf & Eddy v. Mitchell, Judge Stone, delivering the opinion of the court, clearly articulated that "control or right of control by the employer… characterizes the relation of employer and employee and differentiates the employee or servant from the independent

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[73] Justice Miller, *Slaughter House Cases*, 83 U.S. (Supreme Court of The United States 1873).
[74] Justice McReynolds, *Butler V. Perry*, 240:330.
[75] Ibid., 240:333.

contractor." [76] Accordingly, the independent contractor could be distinguished by his maintenance of control over the conditions of his own labor, whereas the employee, upon entering into a contractual relationship, voluntarily entered a realm characterized by subordination and coercion. The Thirteenth Amendment had essentially intended to ensure that all laborers be considered as independent contractors. The concept of the controlled employee, introduced by *Metcalf & Eddy* did not abide by that logic. Thus, he involuntary labor that the Thirteenth Amendment had abolished in 1865 had become the accepted norm within just 60 years.

With the judicial system increasingly categorizing laborers according to a spectrum of control, it had become clear that by the early 20th century, the political vision of the nation had shifted from the Free Labor tenets that informed the Thirteenth Amendment to a Master-Slave perspective that sought to provide protections to what the Federal Government perceived as a national economy characterized by a mass of subjugated and dependent laborers. This ideological shift within the legislative and judicial branches, as well as the beginning of the Great Depression in 1929, helped spur a series of protective legislative measures meant to empower labor by combating the perceived dependency of the laborer and the inequality between labor and capital. However, many major proponents of the labor movement did not embrace such measures as they were seen as economically invasive. Still clutching to the ideals of Free Labor, labor leaders ranging from representatives of the American Federation of Labor (AFL), to William Leiserson, a representative of the Petroleum Labor Policy Board, critiqued purportedly protective governmental measures seeking to alleviate inequalities between labor and capital. As Tomlins explains, for Lieserson, writing in 1934, "the

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[76] Justice Stone, *Metcalf & Eddy V. Mitchell*, 269 U.S., 521 (Supreme Court of The United States 1926).

concepts of 'labor' and 'employers' stood for established organization structures… The process of organization meant the extension of those structures to encompass additional constituencies." Accordingly, Lieserson argued that "public policy should encourage this extension but should leave the actual process to the parties themselves."[77] Labor leaders, like Lieserson, held to the Free Labor rejection of the existence of class hierarchy in the national economy. Lieserson explained along these lines that "the assumption that employees, owners, employers, and investors could be classified into two more less mechanical forces, Labor and Capital, between which frictions and conflicts developed"[78] was patently incorrect. As demonstrated by Lieserson, the laborers whom legislators sought to protect did not universally embrace the political perspective of labor that had developed prior to the New Deal. Despite opposition, protective federal legislation regulating national labor relations would gain popular support during the early 20th century and help fully entrench the Master-Slave vision of labor in U.S. politics.

Master-Slave Legislation: The New Deal and The Fair Labor Standards Act

Following the Great Depression, Franklin D. Roosevelt enacted a series of social and economic policies collectively termed "The New Deal." This sweeping wave of economically protective legislation spanned from 1933 to 1938. In 1938, Congress passed the Fair Labor Standards Act (FLSA). The enactment of the FLSA and other New Deal legislation marked the first period in the nation's political history that required the government to determine the definition, contours, and parameters of the working class. As legal historian Marc Linder explains: "No federal protective labor legislation applicable to workers in general existed in the United States before the advent of the

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[77] Christopher L Tomlins, *The State and the Unions : Labor Relations, Law, and the Organized Labor Movements in America, 1880-1960* (Cambridge: Cambridge U.P., 1985), 144.
[78] Ibid., xi.

New Deal."[79] The FLSA was primarily meant to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency and general well-being of workers" and to thereby alleviate labor conditions that "burdened commerce and the free flow of goods in commerce"[80] As a means of promoting a minimum standard of living for the worker and encouraging the free flow of goods in commerce, The FLSA included heavy restrictions on child labor, regulated overtime pay and, most notably, established a national minimum wage for employees. The FLSA defined the terms of employment in very broad terms. Within the context of the statute, " 'employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employee," the term " 'employee' means any individual employed by an employer", while the term 'employ' means "to suffer or permit to work."[81] Importantly, the FLSA should be seen as legislation founded upon a distinct definition of the laborer according to his subordinated status relative to his employer. The act was indicative of the Federal Government's contention that without legislative intervention, the working class would continue along a path of degradation and subjugation vis-à-vis its employers. Furthermore, in its definition of the term 'employee,' the FLSA located agency in the employer, since it was the characteristics of the authentic employer that would be used as a means of differentiating between employers and independent contractors. The FLSA's definition of the employee is thus highly invocative of the Master-Slave presumption of labor inequality, dependence, and subjugation. Its purpose was even more reminiscent of that ideology. While the FLSA

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[79] Marc Linder, *The Employment Relationship in Anglo-American Law* (New York: Greenwood Press, 1989), 185.
[80] Tomlins, *The State and the Unions*, 144.
[81] *Fair Labor Standards Act of 1938*, 1938, sec. 203, http://uscode.house.gov/download/pls/29C8.txt.

was purportedly enacted as a means of protecting labor, it did so under the assumption that labor was inherently in need of protection. Proponents of Free Labor ideology would have never accepted such an assumption.

The FLSA and most New Deal legislation must be seen as ideologically oppositional to the Thirteenth Amendment. Whereas the Thirteenth Amendment aimed to abolish slavery and involuntary servitude for laborers, the FLSA and other New Deal legislation acted on the presumption of growing power inequality between laborer and employer due to the increasingly involuntary nature of labor. Accordingly, it sought to alleviate such disparities as a means of improving the national economy. Similarly, while the Thirteenth Amendment was meant to ensure that labor in the United States be characterized by voluntariness, autonomy and independence, the FLSA not only accepted the subjugation of labor, but sough to afford rights to those laborers whose relationship to capital could be characterized by the Master-Slave vision of involuntariness, subjugation and dependence. To gain labor rights coverage under the FLSA, laborers had to demonstrate their subordination, dependence, and socioeconomic inferiority vis-à-vis their employers. For this type of legislation to work, labor had to buy into this vision, as Linder explains, as a product of such protective legislation: "Workers… [came] to believe in an image of themselves as passive beneficiaries of forces that operate[d] outside of the capital-labor or employer-employee relationship."[82] As has been elucidated, the major presumption of the FLSA was that laborers did not have equal bargaining power with their employers. According to this rationale, the Federal Government had to aid subordinated laborers by bolstering their bargaining power with federal legislation.

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[82] Linder, *The Employment Relationship in Anglo-American Law*, 5.

As we have seen, the definitional provisions of the FLSA were extremely vague, which ultimately allocated much authority to the judiciary branch, the political body responsible for determining the scope of FLSA coverage. As Linder explains, "congressional silence suggests that Congress gave little or no thought to the contours and dimensions of the working class it meant to protect or to the class or classes that it deemed capable of self-protection."[83] Without congressional direction, the judicial system became responsible for determining the appropriate manner in which to define the laborer. The judicial system, for the first time in American history, had to determine a "valid juridical definition of the working class."[84] In cases immediately following the passage of the FLSA, courts, including the Supreme Court, coalesced upon the "control test," a determination of the extent to which the laborer was controlled in the workplace, as the common indicator of the normal employment relationship. The control test was inherently imbued with the Master-Slave vision of the dependence, exploitation, and subjugation of the working class. Ass Linder explains: "The control test identified classical proletarians, exposed to the full brunt of capitalist exploitation."[85] According to the logic behind the control test, free market laborers could be characterized by their right to bargain and voluntarily enter employment relationships in the *marketplace*. The laborer who deserved FLSA coverage, however, could be distinguished by his inequality relative to his employer in measures of control, dependence, and subservience in the *workplac*e. Thus, post-FLSA courts conceded the voluntary test to the Thirteenth Amendment, implicitly considering whether a laborer's work could be considered voluntary or not, only to subsequently apply to control test, a test considering the

[83] Ibid., 186.
[84] Ibid., 185.
[85] Ibid., 236.

slavishness of the voluntary laborer. It is in this manner that the control test served to undermine the strict involuntary/voluntary duality upon which the voluntary test rested.

Alternatively, the laborer who maintained autonomy and independence in the workplace by passing the voluntary test and failing the control test would not be covered by the legislation, since that type of laborer did not need governmental protections meant to alleviate workplace inequality. This is why independent contractors were explicitly *not* covered by the FLSA. As the statute reads, the laborers covered "shall not include the related activities performed for… enterprise by an independent contractor."[86] The independent contractor, like the employee, was defined by the control test. While the employee is defined by a lack of control, the independent contractor is defined by his maintenance of control in the labor relationship. The employee-independent contractor dichotomy established by the judicial control test thus provided more evidence of the ideologically antithetical relationship between the Thirteenth Amendment and the FLSA. The FLSA had now accepted and subsequently sought to regulate that which the Thirteenth Amendment had formally abolished: the dependence and subordination of labor.

Although the Thirteenth Amendment abolished involuntary servitude and, by extension, coerced, dependent, and highly controlled labor, the ideology of New Deal legislation promoted a new vision of the laborer, as a dependent slave of a dominant master. The Thirteenth Amendment abolished all involuntary forms of labor outside of the penitentiary and thereby supported a vision of the laborer as autonomous and independent, while the FLSA and other New Deal legislation promoted the a vision of

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[86] *Fair Labor Standards Act of 1938*, sec. 203.

the laborer as dependent and subservient and thereby attempted to protect the laborer through federal intervention in the market.

The dominant Federal perception of the increasing power imbalance between employers and laborers and the associatively benevolent vision of the FLSA was explicitly expressed in 1944, in the Supreme Court case, Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123. In the case, the court interpreted the legislative logic behind the enactment of the FLSA as "remedial and humanitarian in purpose." The discourse of the court was strikingly grounded in the Master-Slave tenet that assumed the inherent involuntariness of labor. The court explained that the post-FLSA employee necessarily sacrifice his freedom upon enter a labor relationship:

> We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect.[87]

The laborer, in this view, sacrificed ultimate freedom in the employment relationship — an opinion radically removed from the labor vision of the Thirteenth Amendment, which mandated that labor maintain unmitigated freedom. Along these same lines, the court emphasized the necessity of the control test in determining the employment relationship, since according to the judicial interpretation of the rationale behind the FLSA, control over the labor process had been completely divorced from the employee:

> We cannot assume that Congress here was referring to work or employment other than as those words are commonly used --as meaning physical or mental exertion…controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.[88]

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[87] Justice Murphy, *Tennessee Coal, Iron & Railroad Co. V. Muscoda Local No. 123*, 597.
[88] Justice Murphy, *Tennessee Coal, Iron & Railroad Co. V. Muscoda Local No. 123*, 321 U.S., 598 (Supreme Court of The United States 1944).

Post-FLSA courts, like Tennessee Coal, Iron & Railroad Co., not only permitted but embraced the idea that labor could legally be controlled and required.

Similar judicial discourse grounded in an assumption of the inequality between laborer and employer and the inherent dependency of labor characterized the opinion in the 1945 Supreme Court case, Brooklyn Savings Bank v. O'Neil. The case is instructive insofar as it required the Supreme Court to articulate its understanding of the historical rationale for the passage of the FLSA. Delivering the court's opinion, Justice Reed explained that according to the court's understanding of the legislation, the passage of the FLSA was primarily fueled by a perception of the waning significance of Free Labor ideals and the associated growth of an employer-employee power imbalance that demoted the laborer to inferior bargaining position:

> "The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce."[89]

According to the Supreme Court, then, by the late 1930's the employment relationship in the United States was increasingly characterized by Master-Slave, rather than Free Labor criteria. While the Thirteenth Amendment had originally been enacted as a means of ensuring the national laborer be characterized by the Free Labor ideals of autonomy and independence, the FLSA represented an ideological shift in the national understanding of the appropriate and permissible characteristics of the laborer. This shift was largely influenced by the growth of the American corporation and helped reinforce the dominant political perception of the increasing power imbalance between employer and employee. The employee of the 1940's could be recognized by his economic

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[89] Justice Reed, *Brooklyn Savings Banks V. O'Neil*, 324 U.S., 706 (Supreme Court of The United States 1945).

dependence on his employer, the control maintained over his labor by his employer, and his unequal bargaining power in private employment contracts.

New Deal Era Penal Labor Laws and Their Relation to the FLSA

Although prisoners are explicitly exempt from *guaranteed* anti-slavery protections under the Thirteenth Amendment, with the ideological shift represented by the New Deal, it would seem that their status as controlled, subservient, and dependent laborers demanded FLSA protections. However, prior to the enactment of the FLSA, Congress, recognizing the potential for future recognition of prisoners as employees under New Deal legislation, took three legislative measures to help quash that seemingly radical possibility. The 1929 Hawes-Cooper Act and its 1935 enforcement act, the Ashurst-Sumners Act effectively divorced prisoners from future FLSA coverage. Furthermore, the Walsh-Healy Act, passed in 1936 banned the use of penal labor in federal procurement contracts worth more than $10,000.[90] In their original forms, these acts criminalized the interstate transportation of prison-made goods into states that prohibited such transportation and greatly limited the potential for large-scale labor contracts with prisons.

Signed in 1929, the Hawes-Cooper Act required that prison-made goods be subject to the laws of the state into which they were transported. The act divorced prison-made goods from any potential exemptions to state law, as they were now to be under the legal confines of the state into which they were transported. The act read:

> All goods… manufactured wholly or in part, by convicts… [and] transported into any State… and remaining therein… shall upon arrival and delivery… be subject to the operation and effect of the laws of such State… as though such goods... had been

[90] *Walsh-Healey Public Contracts Act*, *41 U.S.C. 38*, 1936.

> manufactured… in such State… and shall not be exempt therefrom by reason of being introduced in the original package or otherwise."[91]

Pressure for the Hawes-Cooper act came from both laborers and employers. The major proponents were The American Federation of Labor and private manufacturers. The American Federation of Labor was primarily concerned with the unfair competition that could arise between penal and free labor, as Representative Harry Rowbottom explained in 1928 during a Congressional debate over the passage of the act: "Under existing conditions the products of convicts are permitted to flow through channels that bring about a ruinous competition with the labor of free American citizens."[92] Private manufacturers were similarly concerned about the potentially ruinous effects of competition between manufacturers employing prisoners and those employing free laborers. According to Rowbottom, labor and the private sector both sought the "removal of [penal labor's] products from the field of ruinous competition with both free labor and invested capital."[93] Evidently, the rationale for the passage of the Hawes-Cooper Act hinged upon the assumption that inmates were paid less for their labor than free laborers. While this assumption proved to be true when the act passed, this rationale would help perpetuate low wages for inmates through the subsequent passage of the Ashurst-Sumners Act. These legislative measures also established historical precedents exempting inmates from FLSA coverage.

In 1935, the Ashurst-Sumners Act was passed as a means of enforcing the Hawes-Cooper Act. As legal scholar Frank Flynn explains, the Ashurst-Sumners Act

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[91] *Hawes-Cooper Act*, *U.S.C. 60*, 1929.
[92] Harry Rowbottom, *To Divest Prison-Made Products of Their Interstate Character in Certain Cases* (Washington, D.C.: U.S. Government Printing Office, 1928).
[93] Ibid.

"prohibited the transportation of prison-made goods into states that barred them."[94] In 1940, just two years after the enactment of the FLSA, the Ashurst-Sumners Act was amended to divorce prison-made goods from any potential for interstate transportation. As legal scholar Stephen P. Garvey explains, the act, as amended, "made the interstate transportation and sale of prison-made goods itself a federal crime no matter what state law provided."[95] Currently, the Ashurst-Sumners Act completely prohibits the interstate transportation of prison-made goods, regardless of state law:

> Whoever knowingly transports in interstate commerce or from any foreign country into the United States any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners, except convicts or prisoners on parole, supervised release, or probation, or in any penal or reformatory institution, shall be fined under this title or imprisoned not more than two years, or both.[96]

As of its amending, an act that had once given individual states agency over the transportation of prison-made goods within their borders, had become a national mandate prohibiting interstate transportation of prison-made goods, regardless of state prerogative.

The purpose behind the Ashurst-Sumners Act was similar to that of the FLSA: to eliminate labor conditions that produced unfair competition and disrupted the free flow of interstate commerce. Clearly, if prisoners were to be covered under the FLSA, their labor would pose little threat to free labor or the free flow of interstate commerce, since they would be paid prevailing wages and the cost of prison-made goods would incorporate the cost of such prevailing wages. However, if prisoners were to continue to be paid substandard wages, and if they were not to be covered by the FLSA, alternative legislation would be needed to ensure that prison-made goods did not outcompete goods

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[94] Frank Flynn, "The Federal Government and the Prison-Labor Problem in the States. I. The Aftermath of Federal Restrictions," *Social Service Review* 1, no. 24 (March 1, 1950): 20.
[95] Stephen Garvey, "Freeing Prisoners' Labor," *Stanford Law Review* 50, no. 2 (1998): 367.
[96] *Ashurst Sumners Act*, *18 U.S.C. §§1761-62*, 1935.

made on the free market. The Ashurst-Sumners Act served exactly this purpose. As Garvey argues, the Ashurst-Sumners Act is best understood as an agreement "between groups anxious to eliminate competition from prison industries, prison wardens anxious to keep inmates occupied, and prison reformers anxious to preserve prison labor as a means of moral regeneration."[97] While the Ashurst-Sumners Act succeeded in eliminating competition from prison industries, it also enabled prisons to keep inmates working, although at a decreased rate,[98] pleasing free laborers, and to a lesser extent, wardens and prison administrators. Had the Ashurst-Sumners Act not been passed prior to the FLSA, prisoners would have had a convincing case for coverage, since their goods would have been involved in interstate transportation, and on account of the control maintained over their labor by the prison.

Interestingly, organized labor opposed the exception clause of the Thirteenth Amendment, which permitted penal slavery in 1865, but by 1935 was a major lobbying group for legislation that essentially ensured penal slavery, as it removed penal labor from the free market. Seemingly, then, while organized labor opposed the existence of slavery, it reasoned that if penal slavery were to exist, then it preferred to legislatively ensure that penal slaves not compete with free market laborers.

Two years later, the Supreme Court was called upon to rule on the constitutionality of the Ashurst-Sumners Act. In its decision, the court exemplified the popular assumption that penal labor was necessarily paid less than free labor, rendering it difficult for free labor to "compete successfully with unpaid or underpaid convict

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[97] Garvey, "Freeing Prisoners' Labor," 369.
[98] "In the immediate aftermath of the… Ashurst-Sumners Acts, one report found only 23% of the nation's state prison population engaged in "productive jobs." Ibid.

labor."[99] The Ashurst-Sumners Act was thus legislatively justified on the ground that penal labor could be obtained more cheaply than free labor. Tactically enacted in 1936, just two years prior to the FLSA, it also ensured that inmate laborers, who would have been eligible for labor rights coverage under the FLSA according to the judicial control test, would be outside of its reach, since their labor was removed from the realm of interstate commerce. As the Federal Government only maintains constitutional control over interstate rather than intrastate commerce, federal legislation such as the FLSA could only cover commerce that crosses state lines. Since goods made by prisoners had been legally barred from interstate transportation, penal labor was thus relegated to a position outside the reach of the FLSA.

In light of legislation pertaining to penal labor, ranging from the Thirteenth Amendment's exception clause to the Ashurst-Sumners Act, the judicial system would soon be called upon to rule in cases concerning FLSA coverage for inmate laborers. I will discuss these cases, especially the manner in which they helped perpetuate the Master-Slave vision of labor, in great detail in the next chapter.

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[99] Alexander Wellen, "Prisoners and the FLSA: Can The American Taxpayer Afford Extending Prison Inmates The Federal Minimum Wage?," *Temple Law Review* 67, no. 295 (1994): 306.

3. THE JUDICIAL TEST OF THE EMPLOYMENT RELATIONSHIP IN PRISON: THE PRIMACY OF THE VOLUNTARY TEST AND THE EXCEPTION CLAUSE IN PERPETUATING INSTITUTIONALIZED PENAL SLAVERY

"Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back."[100] *– John Maynard Keynes*

Since the enactment of the FLSA, courts ruling on the act's applicability to inmate laborers have remained very consistent in utilizing Master-Slave discourse and rationale as a means of maintaining the system of penal slavery. This discourse was grounded in the rationale of the FLSA, which, as has been discussed, was heavily influenced by the labor vision of Master-Slave ideology. The first case to consider FLSA rights for prisoners was heard in 1948 by a Michigan district court in Huntley v. Gunn Furniture Company. The court rejected inmate laborers claims for FLSA coverage. Since 1948, little has changed. Courts ranging from district courts to Federal appeals courts have nearly unanimously come to the conclusion that prisoners are not legislatively covered by the FLSA and were not intended to be according to legislative purpose. Courts considering the status of penal labor were asked to consider inmate employment status under two distinct sets of circumstances: 1) Whether an inmate could be considered an employee of a private enterprise that had contracted with a prison for inmate labor; and 2) Whether an inmate could be considered an employee of the prison in which he was incarcerated when performing as a laborer under the mandate of the penal institution. In both cases, the initial test of employment relationship was the voluntary test. The voluntary test involved a judicial analysis of the freedom preserved by the prisoner in his work and thus the extent to which the prisoner maintained ownership

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[100] John Maynard Keynes, *The General Theory of Employment, Interest, and Money* (New York: Harcourt, Brace & World, 1964), 351.

over his labor. For these courts, if the prisoner was *required* to work as a penological condition of the his incarceration, it was a sign that the prisoner had been divorced from ownership over his labor – a characteristic that these courts perceived as antithetical to the parameters of employee status for FLSA purposes. According to courts employing the voluntary test, labor was either voluntary or involuntary. The test sought to locate labor on a duality, not a spectrum. While the voluntary test had been encouraged by the Thirteenth Amendment as *the* test of legally permissible labor, the manner in which courts utilized the voluntary test in cases concerning FLSA coverage for inmate laborers was hostile to the original intention of the voluntary test. Whereas the rationale behind the Thirteenth Amendment had never *meant* for the voluntary test to be used as a means of *preserving* slavery, that is exactly the purpose for which these courts employed it. This novel means of applying the voluntary test was thus grounded in the Master-Slave justification of involuntary labor. Whereas proponents of Free Labor ideology held to the tenet that every laborer inherently maintained ultimate liberty over his labor, Master-Slave ideology distinguished chattel slaves from "wage slaves" through the latter's right to voluntarily contract with a master. Unlike the employee, the inmate laborer, as the final constitutionally protected chattel slave, was not free to quit his master or withhold his labor.

Alternatively, courts that considered FLSA coverage for free market laborers during the same era explicitly employed the control test, a measure of the extent to which an employer maintains control over the laborer in the workplace. Courts of this era, like contemporary courts, primarily used the control test as a means of distinguishing between the employee, whose labor was characterized by control and supervision, and the independent contractor, whose labor was free of external authority, even in a

contractual relationship. The control test is reminiscent of Master-Slave ideology, since it is grounded in an assumption of labor as inherently dependent, controlled, subservient, and therefore in need of protection. Furthermore, whereas Free Labor ideology posited that all laborers can and ought to be characterized as independent contractors, the control test, a product of the federal creation of the term "employee" under the FLSA undermined that ideal by categorizing laborers according to their presumed need for State protection.

Although courts considering FLSA status for free market laborers did not explicitly employ the voluntary test, they implicitly recognized its role in determining coverage under the FLSA as a judicial concession to the Thirteenth Amendment. Free market laborers had to pass the voluntary test in order for courts to employ the control test, yet most courts needed not explicitly apply the voluntary test, since all labor outside of prison *had to* be voluntary according to the Thirteenth Amendment. Once laborers passed the implicit voluntary test (a means of ensuring that the laborer was not in fact, a slave), courts then proceeded with the control test, a means of determining the laborer's slavishness. Since prisoners were legally permitted to fail the voluntary test without recourse, courts considering the FLSA status generally have found no reason to employ the control test.

During the New Deal Era, just as the Federal Government and the judicial system were affording rights to the nation's most dependent and subordinated laborers according to the reasoning of the control test, the voluntary test used by the courts to bar prisoners from coverage was largely founded in the Master-Slave preference to preserve legally enforced slavery. Accordingly, courts, grounded in Master-Slave ideology have continued to employ the voluntary test as a means of maintaining the slave

status of prisoners. However, that prisoners were exempted from the Thirteenth Amendment's prohibition on slavery, did not *necessarily* ban their coverage under FLSA legislation, but merely implied that slavery *could be* continued in the penal context. The voluntary test thus allowed courts ideologically inclined to the Master-Slave vision of labor dependence to define prisoners as slaves, divorced from state protections for judicially recognized employees. The prison, the final remaining vestige of institutionalized slavery in the nation, was thus effectively validated by the judicial primacy allocated to the inmate's inability to pass voluntary test.

Although the Supreme Court provided no explicit guidance to lower courts concerning FLSA employment status of inmate laborers, it did engage in judicial consideration of the proper definition of the employer-employee relationship and the extent to which federal protective legislation ought to be extended to laborers. In 1947, one year prior to *Huntley*, The Supreme Court ruled in the case of National Labor Relations Board v. Hearst Publications, Inc. Although the case considered employee status under the National Labor Relations Act (NLRA), according to judicial standards, "coverage of the employer-employee relationship under the Labor and Social Security acts are persuasive in the consideration of a similar coverage under the Fair Labor Standards Act."[101] In *Hearst*, the court considered whether newsboys selling papers for Hearst Publications, Inc. ought to be legally identified as employees of the publication company for the purposes of the NLRA and granted the collective bargaining power it guaranteed to employees. The *Hearst* decision was based upon the control test. In its decision to grant NLRA coverage to the newsboys, the court noted that the newsboys

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[101] Justice Reed, *Rutherford Food Corp. V. McComb*, 331 U.S., 723 (Supreme Court of The United States 1947).

were under a significant level of control in their labor relationship with Hearst Publications:

> The designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers, who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents. Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit.[102]

This judicial measure of control, observation, and discipline maintained by the employer in an authentic employment relationship was certainly reminiscent of the Master-Slave critique of wage slavery as a state deeply imbued with dependency, coercion and control. For the *Hearst* court, employment was necessarily characterized by the unequal relationship between employer and employee in terms of the employer's right to direct control over the employee as well as the subordinate economic status of the employee. Although the employee had the right to freely contract with the employer in the marketplace, the discourse of the *Hearst* court made clear that the liberty of the employee necessarily diminished in the workplace upon the establishment of an employment contract. According to the judicial control test, inmate laborers may have qualified as employees due to the control maintained over their labor by the prisons in which they were incarcerated. However, the first court to consider FLSA status for inmate found no need to employ the control test as a means of assessing the validity of the inmates' claims of employee status since inmates failed to past the voluntary test.

In 1948, a Western Michigan district court became the first to consider FLSA coverage for inmate laborers in the aforementioned Huntley v. Gunn Furniture Co. In *Huntley*, inmates sought reimbursement for the monetary difference between wages they

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[102] Justice Rutlidge, *National Labor Relations Board V. Hearst Publications, Inc.*, 322 U.S., 132 (Supreme Court of The United States 1944).

had earned and the prevailing minimum wage from a furniture company that had contracted with the Michigan state prison industries for inmate labor. The Gunn Furniture Company had contracted with Michigan prison industries to have inmates produce shell casings for the United States military. The plaintiff inmates were required to work 12 hours shifts and were paid little more than 50 cents per shift. Inmates sought FLSA coverage as employees of the Gunn Furniture Company. The court held that in order for the inmates to establish rights under the FLSA, they first had to prove that the furniture company was their employer, according to the legislative definition. In its consideration of whether the furniture company could be considered an employer, Judge Starr, articulating the opinion of the court, noted that the FLSA "contemplates (a) a situation in which the employer, expressly or impliedly, agrees to pay a certain sum to the employee, and (b) has the control and determination of the hours of the work by the employee."[103] The importance of these considerations paled in comparison to the voluntary test that the court utilized. The court denied FLSA coverage for Huntley and other defendant inmates on the grounds that their labor could not be engaged voluntarily, since "the labor of the plaintiffs as inmates of the State prison belonged to the State of Michigan [and as such] they could be lawfully employed only by the state."[104] Accordingly, since the court found that Huntley relinquished ownership over his labor upon incarceration, he and fellow inmates could not be considered employees of the furniture company. The voluntary test that the *Huntley* court employed, thus implicitly defined the employee according to his right to voluntarily enter and exit the employment relationship. Since penal slavery had served as the one exception to the Thirteenth

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[103] Judge Starr, *Huntley V. Gunn Furniture Co*, 79 F. Supp., 18 (United States District Court for The Western District of Michigan, Southern Division 1948).
[104] Ibid.

Amendment, the *Huntley* court and future courts could apply the voluntary test as a means of demonstrating the slave status of inmate laborers while abiding by the language of the Thirteenth Amendment. The voluntary test was thus a means to distinguish between slaves and protected laborers prior to the utilization of the control test. Furthermore, since the control test was a judicial means of distinguishing between independent contractors and employees, the fact that inmates could not pass the voluntary test rendered superfluous the subsequent application of the control test. Interestingly enough, in their denial of employer status to the furniture company, the *Huntley* court was the first court to ever argue that the inmates *were* in fact employees – employees of the prison itself: "The complaint affirmatively shows that the plaintiffs were employees of the Michigan prison industries and not of the defendant."[105] However, it seems implicit within the court's ruling that it found the notion of prison industries as a liable employer under the FLSA to be preposterous.

The Master-Slave ideology of courts during this era continued in a 1961 case concerning the legality of involuntary servitude in prisons. In Draper v. Rhay, a prisoner claimed that the prison in which he was incarcerated had violated the Thirteenth Amendment by forcing him to work. In its ruling, the *Draper* court acknowledged that the prisoner was in a state of involuntary servitude during his sentence, but denied the illegality of such a state, citing the Thirteenth Amendment: "where a person is duly tried, convicted, sentenced and imprisoned for crime in accordance with law, no issue of peonage or involuntary servitude arises."[106] The court thus struck down the plaintiffs' claim of violation under the Thirteenth Amendment, on the grounds that prisoners were

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[105] Judge Starr, *Huntley V. Gunn Furniture Co.* 18
[106] Judge Barnes, *Draper V. Rhay*, 315 F.2d, 13 (United States Court of Appeals for The Ninth Circuit 1963).

not protected by employment legislation, since their labor was involuntary and could be legally recognized as such. The court reasoned, through the voluntary test, that the inmate laborer was certainly in a state of involuntary servitude, yet was not immune from such servitude on account of the Thirteenth Amendment's exception for penal servitude. Once again, the control test was irrelevant if inmates could not pass the voluntary test. Despite the Thirteenth Amendment's Free Labor foundations, courts such as *Huntley* and *Draper* were justified in their use of the voluntary test as a means of distinguishing between the slave status of inmates and employee status, all while abiding by the Thirteenth Amendment on account of the exception clause.

In the same year, the Supreme Court, in a case involving free market laborers, followed the historical precedent set forth by *National Labor Relations Board* by employing the control test of employment relationship in Goldberg v. Whitaker House Cooperative. The court considered whether a cooperative involved in the manufacture and sale of embroidered goods could be recognized as an employer under the FLSA, and conversely, whether members of the cooperative could be recognized as employees. In extending FLSA coverage to laborers working for the cooperative, the court utilized the control test to determine the slavishness of the cooperative's laborers:

> The members are… regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates... The management can expel them for substandard work or for failure to obey the regulations.[107]

The court thus relied on the control maintained by the cooperative over its laboring members, emphasizing terms such as "regiment", "dictate", "expel", and "obey".

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[107] Justice Douglas, *Goldberg V. Whitaker House Cooperative, Inc.* 32 (Supreme Court of The United States 1961).

Members of the Whitaker House Cooperative, like all employees as defined according to the control test, attained labor rights from the State as a product of their perceived subordination, inequality, and need for aid from a protective authority.

In 1971, in a case involving FLSA coverage for inmates, another Michigan court employed the voluntary test as a means of characterizing prisoners as legal slaves. In *Sims v. Parke Davis & Co.*, inmate laborers sued two drug companies and the Michigan state prison industries for minimum wage compensation for work they had done for those entities during their incarceration. Plaintiff inmates were required to work at research buildings, which had been constructed by the drug companies within the confines of the Michigan State prison. Inmates often worked upwards of 12 hours per day for as little as 35 cents an hour. In the court's denial of the plaintiff inmates' claim for FLSA coverage, it emphasized that prisoners, who do not own their own labor, cannot be considered employees: "labor of inmates lawfully incarcerated in Michigan penitentiaries and working on the order of prison officials belongs to the State, rather than to the inmates."[108] Once again, aligning with its judicial predecessors, the *Sims* court used the voluntary test to deny FLSA coverage to inmates. While the *Sims* court did engage in an control test of employer prerogative, considering the extent to which the defendant drug companies could "hire, fire and control…inmates,"[109] the court summed up its denial in a more matter-of-fact manner: "The economic reality is that plaintiffs are convicted criminals incarcerated in a state penitentiary."[110] The *Sims* court's attribution of the inmate's labor to State control was similar to a 1971 case, Hudgins v. Hart, another

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[108] Judge Freeman, *Sims V. Parke Davis & Co.*, 774 F. Supp., 43 (United States District Court for The Eastern District of Michigan, Southern Division 1971).
[109] Judge Freeman, *Sims V. Parke Davis & Co.*, 17.
[110] Ibid., 30.

case involving prison labor in Louisiana in the same year. The *Hudgins* court considered FLSA coverage for an inmate working as an assistant to a blood plasma company. The plaintiff inmate worked as a lab assistant for a company that extracted blood plasma from Louisiana state inmates. The *Hudgins* court argued that "the plaintiff was an inmate at the penitentiary, and as such his labor belonged to the penitentiary."[111] Without ownership of his labor, the inmate could not be seen to have the right to voluntarily enter an employment relationship. These courts thus reasoned that prisoners were not employees engaged in market labor but were rather penologically relocated by the State to the status of involuntary laborers. As the *Sims* court brusquely argued, "lawfully convicted criminals may be required to work by prison authorities for there is not federally protected right of a state prisoner not to work while imprisoned after conviction."[112] Without federal protection for inmate laborers, then, the exception clause in the Thirteenth Amendment would continue to serve as a justification for penal slavery.

The primacy of the voluntary test in judicial decisions on prison labor extended into the late 1970's and early 1980's in Manville v. Board of Governors of Wayne State University in 1978, and in Alexander v. Sara in 1983. In Manville, an inmate, working as a clerk for Wayne State University's educational program in a Michigan Prison, sought minimum wage coverage on account of his alleged status as an employee of the university. The Michigan State court of appeals dismissed the claim, asserting that "it is undisputed that an inmate is not entitled to the minimum wage if employed by the prison… inmates have no right to the fruit of their labor when working for a prison,

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[111] Judge West, *Hudgins V. Hart*, 323 F. Supp., 20 (United States District Court For The Eastern District Of Louisiana, Baton Rouge Division 1971).
[112] Judge Freeman, *Sims V. Parke Davis & Co.*, 774:47.

because the labor of inmates belongs to the state."[113] According to this rationale, the laborer who had no right to the fruit of his labor was necessarily divorced from any right to compensation for such labor. Ownership over labor was a precursor to rights protections from the State. In *Alexander,* The Federal Court of Appeals for the Fifth Circuit denied minimum wage coverage to prisoners working as assistants for a blood plasma corporation in a Louisiana State penitentiary, by employing the voluntary test: "there was no employer-employee relationship, because the inmates' labor belonged to the penitentiary."[114] Still, the inmates' failure to pass the voluntary test did not require these courts to maintain their status as involuntary laborers.

In 1983, the reasoning of a Federal Appeals Court would change the nature of judicial inquiry into prison labor coverage under the FLSA, and provide the basis for a complete reversal in the order in which such courts applied the voluntary test and control test in cases involving penal labor. Whereas courts prior to *Bonnette* applied the voluntary test to cases involving inmates as a means of demonstrating their slave status and thus the inapplicability of the control test, courts considering the same issue after *Bonnette* applied the control test *prior* to the voluntary test. Still, for these *Bonnette*-era courts, regardless of the outcome of the control test, the failure of inmates to pass the voluntary test always evidenced the non-applicability of the FLSA. Thus, while *Bonnette* did not concern inmate labor rights, it did have an impact on future cases concerning the issue, as legal scholar Matthew Lang notes: "Although the factual situation in *Bonnette* did not involve prison workers, within a year many circuit courts began applying the *Bonnette*

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[113] Judge Marutiak, *Manville V. Board of Governors of Wayne State University*, 272 N.W.2d, 6 (Court of Appeals of Michigan 1978).
[114] Per Curiam, *Alexander V. Sara* 3 (United States Court of Appeals for The Fifth Circuit 1983).

Factors to prison labor cases."[115] To be clear, the *Bonnette* factors were four judicial measures of control and are thus nearly synonymous with the control test discussed above.

The case, Bonnette v. California Health and Welfare Agency, concerned the applicability of FLSA coverage to in-home care providers. The case must be understood in light of a 1974 amendment to the FLSA that added state and local government employees to those covered under its provisions.[116] In-home care providers were paid by the state to aid public-assistance recipients. Wages were paid jointly by the Federal Government and the county in which the in-home care providers worked. In the case, Eleanor Bonnette and fellow in-home care providers brought a class action suit against the state of California, alleging that they were entitled to minimum wage provisions and had been significantly underpaid. Although the court made no reference to penal labor, the case would quickly become the precedent upon which courts would proceed in cases involving FLSA coverage for inmates. The court explained that "the determination of whether an employer-employee relationship exists does not depend on isolated factors but rather upon the circumstances of the whole activity," yet its analysis was largely founded upon a consideration of four isolated factors. These factors, which were essentially a more precise definition of the control test, as had been formulated by the district court, and subsequently affirmed by the appeals court, were:

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[115] Matthew Lang, "The Search for a Workable Standard for When Fair Labor Standards Act Coverage Should Be Extended to Prisoner Workers," *University of Pennsylvania Journal of Labor & Employment Law* 5, no. 191 (Fall 2002): 57.
[116] U.S. Department of Labor, *Wage and Hour Division History* (United States Department of Labor, n.d.), http://www.dol.gov/whd/about/history/whdhist.htm.

> Whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employments, (3) determined the rate and method of payment, and (4) maintained employment records.[117]

The court continued that while essential, the four-factored approach was not to be understood as conclusive, but rather had to be based "upon the circumstances of the whole activity."[118] Importantly, the *Bonnette* court emphasized that these need factors need not be considered authoritative or generally applicable, noting rather that such factors were "relevant to this particular situation."[119] Despite such a plea, the *Bonnette* factor control test would become the *initial* test of employment relationship in cases concerning the FLSA for prisoners after 1983.

The *Bonnette* factors, unlike Free Labor ideology, were predicated on the primacy of employer control and power in the employer-employee relationship. Each factor fixed the locus of power in the hands of the employer. The autonomy and independence assumed to be inherent to the laborer under Free Labor ideology ere replaced by a consideration of the extent to which the employer controlled the laborer. Essentially, the *Bonnette* court was interested in the extent to which the authentic employer maintained control over the authentic employee.

The influence of the *Bonnette* ruling and its articulation of the control test had immediate consequences for future cases concerning minimum wage coverage for prison labor. In 1984, Carter v. Dutchess Community College became the first case concerning such coverage to employ the *Bonnette* factors. In *Carter*, a Federal Appeals Court was called upon to decide whether an inmate, working as a teaching assistant in a community college near the prison in which he was incarcerated, ought to gain minimum wage

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[117] Judge Hug, *Bonnette V. California Health and Welfare Agency*, 704 F.2d, 11 (United States Court of Appeals for The Ninth Circuit 1983).
[118] Ibid., 704:10.
[119] Ibid., 704:11.

coverage under the FLSA. The court embraced the *Bonnette* factor control test as the most recent judicial authority on the test of employment relationship. Accordingly, the court, following *Bonnette*, recognized the primacy of control in the employment relationship: "The power to control a worker clearly is a crucial factor determining whether an employment relationship exists."[120] Interestingly, while the court acknowledged a control analysis as the appropriate judicial basis for establishing an employment relationship, the court recognized that such control needed not be total:

> We do not agree that an entity's control over a worker must be "ultimate" in order to justify a finding of an employer employee relationship… the fact that control over a worker may be qualified is not a sufficient factor… to place an employment relationship beyond the scope of the FLSA.[121]

The court's application of the control test must be seen in light of the fact that Carter would have passed the voluntary test, since his employment as a teaching assistant resulted from his acceptance into a voluntary educational program offered by the prison in which he was incarcerated. Ultimately, the court found that the control maintained by the college over Carter, "may [have been] sufficient to warrant FLSA coverage."[122] Although the court made no final ruling as to whether Carter be legally covered under the FLSA, it did emphatically contend that prisoners were not *de facto* divorced from FLSA.[123]

In 1988, in Young v. Cutter Biological, inmates sought FLSA coverage for the work they undertook for a laboratory that had contracted with the prison in which they were incarcerated. Cutter Biological had contracted with the DOC for prisoners to work as assistants in a laboratory located on prison grounds and paid inmates wages far below

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[120] Judge Timbers, *Carter V. Dutchess Community College*, 735 F.2d, 9–10 (United States Court of Appeals for The Second Circuit 1984).
[121] Ibid., 735:10–12.
[122] Ibid., 735:20.
[123] Ibid.

the state minimum wage. Although the inmates were required to work, and thus would have failed the voluntary test, the court initially applied the control test. As such, the court assessed whether the laboratory held enough control over its inmate labor force to be characterized as an employer. The court effectively summarized the *initial* consideration of *Bonnette* era courts when it explained that its essential role was to discern "where the ultimate control and regulation of the inmate/workers were vested."[124] Upon application of the control test (using the *Bonnette* factors), the court found that the Arizona Department of Corrections maintained nearly ultimate control over the inmates, thereby denying their claim for status as employees of the laboratory, since the laboratory could not be seen to have retained sufficient control characteristic of the judicially recognized employer. However, the *Young* case was remarkable, insofar as the inmates also requested that, "the court apply the 'economic realities' [i.e. control] test to the custodial relationship between correctional institution and inmate."[125]

It would seem that the *Young* court had put itself in a double bind. In its opinion, it had denied that the laboratory could be considered the employer of its inmate labor force on account of the ultimate control held by the DOC over the inmates. Now, forced to consider whether the DOC could be legally considered an employer, the court had to recognize that the DOC satisfied the control test of employment relationship. As the court itself had articulated, "the power to hire and fire was vested solely with the state defendants," "it was the DOC's ultimate responsibility to assign and approve the inmates to the Cutter defendants," and "the responsibility for the rate and method of

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[124] Judge Broomfield, *Young V. Cutter Biological*, 694 F. Supp., 4 (United States District Court for The District of Arizona 1988).
[125] Ibid., 694:15.

pay was vested with the DOC."[126] The control test had been the judicial evidence for dismissing Young's claim of employee status under Cutter Biological, yet seemed to provide irrefutable evidence that the DOC met all the necessary employer criteria. As a means of escaping the bind of its initial control test, the court reverted to the voluntary test, arguing that prisoners could not be considered employees, since unlike free laborers, they did not own their own labor: "inmate labor belongs to the institution and inmate laborers do not lose their primary status as inmates simply because they work."[127] The court thus acknowledged that according to its own criteria of control, "the state penal system retain[ed] complete control over the inmate laborers."[128] What is interesting about the *Young* case is the fact that it elected to employ the control test *prior* to the voluntary test. In doing so, the court affirmed that inmates did in fact pass the control test. Ultimately the court ruled that prisoners could not be considered employees of the penitentiary regardless of the control it maintained over their labor.

The 1990 Federal Appeals court case of Watson v. Graves continued the trend of initially applying the control test to cases addressing prisoner FLSA claims. The Watson court also became the first court to *affirm* FLSA coverage for inmate laborers. It did so because the plaintiff, Kevin Watson, was found to be voluntarily laboring under a sufficient level of control maintained by a work-release construction company to affirm the company's status as his employer. The court, like its judicial predecessors in the *Bonnette* era, utilized the control test and isolated each of the *Bonnette* factors for analysis. In its affirmation of FLSA coverage for Watson, the court found that the construction company "supervise[d] and controlled the employee work schedules or conditions of

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126 Ibid., 694:11.
127 Ibid., 694:15.
128 Ibid.

employment" and "had the de facto power to hire and fire."[129] *Watson* was thus a prime example of the primacy of the voluntary test in cases involving inmate labor rights, as Watson's ability to pass the voluntary test allowed the court to continue with a control test analysis.

One year after *Watson*, in 1991, a Federal Appeals court heard another case involving FLSA coverage for prisoners in Gilbreath v. Cutter Biological, Inc. The case proved to be very similar in context to the 1988 *Young* case, as inmates called for FLSA coverage, arguing that they were employees of both the DOC and Cutter Biological, a company that had contracted with the state's prison industry. Inmates were employed as assistants to a blood plasma center located on the premises of the prison. *Gilbreath*, like *Young*, rejected the view that prisoners could be considered employees of the DOC, since the DOC did not maintain the same type of pecuniary interest in its inmate laborers as typical employers did. The *Gilbreath* court, like *Young,* acknowledged that the DOC generally satisfied the four-pronged control test, yet considered the DOC's omnipotence over the lives and labor of prisoners to be uncharacteristic of the typical employer. As judge Trott, delivering the court's opinion, explained:

> The state's absolute power over appellants is a power that is not a characteristic of - and indeed is inconsistent with - the bargained-for exchange of labor which occurs in a true employer-employee relationship. Arizona's prisoners have no economic need for the FLSA, none.[130]

While it would seem that the FLSA and New Deal legislation in general had intended to provide protection for workers who were increasingly reliant on wages for survival and to assure rights to those workers whose labor was under increasing scrutiny and control

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[129] Judge Wiener, *Watson V. Graves*, 909 F.2d, 18 (United States Court of Appeals for The Fifth Circuit 1990).
[130] Judge Trott, *Gilbreath V. Cutter Biological, Inc.*, 931 F.2d, 14–15 (United States Court of Appeals for The Ninth Circuit 1991).

by employers, the *Gilbreath* court decided to deny coverage to prisoners, despite acknowledging the overarching control held by the DOC over its laborers. The control test used by courts from *Bonnette* until *Vanskike* demonstrated that despite being under levels of control characteristic of free market laborers, prisoners could not be afforded rights in light of the involuntary nature of penal labor. The rejection of the *Gilbreath* court is perfectly intelligible according to the Master-Slave distinction between laborers and slaves. Like proponents of Master-Slave ideology, the *Gilbreath* court argued that prisoners, as slaves, had no need for minimum wage coverage since their labor was paid for *in kind* by the penitentiary. According to this rationale, Trott's opinion for the Ninth Circuit in *Gilbreath* was one of the few *thorough* judicial denials of the potential for FLSA coverage for prisoners: "I reject as almost whimsical the notion that Congress could have intended such a radical result as bringing prisoners within the FLSA without expressly so stating."[131] Ending his opinion, Trott explicitly likened prison labor to involuntary servitude. For Trott, a prisoner's "work in prison could be accurately characterized in an economic sense as involuntary servitude, peonage, or indeed slavery."[132] Not only did the Thirteenth Amendment permit such slavery, but proponents of Master-Slave ideology even promoted such slavery, since prisoners, as chattel slaves, as opposed to wage slaves, deserved their state of servitude and warranted no protection from the State due to their crimes against society.

Interestingly, in her alternative opinion in *Gilbreath*, Judge Rymer emphasized the inapplicability of the control test for laborers who failed to pass the voluntary test. For Rymer, the issue was simple, inmates did not retain ownership over their own labor

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[131] Ibid., 931:13–14.
[132] Ibid., 931:12.

upon incarceration since they could be legally forced to work: "The facts in this case show that inmate labor belongs to the institution…The inmate assistants were…not free not to work."[133] As will be seen below, Rymer's opinion would set the stage for the *Vanskike* court's radical rejection of the applicability of the control test in cases involving involuntary inmate laborers.

Only one year after its emphatic and universal denial of FLSA coverage to prisoners in *Gilbreath*, the Federal Court of Appeals for the Ninth Circuit became the first court to rule in favor of FLSA coverage for inmate laborers as employees of the *prison* in which they were incarcerated in the 1992 case of Hale v. State of Arizona I. In *Hale I*, inmates producing goods for an IOBE (Inmate-operated business enterprise) under the supervision of The Arizona Correctional Industries, ARCOR, sued ARCOR and state prison officials, seeking coverage under the FLSA, having been paid well below minimum wage for labor required of them by Arizona law. The plaintiff inmates worked regularly for the IOBE and were paid 50 cents an hour. Since the Ninth Circuit's judges had not come to a majority opinion in *Gilbreath*, the circuit was called upon to consider anew the applicability of the FLSA to prisoners. Although the court applied the historical precedent, the control test, it became the first court to determine that inmates could be employees of prisons and affirmed FLSA coverage for Hale and his inmate co-plaintiffs. Whereas in *Gilbreath*, the same court had held just one year prior that the involuntary nature of prison labor barred prisoners from FLSA coverage, the court now emphasized that ARCOR satisfied the control test since it maintained a level of control over its inmate laborers characteristic of an employer. The *Hale I* court was radical

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[133] Judge Rymer, *Gilbreath V. Cutter Biological*, 932 F.2d, 34 (United States Court of Appeals for The Ninth Circuit 1991).

insofar as it was the first and only court to *eschew* the voluntary test, leading to its utterly novel conclusion that inmates were, in fact, employees. Delivering the opinion of the court, Judge D.W. Nelson explained:

> The great control ARCOR and the DOC exercise over the IOBEs [Inmate-Operated Business Enterprises] indicates that the IOBEs are not separate entities but rather are arms of ARCOR itself… ARCOR and the IOBE certainly meet all of the factors set out in *Bonnette* and *Gilbreath,* and constitute employers subject to the provisions of the FLSA.[134]

The court also found FLSA coverage of inmates to be consistent with congressional purpose, going so far as to state that it was Congress' intention to cover prisoners: "the way the Act was written suggests that Congress intended to include prisoners within the scope of the Act."[135] The control test of employment relationship, one that was deeply rooted in Master-Slave ideology, had finally affirmed FLSA coverage for inmate laborers. As legal scholar James Haslem explains, the *Hale I* decision proved to be a victory for inmate laborers rights on a national level: "The Hale I holding would have made it difficult for courts to ever justify not extending FLSA coverage to prisoners."[136] It should come as no surprise, considering the uphill battle faced by prisoners in their quest for FLSA coverage, that only one year later, the relevance and applicability of the control test in cases concerning the employment status of involuntary inmate laborers were called into question. Furthermore, the interpretation of congressional intent provided in *Hale I* had to be drastically reworked if penal slavery were to continue.

The *Hale I* court's radical affirmation of FLSA coverage for inmate laborers would only hold judicial precedent for a few months in 1992. Two months after the *Hale I* decision, on June 24, 1992, the Federal Court of Appeals for the Seventh Circuit

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[134] Judge D.W. Nelson, *Hale V. Arizona I* 32 (n.d.).
[135] Ibid., 12.
[136] James Haslem, "Prison Labor Under State Direction: Do Inmates Have the Right to FLSA Coverage and Minimum Wage?," *Brigham Young University Law Review* 2 (1994): 383.

would completely undermine the *Hale I* ruling and critique its rationale. This seminal case, Vanskike v. Peters, would once again mark a reversion to the primacy of the voluntary test that had been universal in the judiciary prior to *Hale I*. The case was nearly identical to *Hale I*. In the case, a prisoner in an Illinois penitentiary, Daniel Vanskike, filed a complaint against the Illinois Department of Corrections, claiming that his work for the DOC qualified him and other prisoners for FLSA coverage. Vanskike had been forced to do custodial and "knit shop piece-line" work for the prison, for which he was paid far below the national minimum wage. Judge Cudahy, articulating the court's opinion in the case, began with an analysis of historically relevant cases that had fully or partly affirmed FLSA coverage for prisoners. In doing so, Cudahy recognized the control test as the prevailing test of employment relationship in such cases, and importantly, clarified that his court held that "prisoners are not categorically excluded from coverage simply because they are prisoners."[137] Accordingly, the court had to place itself within the context of *Hale I* ruling, which had bestowed FLSA rights upon inmate laborers in a similar case. The *Vanskike* court began by distinguishing itself from *Carter* and *Watson*. Whereas *Carter* and *Watson* concerned inmates voluntarily working for private entities, *Vanskike*, like *Hale I*, concerned inmates working for the DOC. Accordingly, the *Vanskike* court had to systematically critique the analysis of the *Hale I* court as a means of providing judicial credibility to its conclusion denying FLSA coverage to Vanskike and other inmate laborers.

One of the most important aspects of the methodology of the *Vanskike* court was the primacy it assigned to the voluntary test. Unlike *Hale I*, the *Vanskike* court

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[137] Judge Cudahy, *Vanskike V. Peters*, 974 F.2d, 7 (United States Appeals Court of Appeals for The Seventh Circuit 1992).

denied the relevance of the control test to cases concerning involuntary penal labor. According to the court, "the relationship between the DOC and a prisoner is far different from a traditional employer-employee relationship, because… inmate labor belongs to the institution."[138] Having emphasized the overarching importance of the voluntary test, the court continued by critiquing previous courts' usage of the control test. According to the *Vanskike* court, the control test was inappropriate in cases concerning prison labor since "the Bonnette factors fail to capture the true nature of the relationship for essentially they presuppose a free labor situation."[139] For the *Vanskike* court, then, penal labor could not be judged by the same criteria as free labor since prisoners did not maintain ownership of their labor, and were thus engaged in involuntary servitude rather than free market labor. Utilizing an analysis similar to *Gilbreath*, the court found the control held by the DOC over inmates to be too great to qualify as an employment relationship: "there is obviously enough control over the prisoner; the problematic point is that there is too much control to classify the relationship as one of employment."[140] Switching the emphasis to an analysis of the characteristics of the authentic employee, the court found that prisoners could not be considered employees since "they have not contracted with the government to become its employees."[141] The difference between prisoners, as involuntary servants, and employees recognized as wage slaves worthy of legislative protection, was the latter's right to voluntarily contract with an employer. However, the *Vanskike* court's task was not to determine whether or not penal labor was involuntary, but rather, to consider the

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[138] Ibid., 974:10.
[139] Ibid., 974:12.
[140] Ibid., 974:13.
[141] Ibid.

extent to which the labor of prisoners *ought* to remain involuntary. Denying FLSA coverage for involuntary laborers *due* to the involuntariness of their labor was quite circular logic and remained fully entrenched in the Master-Slave vision of preserving the institution of slavery in the United States.

Aside from its rejection of the relevance of the control test in cases involving inmates working for the DOC rather than private companies, the *Vanskike* court's decision relied in large part on an analysis of congressional purpose in enacting both the FLSA and the Ashurst-Sumners Act. This judicial move was important, since the *Hale I* court had come to the radical conclusion that Congress had indeed meant for penal labor to be covered under the FLSA. According to the text of the FLSA, it was enacted as a means to annul "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and to prevent the potential for underpaid labor to "burden commerce and the free flow of goods in commerce."[142] In light of the explicitly stated Congressional purposes behind the enactment of FLSA legislation, the *Vanskike* court considered whether Congress could have intended for prisoners to be covered by the legislation. The court first considered the legislation's objective of guaranteeing a minimum standard of living for workers. The court found that this first purpose of the FLSA was irrelevant in the case of prisoner labor:

> Prisoners' basic needs are met in prisons… requiring the payment of minimum wage for a prisoner's work in prison would not further the policy of ensuring a "minimum standard of living," because a prisoner's minimum standard of living… is not substantially affected by wages received by the prisoner.[143]

This logic was flawed in a number of ways and was also remarkable in its affinity to

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[142] *Fair Labor Standards Act of 1938*.
[143] Judge Cudahy, *Vanskike V. Peters*, 974:15.

antebellum defenses of slavery. As legal scholar Noah Zatz explains, the *Vanskike* logic denied the social life of prisoners:

> This type of reasoning is based on a characterization of prisoners as 'lone individuals'… [as the]… prison's provision of food, shelter, and medical care to the prisoner is taken as meeting inmates' basic needs, without considering how many family members may have lost access to the inmate's wages.[144]

However, this 'lone individual' view is more intelligible in terms of the manner in which slaves have historically been treated as socially dead individuals. As Bair explains: "The slave is considered socially dead, as he or she is cut off from the family and community relationships that are understood to be the basis of a person's life in relation to society."[145] As has been discussed above, the FLSA was primarily enacted as a means of providing employees, a class of laborer perceived to be under increasing control and increasingly reliant on employers for subsistence, rights that could ensure a minimum standard of living and combat unfair market practices. The legislation thus specifically targeted those laborers most reliant on their employers for survival and those laborers whose labor was most controlled. Prisoners certainly fell into this category of laborer. Interestingly, the *Vanskike* court implicitly acknowledged that prisoners, as laborers, must be afforded the same type of minimum standard of living guaranteed by the FLSA. Although the court emphasized this, they continued by maintaining that because such needs were already met, the FLSA has no applicability. In a sense, according to the *Vanskike* court, prisoners did not need FLSA coverage since they were already legally required to receive benefits accrued by FLSA coverage. According to this logic, characteristic of the Master-Slave distinction between slaves and free market laborers,

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[144] Noah Zatz, "Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships," *Vanderbilt Law Review* 61, no. 857 (April 1, 2008): 932–933.
[145] Asatar P Bair, *Prison Labor in the United States : an Economic Analysis* (New York: Routledge, 2008), 32.

prisoners, as contemporary slaves, were in no need of wages since their standard of living was providing *in kind* by the penitentiary.

The Master-Slave ideology behind cases concerning FLSA coverage for prisoners reached its pinnacle in *Vanskike*. Consider the affinity between Fitzhugh's defense of slavery on the grounds that the master effectively protected and provided for his slaves and the *Vanskike* court's denial of minimum wage coverage for prisoners, since the prison, as master, already provided for its penal slaves. In the 19th century, Fitzhugh explained an essential tenet of the Master-Slave vision, that the master "afford protection and support at all times to the laboring class," and continued by emphasizing that "all these purposes, slavery fully and perfectly attains."[146] The prison, as the contemporary slave master, afforded protection and support at all times to penal slaves, rendering superfluous the rights assigned to employees, or 'wage slaves.' The minimum standard of living maintained by the prisoner was guaranteed *in kind* by the prison, just like that of the slave was guaranteed *in kind* by his master.

Having established that the first purpose of the FLSA was already met in the context of prison labor, the *Vanskike* court continued with an analysis of the second major purpose of the FLSA – preventing the detrimental effect of substandard wages on interstate commerce. Beginning its analysis, the court recognized that the fungibility of labor created a scenario in prison in which substandard inmate wages could be detrimental to the labor opportunities of free workers, who could hypothetically be employed in jobs normally filled by prisoners. The court acknowledged that such a conclusion would create a scenario in which prisoners, regardless of the context of their

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[146] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 78.

labor, would need to be paid minimum wage as a means of promoting stability in the marketplace:

> For every prisoner who is assigned to sweep a floor or wash dishes for little or no pay, there is presumably someone in the outside world who could be hired to do the job – someone who would have to be paid at least $4.25 an hour… carried to its logical conclusion, prisoners must be paid minimum wage for anything they do in prison that can be considered 'work.' [147]

As a means of critiquing such a conclusion, the *Vanskike* court emphasized that Congress had already addressed the potential economic problems caused by substandard wages in prison, with the enactment of the Ashurst-Sumners Act. The court argued that since the Ashurst-Sumners Act would be rendered superfluous if prisoners were to be covered by the FLSA, it was doubtful that Congress could have intended such a scenario, especially since the FLSA was enacted just three years after the Ashurst-Sumners Act. As the court explained, the rationale behind the enactment of the Ashurst-Sumners Act was based upon an assumption of the low wages paid to inmate laborers: "that is why the fruits of prison labor are assumed to be low-cost goods."[148] Once again, the discursive logic of the *Vanskike* court recognized that inmate laborers fell within the legislative scope of the FLSA. As such, the court concerned itself with deciding whether prisoners were assured a minimum standard of living and whether their role in the national economy would be a hindrance to the functioning of the marketplace. To deny FLSA coverage for involuntary inmate laborers, the court demonstrated that both of the purposes of the FLSA were already met in the context of prison labor. The *Vanskike* court thus concluded that prisoners ought not be covered by the FLSA, since such coverage would make no difference to either the penal slave or the

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[147] Judge Cudahy, *Vanskike V. Peters*, 974:17–18.
[148] Ibid., 974:21.

national economy.

Soon after the *Vanskike* decision, and in light of the novel analysis it had introduced in cases involving FLSA coverage for prisoners, the Federal Appeals Court for the Ninth Circuit reheard *en banc* Hale v. Arizona (*Hale II*), recognizing that it had to reconcile the conflicting decisions of *Hale I* and *Gilbreath*. The *Hale II* court, like the *Vanskike* court before it, eschewed the control test in favor of the voluntary test. Judge Rymer, delivering the opinion of the court, explained the primacy of the voluntary test: "Convicted criminals do not have the right freely to sell their labor," creating a scenario in which "the economic reality is that they labor belong[s] to the institution."[149] Rymer continued by emphasizing that the relationship between the inmate laborer and the prison was penological rather than pecuniary: "the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner."[150] Rymer's assumption of mutual exclusivity between penological and pecuniary aims explicitly rejected the inmates' suggestion that their labor was forced according to penological *and* pecuniary aims:

> An employment relationship exists because ARCOR profits from the work inmates perform; and that even though penological interests may be paramount in the prison-prisoner relationship, and employer-employee relationship may exist at the same time.[151]

The opinion delivered by the *Hale II court* aptly demonstrated what Zatz has deemed "the exclusive market approach" to defining the employment relationship. In the context of prison labor, this approach refused to acknowledge the potential for the co-existence of pecuniary and penological aims for penal labor. As Zatz summarizes: "There is no room in this view for the coexistence of penological and pecuniary aims. Once the prison

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[149] Judge Rymer, *Hale V. Arizona II*, 993 F.2d, 26 (United States Court of Appeals for The Ninth Circuit 1993).
[150] Ibid., 993:23–24.
[151] Ibid., 993:18.

appears, the economy vanishes."[152] In other words, "the prison and the economy are mutually exclusive."[153] What courts employing this approach failed to realize was that work, whether in the free market or the penitentiary almost always promoted positive values and provided economic benefits. Arguing that labor in prison served penological, rather than pecuniary aims, Judge Rymer explained that "correctional industries of the sort sponsored by ARCOR in these cases occupy idle prisoners, reduce disciplinary problems, nurture a sense of responsibility, and provide valuable skills and job training."[154] Rymer's decision thus betrayed a logical inconsistency, since work, steady employment, and regular income almost always combat idleness, reduce disciplinary problems, nurture a sense of responsibility, and improve job-related skills.

Providing a dissenting view, Judge Norris aptly critiqued some of the logical and judicial inconsistencies within Rymer's opinion. Furthermore, Norris provided a convincing condemnation of the applicability of the voluntary test in cases considering the employment status of prisoners. Norris correctly recognized the primacy of the voluntary test in Rymer's opinion. However, he seemed perplexed as to why that would exempt rather than enforce FLSA coverage for prisoners: "if being forced to work means 'being subject to" work, then in forcing the prisoners to work the state "suffers" them to do so."[155] Norris also clarified that the political impotence of inmate laborers ought to render them more, rather than less in need of FLSA coverage:

> The less bargaining power workers have, the greater the need the apply the FLSA to protect them and those who compete against them… The majority seizes upon the prisoner's lack of bargaining power as evidence that he is not an employee of the state. But it is exactly the worker who lacks bargaining power that the FLSA seeks to reach,

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[152] Zatz, "Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships," 891.
[153] Ibid., 892.
[154] Judge Rymer, *Hale V. Arizona II*, 993:36.
[155] Ibid., 993:48.

> for this is the worker who is most likely to be working for substandard wages and thereby "endangering national health and efficiency.[156]

Nelson's dissent anticipated the critique Zatz would eventually make of Rymer's decision, noting that "common sense tells us this relationship is both penological *and* pecuniary." Nelson's critique of the voluntary test was certainly tinged with Free Labor ideology, as it represented a complete rejection of a test that had historically been used as a justification for slavery in the penitentiary. By calling for FLSA coverage for prisoners, Norris attempted to bring prisoners one step closer to the Free Labor ideal of complete liberty. Furthermore, Norris' dissent represented the only moment in judicial history where a judge recognized the involuntary status of penal labor and chose *not* to acknowledge the legitimacy of penal slavery, despite the fact that it had been legally *permitted* by the exception clause of the Thirteenth Amendment.

Since *Vanskike* and *Hale II*, nearly every circuit court of appeals has applied the voluntary test in cases concerning inmate labor rights, often combined with a consideration of the congressional purpose behind both the Ashurst-Sumners Act and the FLSA. In 1994, the Federal Appeals Court for the District of Columbia Circuit found that "where an inmate's labor is compelled and/or where any compensation he receives is set and paid by his custodial, the prisoner is barred from asserting a claim under the FLSA, since he is definitely not an employee."[157] In 1994, the Eighth Circuit reasoned that "the economic reality of the relationship between inmates and the DOC dictates that the inmate not be considered employees…inmates have not volunteered or

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[156] Judge Norris, *Hale V. Arizona II*, 993 F.2d, 54–55 (United States Court of Appeals for The Ninth Circuit 1993).
[157] Judge Sentelle, *Henthorn V. Department of Navy*, 29 F.3d, 14 (United States Court of Appeals for The District of Columbia Circuit 1994).

contracted to work for the State; they are assigned and required to do so."[158] In 1995, the Fifth Circuit firmly held that "Congress most certainly did not intend the FLSA to apply to *forced* prison labor."[159] The Fourth[160] and Tenth Circuits[161] have also employed this judicial rationale.

With the exception of the ruling in *Hale I*, courts considering inmate labor rights under the FLSA have unanimously ruled against prisoners, primarily according to the voluntary test, which reasoned that since inmates have no right to voluntarily enter or exit the employment relationship, their labor belongs to the prison in which they are incarcerated. Thus the inmate laborer could be legally characterized as slaves according to the exception clause of the Thirteenth Amendment.

Under the dominant logic and rationale expressed by the judiciary throughout the history of cases concerning inmate labor rights, and without legislative intervention, the slave status of penal labor would have remained as it had since far before the enactment of the Thirteenth Amendment. The exception clause of the Thirteenth Amendment did not legislatively *require* that courts from *Ruffin* to *Vansike* maintain the system of penal slavery in the United States, yet served as a justification for their conclusions maintaining the system of penal slavery. Despite not being bound to an interpretation of inmates as penal slaves outside of the scope of FLSA coverage, such courts had made it abundantly clear that according to their near universal embrace of the voluntary test and pro-penal slave legislative interpretations, the abolition of penal

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[158] Judge Lively, *McMaster V. Minnesota*, 30 F.3d, 10 (United States Court of Appeals for The Eighth Circuit 1994).
[159] Judge Winter, *Danneskjold V. Hausrath*, 82 F.3d, 13 (United States Court of Appeals for The Second Circuit 1996).
[160] Judge Wilkinson, *Harker V. State Use Industries*, 990 F.2d (United States Court of Appeals for The Fourth Circuit 1993).
[161] Judge Barrett, *Franks V. Oklahoma State Industries*, 7 F.3d (United States Court of Appeals for The Tenth Circuit 1993).

slavery would not occur in the judiciary. The conservatism within the judiciary on the subject of penal labor renders intelligible the shift of focus within the Republican Party to a legislative approach to the abolition of penal slavery since the 1970's. Clearly, if the issue were left to the judiciary, the exception clause of the Thirteenth Amendment would continue to serve as the primary legal justification for the denial of labor rights to inmates.

4. CONTEMPORARY POLITICAL ATTITUDES TOWARDS PENAL SLAVERY: THE APPROPRIATE RELATIONSHIP BETWEEN THE FREE MARKET AND PENAL LABOR

"The way criminals are understood in American society –as dehumanized objects, more like beasts or monsters than human beings – serves as a condition of existence for slavery in prisons"[162] *– Asatar Bair*

In light of the judiciary's consistent use of the voluntary test and purposive legislative interpretation as means of affirming the slave status of penal labor, Democrats and Republicans have stayed true to their respective ideological allegiances in their contemporary legislative approaches to either expand or restrict prison industries, and by association, limit or promote inmate labor rights. Republicans, characterized by a Free Labor embrace of liberty in labor and *laissez-faire* capitalism, politically promote the expansion of market production in prisons, prisoner employment, and ultimately fair wages for prisoners. By passing legislation that has shifted penal labor from slavery to employment, Republicans have brought some prisoners one step closer to the Free Labor ideal of ultimate liberty, free of restrictions and protections. However, the Republican demand for fair wages for prisoners should not be seen as isolated from the Republican tradition's historical economic focus on the expansion of capital and its belief in the economic superiority of free market over slave labor. According to 19th century proponents of Free Labor ideology, free market labor and *laissez-faire* capitalism were the ideal means to ensure economic productivity. Thus, Republicans have always maintained a belief in the economic superiority of free labor. According to Thaddeus Russell, free laborers in antebellum America "worked four hundred hours more hours per year than did slaves."[163] It is no wonder why northern Republican Free Laborers felt so threatened by slavery, and maintained such ideological opposition to its existence:

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[162] Bair, *Prison Labor in the United States*, 152.
[163] Thaddeus Russell, *A Renegade History of the United States* (New York: Free Press, 2010), 57.

slavery lacked the productivity of free labor and was characterized by irresponsibility stemming from the oppression of the slave. This historical critique of slavery as a hostile institution to the expansion of capital and industry still seems to inform contemporary Republican legislative attempts to bring penal slaves into the free market. Just like Free Labor Republicans of the 19th century, contemporary Republicans prioritize economic liberty as the most effective means to promote the expansion of capital and national industry. Thus while Republicans are the most vocal critics of penal slavery, the legislation promoted by Republicans is always primarily motivated by market expansion rather than rights for inmate laborers. In the Republican view, penal labor represents an undeveloped and underutilized source of capital expansion. Contemporary Republicans seek to bring the labor of millions of unemployed convicts into the free market through the expansion of prison industries via the repeal of restrictive New Deal legislation and the implementation of voluntary labor programs for inmates.

Democrats, characterized by their historical defense of slavery and embrace of market regulations on labor remain adamantly opposed to the expansion of prison production and the associated development of labor protections for prisoners. Whether by proposing legislation that formally excludes prisoners from FLSA rights, or simply by expressing opposition to the expansion of prison industries on account of the potential competition between free market and penal labor, Democrats resist the expansion of penal labor that would accompany the expansion of prison industries. Since the prison is the final vestige of institutionalized slavery in the United States, contemporary Democrats, still grounded in Master-Slave ideology, either remain apathetic about the emancipation of prisoners, or promote the prolongation of penal slavery as a means of protecting free market laborers from unfair competition. Since the primary legislative

means through which penal labor programs can be expanded is through private sector partnerships with penal institutions, Democrats are fundamentally opposed to such expansions, and by association, the rights that are afforded to prisoners working under such partnerships.

Prison Industry Enhancement Certification Programs and The Extension of Minimum Wage Rights to Penal Labor

In 1973, Republican Senator Charles Percy introduced what was perhaps the first major bill to address penal slavery. The bill, entitled The Federal Criminal Justice System Reorganization Act, aimed to promote the expansion of Federal prison industries, by allowing Federal Prison Industries (FPI) to "contract with businesses, corporations, or other private groups to establish factories or projects within federal prison walls or nearby for the purpose of employing and training offenders." Percy emphasized the need for participation in FPI to be voluntary and for inmates working for FPI to be paid prevailing market wages. [164] Percy's focus on the market expansion of private industries and the growth of penal labor programs was entirely consistent with his political affiliation as a free market, Free Labor republican. In his obituary, the L.A. Times aptly described Percy as "an apostle of free markets who sought to ease federal regulation of U.S. corporations."[165] The bill failed to pass but would serve as the historical foundation for Percy's next, successful legislative attempt at expanding prison industries, this time, at the state level.

In 1979, the United States Congress passed the Prison Industry Enhancement Certification Program (PIECP), a piece of legislation sponsored by Percy that would

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[164] Walter Jensen, Edward Mazze, and Neal Miller, "Legal Reform of Prison Industries: New Opportunities for Marketing Managers," *American Business Law Journal* 12, no. 2 (1974): 7.
[165] Associated Press, "Charles H. Percy Dies at 91; Moderate Former GOP Senator," *The Los Angeles Times*, September 18, 2011, http://www.latimes.com/news/obituaries/la-me-charles-percy-20110918,0,3266583.story.

represent the first legislative recognition of minimum wage rights for prisoners. PIECP served as an amendment to the Ashurst-Sumners Act. As such, it served to permit prison-made goods into the realm of interstate commerce for the first time since the New Deal:

> Exempts State and local certified departments of corrections from normal restrictions on the sale of prisoner-made goods in interstate commerce. In addition, the program lifts existing restrictions on these certified corrections departments, permitting them to sell prisoner-made goods to the Federal government in amounts exceeding the $10,000 maximum normally imposed on such transactions.[166]

PIECP created pilot programs that permitted private sector partnerships with state penal institutions and also exempted the goods manufactured under such programs from the Ashurst-Sumners Act. All inmates labor for PIE programs was voluntary and had to be rewarded with market-based wages. The manner in which the act created a sphere of voluntary prison labor and amended New Deal era legislation restricting the economic scope of prison-made goods guaranteed the economic expansion of prison industries. Percy, recognizing the prevailing judicial rationale in cases concerning labor rights for prisoners, found a legislative means of changing the material reality of penal labor. The most innovative aspect of PIE legislation was that it required *voluntary* participation on the part of the inmate laborer. Inmate involvement in PIE programs had to be voluntary as a means of guaranteeing that inmates involved in such programs would pass the voluntary test. This explains why PIECP mandated that participation "be voluntary on the part of the inmate."[167] Since, commerce related to slave labor is implicitly exempted from interstate commerce according to the economic rationale behind the FLSA, the first step towards the market expansion of prison industries was to

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[166] Nancy Gist, *Prison Industry Enhancement Certification Program* (Washington, D.C.: U.S. Department of Justice, November 1995), 1.
[167] Charles Percy, *Proceedings and Debates of the 96th Congress: Volume 125 - Part 10* (Washington, D.C.: United States Government Printing Office, 1979), 11834.

emancipate prisoners from involuntary servitude. The emphasis on voluntary labor as a requirement for participation in PIE programs shifted the material relationship between prisoner and prison away from that of master and slave, and towards that of employer and employee. By mandating that inmate laborers pass the judicial voluntary test and undermining the legislative relevance of the Ashurst-Sumners Act, PIE programs brought penal labor into the realm of interstate commerce by creating system of *voluntary* penal labor. Laborers who were voluntarily involved in interstate commerce and under the control of their employers *had* to be protected by minimum wage rights, according to the rationale and language of the FLSA. Thus, minimum-wage rights for inmate laborers had to be included in PIECP legislation. Percy argued that extending minimum wage coverage to prisoners in certain cases would "strengthen prison industries at the State level"[168] and "create as realistic a working environment as possible within the prison walls, while enabling an inmate to become more self-sufficient, to the benefit of himself, the prison system, and the tax-payer."[169] PIECP legislation thus furthered the vision of Free Labor ideology, as it emancipated prisoners working for PIE programs from penal slavery by bringing their labor into the free market realm. While the emancipation of penal labor may not have been the primary motivation behind the legislation, it did mark the first moment since the passage of the Thirteenth Amendment that penal labor was legislatively brought under the scope of protective labor legislation.

The primary economic rationale behind the PIECP legislation was to promote the expansion of prison industries by encouraging the growth of partnerships between penal institutions and the private sector. Unable to participate in interstate commerce,

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[168] Ibid.
[169] Ibid.

and barred from contracting with the federal government, State prisons were increasingly unable to provide jobs for inmates. To understand the historical degradation of penal production, one can look at the percentage of prisoners engaged in commodity production and the value produced by the average inmate per year during the years ranging from 1885 to 2001. This data, researched by economist Asatar Bair, demonstrates just how rapidly prison production has declined. Whereas over 70% of inmates were employed in the field of commodity production in 1885 (prior to the enactment of federal restrictions on prison industries), by 2001, less than 5% were similarly employed. Similarly, in 1885, the value per inmate per year was over $11,000, but by 2001 was at a meager $1,248.[170] Historically, penal institutions, private enterprise, and labor unions have agreed that labor was rehabilitative to the prisoner, reduced the dangers associated with idleness, and helped with the daily maintenance of prison facilities. The increasing prevalence of idleness among inmates, as a product of federal restrictions on prison-made goods was thus an increasing concern for most organizations politically or economically interested in prison labor.

With penal institutions and the private sector pushing for mutually beneficial legislation that would increase profits by lifting restrictions on the expansion of prison industry and correlatively by providing the private sector with access to an enormous, untapped labor force, Republicans such as Percy, were unsurprisingly drawn to the potential of such partnerships to facilitate the expansion of national industry and capital. Although the amendment was initially passed as a means to bolster the economic viability of prison industries and reduce inmate idleness, it would become a means through which private industry could gain access to a historically underemployed

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[170] Bair, *Prison Labor in the United States*, 116.

population of inmate laborers, without economically burdensome federal restrictions. According to the "Prison Industry Program Fact Sheet," published by the Bureau of Justice Assistance in 1995, "The PIE Certification Program allows private industry to establish joint ventures with State and local correctional agencies to produce goods using prison labor." The clear incentives for private sector partnerships with penal institutions were not overlooked by the Department of Justice, which has advertised PIE programs as mutually beneficial to both private and prison industry. According to the Bureau of Justice Assistance, the private sector benefits from access to prison labor, as "the program provides a stable and readily available workforce" and because "many correctional agencies provide manufacturing space at greatly reduced rates to private sector companies involved in the program."[171]

PIECP legislation was primarily backed by private corporations and state penal institutions as a means of circumventing the economically restrictive New Deal era laws that had greatly reduced the practicality, scope, and profitability of prison labor. The American Correctional Association, the largest correctional association in the world, seems to have been one of the major players behind PIECP, as evidenced by a letter written to Senator Percy, expressing their views on the act: "The ACA strongly supports the principles and concepts encompassed by the proposed amendment."[172]

Since PIECP sought to expand rather than reduce the scope of prison industries, it had the inherent potential to displace free market labor. Percy thus sought to alleviate potential contention from organized labor, which had historically found the expansion of prison industries to be antithetical to its interests. Accordingly, Percy included a

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[171] Gist, *Prison Industry Enhancement Certification Program*.
[172] Percy, *Proceedings and Debates of the 96th Congress: Volume 125 - Part 10*, 11839.

provision within the act that "would require consultation with local labor representative prior to the initiation of projects… to assure that paid prison employment…not result in the displacement of employed workers."[173] Evidently, organized labor was not appeased by the consultation clause, as Percy, in a slightly paternalistic address levied at union members, maintained that despite its potential drawbacks, the legislation was in best interests of organized labor:

> "I recognize full well the concerns of organized labor. But I would say to them that if their job is to arrest the decline they are now having… they had better look to the new interests of members of organized labor today… the cost of crime to our society."[174]

Whereas the private sector had once sided with organized labor to lobby for the passage of the Ashurst-Sumners Act as a means of limiting competition between prison industries and private enterprise, the interests of the private sector and organized labor had become disjointed die to the country's burgeoning population of unproductively employed prisoners. By the 1970's, the private sector and the Republican order had begun to envision profit in prisons, whereas organized labor continued its lament over unfair competition with prisoners. Despite its potential drawbacks for organized labor, Percy argued that the act would benefit private enterprise, prisons, prisoners, and even taxpayers.

Due to the political and socioeconomic sensitivity surrounding private sector partnerships with prison industry, PIECP legislation included a number of requirements and restrictions as a means of gaining popular support and appeasing politically oppositional groups. While inmates involved in PIE certification programs must be paid at least the federal minimum wage, up to 80% of inmate wages may be deducted for

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[173] Ibid., 11834.
[174] Ibid., 11836.

taxes, room and board, family support, and victim compensation funds. Still, studies have shown that on average, such deductions amount to 54%,[175] significantly less than the maximum deduction. Finally, in order for a prison to be certified for a PIE program, it must first consult with members of local organized labor to minimize free market labor displacement as well as members of local businesses whose profits could be decreased by the presence of the PIE program.[176]

Despite a plethora of economic incentives to the private sector, the size and scope of PIE programs nationwide have been limited. According to the National Industries Association, Inc. (the technical assistance provider for the programs), as of 2010, PIE programs had employed only 4,500 to 5,000 inmates nationwide.[177] Considering that PIE programs have been in operation for over thirty years, the number of inmates it historically employed is surprisingly low, especially since in 2010 alone, the U.S. prison population exceeded 2,000,000.[178] As penal historian Christian Parenti explains, the dearth of private sector interest in PIE programs is most likely related to insufficient industrial space within prisons, the negative public relations toll born by industries who employ prisoners, the lack of experience characteristic of most penal labor, and the bureaucratic system of safety measures inherent to the functioning of prisons which renders prisoners an extremely unstable labor force.[179] Despite minimal private sector involvement, private sector support of PIECP legislation evidences the

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175 Bair, *Prison Labor in the United States*, 90.
176 Department of Justice, *Prison Industry Enhancement Certification Final Program Guidelines*, April 7, 1999.
177 Barbara Auerbach, *Summary Findings of the 2009-2010 PIECP Compliance Site Assessments* (Baltimore, MD: National Correctional Industries Association, Inc., December 9, 2010).
178 Lauren Glaze, *Correctional Population in the United States, 2010* (Washington, D.C.: U.S. Department of Justice, December 2011).
179 Christian Parenti, *Lockdown America : Police and Prisons in the Age of Crisis* (London: Verso, 2000), 233–234.

positional 360 undertaken by the private sector vis-à-vis prison industries and prison labor more generally.

In justifying the urgency of PIECP legislation, Percy failed to recognize the importance of this historically evidenced ideological shift within the private sector. As has previously been discussed, the private sector and organized labor were the two most influential groups lobbying for passage of the Ashurst-Sumners Act due to the perceived economic advantages maintained by prison industries resulting from of their access to an inordinately cheap and steady supply of labor. Percy justified the need for the PIECP amendment by noting how restrictive New Deal era legislation had begun to adversely effect the economic viability of prison industries: "Over the years… they have developed into heavy-handed roadblocks to growth among even the most progressive prison industry programs."[180] Certainly Percy was correct. However, it seems that he failed to recognize that these New Deal laws, specifically the Ashurst-Sumners Act, were *always meant* to serve as roadblocks to prison industry programs. Just as the private sector had once been highly influential in curbing the development of prison industries, it now proved essential in promoting an amendment that would provide private industries with access to a large, unemployed labor force that was legally barred from collective organization.

Contemporary Political Attitudes towards Penal Slavery and The Economic Role of Prison Industries

The passage of PIECP legislation has shed light on the contemporary political atmosphere concerning the proper economic roles of prison industries and penal labor. Currently, there are two competing views on the ideal role of prison industries in the

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[180] Percy, *Proceedings and Debates of the 96th Congress: Volume 125 - Part 10*, 11834.

national economy, and more specifically, the level of compensation appropriate to inmate laborers. These two divergent views correspond with the 19th century ideological debate between northern Free Labor Republicans and southern Master-Slave Democrats. Republicans, ranging from Charles Sumner to Charles Percy have generally held that wages and labor relationships ought to be settled in the unrestricted, free market arena of *laissez-faire* capitalism. These political contemporaries of 19th century Free Labor Republicans have sought to bring penal labor one step close to the Free Labor ideal of ultimate liberty by expanding penal labor into the free market realm, and by ultimately providing labor rights to those free market inmate laborers. This political advocacy for prison labor rights is a necessary extension of Republican support for economic measures that promote the expansion of capital. Only by granting minimum wage to prisoners could the burgeoning penal labor force be exploited for the expansion of national industry, since slave labor is not permitted in interstate transportation according to the logic of the FLSA.

Conversely, Democrats from John Henderson to Senator Harry Reid have generally argued that the relationship between employer and laborer is inherently unequal and thus requires regulation and legislative protection to avoid labor exploitation and increased economic inequality. Furthermore, these Democrats have expressed discomfort at emancipating penal labor, since penal slavery poses no threat to the party's main constituents: organized labor. The Democratic Party does not explicitly promote penal slavery, but has contemporarily demonstrated either deep ambivalence or stringent opposition to the emancipation of inmate slaves. This ideological position seems to stem from the Democratic Party's historical basis as the most prominent political party in the slaveholding South, as the most vocal critics of the possibility for the market to

justly regulate labor relations, and even of the coherence of the ideals of Free Labor. Since the Democratic tradition has historically served the interests of organized labor, the expansion of prison industries represents increased competition for its most staunch supporters. As contemporary Democrats oppose the expansion of prison labor programs into the free market and thus labor rights for prisoners, they either remain apathetic to the maintenance of penal slavery or implicitly prefer penal slavery to free marker inmate employment under the legislative scope of the FLSA.

Because the FLSA regulates the relationship between employers and employees through federally mandated protections for employees, it must be seen as legislation ideologically founded upon the major tenets of Master-Slave ideology. However, since the relationship between prison and prisoner, as historically articulated by the judicial system, is most characteristic of that between master and slave, FLSA coverage for prisoners is arguably representative of a step in the direction of Free Labor. Courts from *Ruffin* to *Vanskike* have, according to the rationale of the voluntary test, either explicitly or implicitly categorized prison labor as legally involuntary. Accordingly, any shift within the context of penal towards voluntariness represents a transition towards Free Labor. The political positions contemporarily maintained by Democrats and Republicans with regards to the ideal status of penal labor are entirely consistent with each party's ideological underpinnings that were most evident in the political debate over the language of the Thirteenth Amendment.

Republicans, beginning with Charles Sumner, have historically advocated for prisoners to be treated as free laborers, whereas Democrats helped advance legislation that legalized the enslavement of prisoners, and continue to promote legislation that explicitly exempts inmates from the scope of labor rights legislation, specifically of the

FLSA. Furthermore, Democrats express deep discomfort over Republican legislation that grants labor rights to inmates by incorporating inmate laborers into the free market.

The contemporary Republican perspective on penal labor is that, given the rapidly rising rate of incarceration and increasing idleness among prisoners, the national economy and prisons are best served by deregulating the market for prison-made goods to encourage increased private sector partnerships with penal institutions, and thus the expansion of free market penal labor. While minimum wage rights for inmate laborers may not be the party's primary concern, FLSA coverage for inmates involved in voluntary prison industry programs is an intrinsic consequence of legislation that incorporates the products of prison industries into the free market. Continuing in the spirit of 19th century Free Labor Republicans such as Charles Sumner, major contemporary Republican figures have been at the forefront of the fight to incorporate penal labor into the free market. Two of the most prominent and outspoken proponents of this position are former Chief Justice Warren Burger and former Attorney General of the Reagan administration, Edwin Meese III. Burger served as Chief Justice of the Supreme Court from 1969 to 1986, having been nominated for the position by Republican President Richard Nixon. Burger exemplified the Republican perspective on the ideal economic role of prisons in his 1985 editorial, "Prison Industries: Turning Warehouses into Factories with Fences." Burger's approach rested on four fundamental proposals, characteristic of the Republican view:

> The conversion of prisons into places of education and training and into factories and shops for the production of goods… The repeal of all statutes that limit the amount of prison industry production… The repeal of all laws discriminating against the sale or transportation of prison-made goods… [and] The cooperation and active participation

> of business and organized labor leaders in programs to permit wider use of productive facilities in prisons.[181]

Edwin Meese made a similar case for the expansion of prison industries through the repeal of restrictive federal legislation. Like Burger and Percy, Meese is a passionate fiscal conservative. In a 2012 column for Townhall magazine, Meese praised Reagan for his plan that "unshackled the private sector."[182] Meese's praise of the free market renders intelligible his advocacy for the expansion of prison industries:

> The time is ripe to reduce the costs of incarceration by expanding inmate work programs… Yet because they're restricted by two 1930s federal laws that drastically limit interstate commerce in prison-made goods, industries remain a minor part of most prison operations. In 1994, just 7.4% of the 875,000 state prisoners in the U.S. and about 19% of the 90,000 federal inmates worked in such prison industries.[183]

These Free Labor Republican thinkers not only advocate the expansion of prison industries, but according to their faith in the tendency of the free market to regulate wages, even support the extension of market based wages to inmate laborers. While Burger does not advocate "union-scale wages" for inmates participating in the factories with fences model, he does believe that prisoners ought to be paid "reasonable compensation,"[184] presumably at a rate significantly higher than contemporarily. Furthermore, Burger is quick to emphasize that such labor must mimic that of the free market, insofar as it must not be forced, but rather "every prisoner should be *induced* to cooperate…Prisoners who cooperate in prison programs can receive shortened sentences and extra privileges."[185] For contemporary Republicans, as first demonstrated

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[181] Warren E. Burger, "Prison Industries: Turning Warehouses into Factories with Fences," *Public Administration Review* 45 (November 1, 1985): 754.
[182] Edwin Meese III, "The Reagan Resolve, by Those Who Knew Him," *Townhall*, February 6, 2012, http://townhall.com/columnists/edwinmeeseiii/2012/02/06/the_reagan_resolve_by_those_who_knew_him/page/full/.
[183] Edwin Meese III and Rostad Knut, "Editorial," *The Wall Street Journal* (New York, May 1, 1996), sec. A14.
[184] Ibid.
[185] Ibid., 756.

by PIECP legislation, shifting prison labor from coerced to voluntarily is the initial step towards the expansion of prison industries. Republicans such as Meese and Burger have thus recognized that if prison industries were to expand into the free market of interstate commerce, inmate laborers would need to be covered under the FLSA, and would therefore need to be working voluntarily to ensure that they avoid being judicially categorized as slaves.

On the other side of the debate over the expansion prison industries are Democrats and organized labor. Just as 19th century southern Democrats had been the most adamant proponents of the exception clause in the Thirteenth Amendment and thus penal slavery, contemporary Democrats remain opposed to the rationale behind PIECP, since it seeks to expand rather than reduce prison labor programs, by extending minimum wage coverage to prisoners. According to a 1997 study by Daniel Gallagher and Mary Edwards, "states with stronger unions…[and] democratic governors… will be less likely to allow PIE projects."[186] While Democrats support rights for organized labor, they remain opposed to the free market expansion of prison labor, since such an expansion threatens free market laborers. Democrats thus remain adamant that if prison labor is to exist in any form, it must remain outside of the free market realm. Contemporarily, the only means of ensuring that prison industries and penal labor do not compete with free market labor is by preserving the slave status of prison labor by maintaining restrictions on prison industry and denying FLSA coverage to inmates.

At the forefront of this Democratic opposition to the market expansion of prison labor is Democratic Senator Harry Reid, who in 1994 authored and proposed an

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[186] Daniel Gallagher and Mary Edwards, "Prison Industries and The Private Sector," *Atlantic Economic Journal* 25 (1997): 91.

amendment to the FLSA that sought to add prisoners to the list of laborers exempted from its legislative scope. Reid, following the *Hale I* decision, grew worried that prisoners were on the verge of gaining FLSA coverage, and thus hoped to provide a clear legislative answer to the question that the judiciary had been struggling with for over a century: the employment status of inmate laborers. Reid's unwavering opposition to FLSA coverage for inmates was not unique, but rather indicative of the Democratic Party's perspective on prison labor, as five of the bills seven cosponsors were Democratic Senators.[187] Reid, explaining the urgency for the amendment emphasized the pressing need "to exempt prisoners from coverage under the FLSA to make it clear to the courts that [prisoners] are not covered."[188] By exempting inmate laborers from FLSA coverage, Reid and similarly inclined Democrats sought to resist increased competition between free market and inmate laborers. Reid correctly feared that if the FLSA were to be extended to prisoners, it would ensure the increased market presence of prison industries.

Senator Strom Thurmond also advocated for the exemption of prisoners from FLSA coverage. Although Thurmond was a member of the Republican Party at the time, his views were strongly characterized by his political beginnings as a segregationist Democrat. Thurmond only switched to the Republican Party after the passage of the 1964 Civil Rights Act. Thurmond expressed his opposition to FLSA coverage for prisoners based on fiscal considerations: "If our state prison systems are required to apply the protections of the Fair labor Standards Act to its inmates, they would be forced to pay millions of additional dollars each year for inmate labor or not be able to

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[187] Harry Reid, *Implications of The Fair Labor Standards Act for Inmates, Correctional Institutions, Private Industry, and Labor* (Washington, D.C.: U.S. Government Printing Office, 1993), 3.
[188] Ibid.

employ them at all."[189] Thurmond's opinion on the economic viability of FLSA coverage for inmates is slightly odd in light of the fact that the penal system remains overwhelmingly in favor of the market expansion of prison industries. It seems more likely that Thurmond could not reconcile his conception of prisoners as involuntary servants of the State with their coverage under the FLSA. Reid and Thurmond's stringent opposition to labor rights for prisoners is ideologically consistent with the views held by southern Democrats in the Antebellum south, as evidenced by the party's role in authoring exception clause. Reid, Thurmond, and other ideologically aligned Democrats are opposed to FLSA coverage for prisoners as such coverage threatens organized labor by facilitating the economic expansion of prison industries. Implicitly, these Democrats demonstrate a preference for penal slavery over market competition between free and penal labor. Continuing the political trend of Democratic opposition to inmate labor rights, in 1995, Karen Thurman, a Democratic representative from Florida, proposed a bill in the House of Representatives that was nearly identical to the one proposed by Reid in the Senate one year earlier. Thurman's bill, H.R.868, like Reid's, sought to amend the FLSA to exempt inmates from coverage.[190] After Reid's bill failed to pass, he continued his leading role in the Democratic crusade against labor rights for prisoners, by cosponsoring an identical bill in 1996. The bill, S. 1943, was proposed by Democratic senator Bob Graham, and once again sought to add inmates to the list of laborers exempted from the FLSA.[191] The Democratic Party's steadfast

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[189] Strom Thurmond, *Implications of The Fair Labor Standards Act for Inmates, Correctional Institutions, Private Industry, and Labor* (Washington, D.C.: U.S. Government Printing Office, 1993), 2.
[190] Karen Thurman, *H.R.868- To Amend the Fair Labor Standards of 1938 to Provide an Exemption from That Act for Inmates of Penal or Other Institutions Who Participate in Certain Programs* (Washington, D.C.: Library of Congress, 1995), http://thomas.loc.gov/cgi-bin/bdquery/D?d104:3:./temp/~bd5qVN::.
[191] Bob Graham, *S. 1943*, 1996, http://www.gpo.gov/fdsys/pkg/BILLS-104s1943is/pdf/BILLS-104s1943is.pdf.

political motivation to exempt inmates from the FLSA demonstrates the party's uncritical acceptance of penal slavery. Democrats seem far more comfortable preserving the national system of penal slavery than with legislation that permits prison industries and inmate laborers to compete with free market laborers and associatively brings inmate laborers under the scope of the FLSA.

While organized labor shares the Democratic order's opposition to the expansion of prison industry, it generally advocates for minimum wage coverage for those prisoners who do work as a means of limiting the displacement of free laborers by prisons laborers as a product of wage differentials. Speaking out against Reid's 1994 amendment to the FLSA, Maria Echaveste, Wage and Hour Administrator for the U.S. Department Of Labor, explained the position of the AFL-CIO on prison industry and wages for inmate laborers:

> The American Federation of Labor and Congress of Industrial Organizations' (AFL-CIO) position is that prison labor programs should pay wages that are not less than the prevailing wages for similar work in the private sector to avoid unfair competition and displacing workers who are not imprisoned… [yet] The AFL-CIO opposes the sale of prison-made goods and services to the public.[192]

Organized labor thus aligned with Republicans insofar as it advocated minimum wage coverage for prisoners who were employed by private industry, although it avidly opposed the expansion of private sector partnerships with penal institutions for which Republicans so passionately advocated. As Ann F. Hoffman, legislative director of the Union of Needletrades, Industrial and Textile Employees, explained during a 1997 Congressional hearing on the expansion of FPI:

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[192] Maria Echaveste, *Implications of The Fair Labor Standards Act for Inmates, Correctional Institutions, Private Industry, and Labor* (Washington, D.C.: U.S. Government Printing Office, 1993), 23.

> UNITE shares the view of the AFL-CIO that training opportunities should be provided for prisoners to help in their rehabilitation and to reduce recidivism, but prisoners should never be used in competition with free labor or to replace free labor.[193]

Thus organized labor, like contemporary Democrats, expresses discomfort at the prospect of prison industry expansion, but unlike Democrats, concedes that if such expansion is inevitable, that minimum wage for inmate laborers must be included as a means of decreasing unfair competition between free market and penal labor.

Other prominent Republicans ranging from former Republican president George W. Bush to former Republican senator Phil Gramm have also embraced the economic expansion of prison industries and prison labor programs. In 1997, during Bush's tenure as governor of Texas, the L.A. Times reported that he had a "World Wide Web site that advertise[d] the state's inmate work programs, complete with pictures showing prisoners building new prisons."[194] At a 1995 NRA convention, Phil Gramm advocated for the extensive expansion of prison industries: "I want to turn every federal prison in this country into a mini industrial park."[195] This is the same Phil Gramm who wrote and helped pass a repeal of the Glass-Steagall Act, which had formerly separated Wall Street and commercial Banks. Time Magazine described Gramm in 2009, as "Washington's most prominent and outspoken champion of financial deregulation."[196] Gramm thus represents yet another contemporary Free Labor, free market ideologist who aspires to expand the economic scope of prison industries and thus prison labor.

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[193] Ann Hoffman, *Options to Improve and Expand Federal Prison Industries* (Washington, D.C.: U.S. Government Printing Office, 1997), 97.
[194] Graham, *S. 1943*.
[195] Donald F Sabo, Terry Allen Kupers, and Willie James London, *Prison Masculinities* (Philadelphia, PA: Temple University Press, 2001), 251.
[196] Gramm Fox, "Phil Gramm Says the Banking Crisis Is (Mostly) Not His Fault," *Time Magazine*, January 24, 2009, http://www.time.com/time/business/article/0,8599,1873833,00.html.

In 2006, Republican representative Peter Hoekstra proposed a bill, The Federal Prison Industries Competition in Contracting Act of 2006, which sought to abolish FPI's mandatory source clause (a legislative mandate that agencies of the Federal Government purchase products from FPI if they are offered at a competitive rate) and extend minimum wage coverage for inmate laborers working for FPI programs. The bill thus sought to bring FPI and by association, its inmate laborers into the free market. Accordingly, the bill required that inmates participate voluntarily. As a means of allowing FPI to adjust to increased inmate wages, the bill maintained that by 2013 inmate laborers be paid at least the federal minimum wage for their labor under FPI programs. The bill easily passed the House of Representatives but failed to pass the Senate.[197] Still, the bill represented yet another attempt by a contemporary Republican to expand the economic scope of prison industries.

The Federal Justice Department in the Reagan era also expressed views on penal labor very similar to those held by contemporary Republicans. In 1985, Reagan's Justice Department published "Work in American Prisons: Joint Ventures with the Private Sector," which essentially outlined the overarching national benefits of private sector partnerships with prison industries. The politics of the Justice Department were most evident in a section entitled "Everyone benefits," which highlights the importance of prison industrialization for the private sector, penitentiaries, wardens, prison guards, victims of crime, and even prisoners themselves.[198] Interestingly, Reagan had always favored liberalization of prisons and sought to shift the socioeconomic status of

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[197] Peter Hoekstra, *Federal Prison Industries Competition in Contracting Act of 2006*., 2005, http://www.govtrack.us/congress/bills/109/hr2965.
[198] U.S. Department of Justice – Office of Justice Programs - National Institute of Justice – "Work in American Prisons: Joint Ventures with the Private Sector". 1985. 12

prisoners from slaves of the State towards the level of citizenship maintained by free U.S. citizens. In 1968, as Governor of California, Reagan passed The Inmate Bill of Rights, "which guaranteed prisoners most rights enjoyed by free people, including the right to marry, to have conjugal visits… and to have unrestricted access to all forms of reading material."[199]

Contemporary Republican think tanks are at the forefront of the political battle to improve the economic productivity of penal labor as an alternative to the inactivity, lack of productivity, and general sloth inherent to penal slavery. In 1996, Morgan Reynolds, director for the criminal justice center of the National Center for Policy Analysis (NCPA), a conservative non-profit think-tank, emphasized the Republican insistence upon the need to "repeal state and federal limitations on inmate pay to allow more flexible market-determined prices for inmates' labor."[200] A publication issued by the NCPA aptly demonstrates the contemporary Republican critique of slavery. Reynolds, explaining the Republican view, maintained that:

> Work for prisoners, whether for private or public employers, does not have to be forced labor. Those who favor such work are not advocating a new form of slavery, involuntary servitude, an American gulag or any other such revolution. Nor is any reduction in prisoner rights and privileges involved. Rather, the denial of productive work can be considered physical, mental and moral abuse for healthy prisoners.[201]

Contemporary Republicans like Reynolds clearly do promote a new form of slavery, but are rather continuing their historical crusade against institutionalized slavery in the United States, by promoting the extension of productive market labor to the

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[199] Kevin Starr, *Coast of Dreams California on the Edge, 1990-2003* (New York: Vintage Books□: a division of Random House, 2006), 102, http://www.contentreserve.com/TitleInfo.asp?ID={3646DF0E-4667-4862-B913-E7567CB8B27F}&Format=410.
[200] One Hundred Fourth Congress, *Federal Prison Industries, Incorporated* (Washington, D.C.: U.S. Government Printing Office, 1996), 37.
[201] Morgan Reynolds, *Factories Behind Bars*, NCPA Policy Report (Dallas, Texas: National Center for Policy Analysis, September 1996), 23.

penitentiary. Reynolds and the NCPA are adamant about the abolition of forced labor, as Reynolds emphasizes that "statutes to facilitate work among prisoners should be drafted as permissive rather than mandatory labor." For Republicans like Reynolds, prisoners represent an untapped labor force that should be put to work as a means of expanding capital. As Reynolds lamented during a Congressional hearing in 1996: "If you get able-bodied adults off welfare and into jobs, it is widely viewed as progress and not a threat to the livelihood of others, and yet there is this enormous concern over…prisoners."[202] Those who critique the Republican politics concerning emancipation of prisoners from slavery, specifically Democrats, must be seen as maintaining a certain political apathy towards penal slavery through their general opposition to the expansion of penal labor programs.

Whereas Democrats are willing to sacrifice the expansion of penal labor as a means of keeping prison-made goods out of the free market, Republicans, as exemplified by Reynolds, are passionate about providing jobs for inmates through private sector partnerships: "If we are going to create gainful employment in prisons and find markets for prison-made products and do it on a mass scale, we need to heavily involve the private sector."[203] Republicans thus embrace competition between inmate and free market laborers, since according to their historical foundation in Free Labor ideology, all laborers produce value that expands capital, rendering counterproductive any notion of inherent antagonism between free and prison labor. Competition in the Republican view inherently promotes the expansion of capital. As Reynolds explains, "it is good to have fair competition for prison labor, so we can find the most productive use of it and have a

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[202] Morgan Reynolds, *Federal Prison Industries, Incorporated* (Washington, D.C.: U.S. Government Printing Office, 1996), 29.
[203] Ibid., 27.

level playing field"[204] Reynolds effectively articulates the relevance of this Free Labor vision to the status of inmate laborers: "newly created value is a social boon, not a curse, whether it is produced by prison labor or Free World labor."[205]

A more recently founded Republican coalition, the "Right on Crime," also exemplifies the contemporary Republican attitude towards penal slavery. The Right on Crime is a project of the Texas Public Policy Foundation, a conservative research institute that is grounded in the primary tenets of Free Labor ideology, including, " limited government, free markets…liberty and personal responsibility."[206] Coining itself "The Conservative Case for Reform," the "Right on Crime" approach is supported by Republicans such as former Governor of Florida Jeb Bush, 2012 presidential candidate Newt Gingrich, Ed Meese III, and former U.S. Secretary of Education William Bennett. In its statement of principles, the "Right on Crime" demonstrates its commitment to Free Labor ideals. Most elucidating in this regard is the project's position on the proper relationship between prisons, government, and freedom: "Criminal law should be reserved for conduct that is either blameworthy or threatens public safety, not wielded to grow government and undermine economic freedom." Furthermore, the project claims to promote "individual liberty, personal responsibility, [and] free enterprise," since the nation's "security, prosperity, and freedom depend on it."[207] Through an analysis of the ideals lauded by such Republicans, it becomes very clear just what vices they wish to combat inherent to institutionalized penal slavery: oppression, irresponsibility, and inefficiency.

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[204] Morgan Reynolds, *Options to Improve and Expand Federal Prison Industries* (Washington, D.C.: U.S. Government Printing Office, 1997), 70.
[205] Reynolds, *Federal Prison Industries, Incorporated*, 28.
[206] Right on Crime, *About*, n.d., http://www.rightoncrime.com/about/.
[207] http://www.rightoncrime.com/the-conservative-case-for-reform/statement-of-principles/

Consider the similarities between the *Right to Crime* project's critique of contemporary prisons, and the critique of slavery presented by William Eller Channing, a prominent Republican abolitionist in the antebellum United States: "The slave… stripped of self-respect, and having nothing to gain in life, how can he be expected to govern himself?"[208] For Channing, the oppression and hopelessness inherent to slavery rendered the slave incapable of the virtues of self-government: responsibility and a strong work ethic. As the NCPA makes clear, Republicans are astounded by the lack of productivity of prison labor in its slave form: "State and federal prison systems control a huge asset — convict labor — and largely waste its productive potential."[209] Contemporary Republicans, such as those who support the "Right on Crime" and the NCPA continue their party's historical opposition to slavery, although primarily through political motivations that seek promote the expansion of capital.

In 2012, a bill proposed by a Republican in the Alabama House of Representatives that sought to permit private sector partnerships with prison industries was met with fierce opposition from state democrats. Republican state representative Jim McClendon proposed the bill, which sought incorporate PIECP principle in Alabama state prisons. Accordingly the program "would be entirely voluntarily and inmates could not be forced to participate," and "inmates who volunteer for the program would earn minimum wage or more." Democrats characteristically expressed discomfort with the bill, as Democratic state Representative Demetrius Newton explained: "I just don't like using prisoners to do things that compete with the free market." According to a newspaper article covering the bill, "Newton said the bill was

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[208] Russell, *A Renegade History of the United States*, 62–63.
[209] Reynolds, *Factories Behind Bars.*

somewhat reminiscent of the days of prison mines and other forced prison labor," but the bill sought exactly the opposite ends: to free prisoners from forced labor through the expansion of voluntary programs.[210]

Newton's comments seem to be representative of the Democratic Party's contemporary stance on penal slavery. Since the party has historically been the primary political representatives of organized labor, Democrats maintain adamant opposition to the expansion of penal labor, as any such expansion has the potential to threaten free market labor. Thus, while the Democratic Party may not commend the system of penal slavery, it certainly remains apathetic to the last vestige of institutionalized slavery in the United States and even seeks legislative measures to exempt inmates from labor rights. According to the contemporary Democratic rationale, penal slavery represents a lesser evil than competition between free and inmate labor.

[210] Chandler, "Alabama House Members Debate over Bill to Allow Businesses to Hire Prison Inmates."

Conclusion

In 1865, the Confederate States of America, led politically by Southern States, were defeated in the American Civil War by Union forces led politically by Northern Republicans. Forced to concede the institution of slavery, these Southern Democrats, driven by Master-Slave ideology, were most influential in authoring a clause in the Thirteenth Amendment that preserved the legality of slavery in prisons. That clause still remains today. Contemporarily, the Democratic Party, seemingly far removed from its Confederate, slave-holding roots, seems to be apathetic to the existence the last vestige of legalized slavery in the United States. Having lost the plantation, the prison is the final space where the century-old political and ideological war over institutionalized slavery still rages.

The contemporary Republican discourse promoting labor rights for prisoners is certainly problematic. It seems clear that the primary goal for Republicans is not minimum wage rights for inmate laborers, but rather the expansion of prison industries into the free market. This is entirely consistent with the party's historical and contemporary politics promoting the expansion of capital and industry in the United States. In order for Republicans to advance the expansion of prison industry, they are legislatively required to include prison labor rights in any legislation that seeks such ends. This is because the primary rationale behind the FLSA was to outlaw substandard wages that would interfere with fair competition in interstate commerce. Accordingly, prisoners would not be allowed to enter the realm of interstate commerce without being guaranteed minimum wage coverage. Simply put, slaves cannot be involved in interstate commerce. Thus, contemporary Republicans make a political concession to the legislative logic behind the FLSA. If minimum wage rights for prisoners served to

expand capital and national industry, such rights had to be granted. Although the party was initially founded upon Free Labor principles of autonomy, liberty, and equality, it seems it has become completely subject to the demands of capital and business. Fitzhugh may have foreseen the political motivations behind contemporary Republican politics, when in the 19th century he argued that Free Labor ideology promoted: "slavery to Capital."[211] While Republicans currently critique penal slavery, such critiques are mostly motivated by the party's submission to the expansion of capital. Republicans who advocate for labor rights for prisoners ought not be seen as abolitionist, but rather as slaves to the whims of capital.

Just as Republicans must not be regarded as motivated by a moral urge to emancipate prisoners from penal slavery, Democrats should not be seen as explicitly motivated by a defense of slavery in prisons. The problematic point for the Democratic party's politics on the issue of penal slavery is the manner in which their allegiance to free market labor has blinded them from the urgency of protections for the country's must subjugated labor force. As we have seen, with the enactment of the FLSA, Democratic labor legislation is generally influenced by considerations of economic power-imbalance. The FLSA, in this vein, was enacted under the assumption that laborers in the 1930's were increasingly subjugated by their employers and needed State protections to alleviate the growing inequality between employee and employer. Thus, the act served to define labor as inherently weak, reinforced the image of the subjugated laborer, and ultimately bestowed protective rights upon the weak laborer. However, while the Democratic Party was responsible for the Thirteenth Amendment's exception

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[211] Fitzhugh and Rowan Helper, *Ante-Bellum: Writings of George Fitzhugh and Hinton Rowan Helper on Slavery*, 104.

clause, which preserved penal slavery, and thus encouraged the subjugation of the penal slave, contemporary Democrats have not embraced legislation that would protect laborers in prison. In fact, counter to the general political logic of the Democratic Party, contemporary Democrats have advocated for legislation that explicitly *exempts* prisons from protective legislation. In this regard, it seems that the Democratic Party has stayed true to Fitzhugh's 19th century maxim claiming the inherent superiority of "slavery to human Masters" as opposed to "slavery to Capital."[212] Since prisoners represent the final form of labor protected from subjugation to capital, it would seem that the contemporary Democratic Party prefers to maintain penal slavery rather than subject prisoners to the cruel master that is capital.

Regardless of the true political motivations behind the contemporary Republican Party's political attitude towards the emancipation of penal slaves, it still must be seen as continuing the Republican tradition, most principally set forth by Charles Sumner in the 19th century, of abolitionist politics. Whether such abolitionist politics are entirely motivated by capital almost seems beside the point. Republicans are the most politically active politicians pressing for the emancipation of penal slaves. As we have seen, Free Labor ideals, not moral opposition to slavery were the primary motivations behind the emancipation of slaves in the antebellum South. Perhaps it would be more romantic if morality rather than capital served as the basis for contemporary Republican politics promoting the emancipation of prison slaves. However, in my view, it is the politics and not the rationale behind them that is admirable. It is worth wondering, however, whether those politics would change if Republicans were legislatively permitted to promote the expansion of prison industries

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[212] Ibid.

without extending labor rights to prisoners. Or would they instead insist, as a matter of ideological principle divorced from the legislative context of the FLSA, that slaves could not participate in interstate commerce?

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