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Abraham Lincoln's Legacy to Wisconsin Law, Part 3:

The Free Labor Doctrine

Feb. 12, 2009, was the 200th anniversary of Abraham Lincoln's birth. Lincoln arguably did more than any other individual to shape America. He influenced and was influenced by powerful legal and political currents that continue to play a vital role in shaping American law, including the law of Wisconsin. This is the last in a three-article series that examines the legal connections between Lincoln and Wisconsin. The **first article** in this three-part series appeared in the December 2008 *Wisconsin Lawyer*. The **second article** appeared in the February 2009 issue.

*by **Joseph A. Ranney***

Many people believe that Abraham Lincoln opposed slavery and contributed to its abolition mainly on moral grounds. That belief is one of the main reasons why Lincoln is the most beloved American president, but it is not entirely accurate. Lincoln, like most Northerners, adhered to the *free labor doctrine*, which held that freedom was economically as well as morally superior to slavery.

The free labor doctrine was a cornerstone not only of the antislavery movement but also of Northern legal thought as a whole before the Civil War. After the war, the free labor doctrine proved unexpectedly hardy. It was reshaped with only minor modifications to fit the economic and cultural changes taking place in an expanding, increasingly industrialized America. Wisconsin promptly assimilated the free labor doctrine into its legal system at statehood, and the doctrine has continued to influence Wisconsin law to the present day.

Free Labor Before the Civil War

The free labor doctrine first arose in the early 19th century as the tension between North and South over slavery increased. Southern intellectuals, many of whom had previously viewed slavery as a necessary evil, now felt a need to defend it as a positive good. They argued that all humans were either masters or followers by nature, slavery therefore was part of the natural order, and efforts to break down barriers of race and class would only lead to dislocation and unhappiness for all. Opponents of slavery developed the free labor doctrine in response.[1]

Lincoln neatly summarized the tenets of the free labor doctrine in the only major speech he gave in Wisconsin. In the fall of 1859, Lincoln spoke at the Wisconsin State Fair in Milwaukee during a tour in preparation for his 1860 presidential bid. Lincoln criticized Southerners who "assume[ ] that labor is available only in connection with capital – that nobody labors, unless somebody else, owning capital … induces him to do it." "Having proceeded so far," he said, "they naturally conclude that all laborers are necessarily either hired laborers, or slaves. They further assume that whoever is once a hired laborer, is fatally fixed in that condition for life."

Lincoln disagreed. Capital, he explained to his audience, "is the fruit of labor, and could never have existed if labor had not first existed." Unlike the Southern system, free labor gave everyone regardless of background the chance to get ahead through hard work and self-improvement, "by the best cultivation of the physical world beneath and around us, and the intellectual and moral world within us."[2] Lincoln linked the economic component of the free labor doctrine to its idealistic component in other speeches. In 1858, shortly before his celebrated debates with Sen. Stephen Douglas, he argued to an Illinois audience that although "the negro is not our equal in color – perhaps not in many other respects, still, in the right to put into his mouth the bread that his own hands have earned, he is the equal of every other man, white or black."[3]

The free labor doctrine made its appearance in American law as part of legal instrumentalism, the philosophy that law should be shaped to favor entrepreneurialism and economic development over all other interests.[4] Wisconsin subscribed enthusiastically to both free labor and legal instrumentalism. For example, in territorial Wisconsin, disputes frequently arose between owners of water mills and upstream landowners whose lands were frequently flooded by the mill owners' dams. In 1840 the territorial legislature enacted a law that favored mill owners by limiting the damages that upstream landowners could collect for flooding caused by mill dams. In *Newcomb v. Smith* (1849), a closely divided Wisconsin Supreme Court upheld the mill-dam law over an objection that it impaired landowners' traditional right of absolute control over their own land. The court recognized that the law could be upheld only as an exercise of eminent domain, and that eminent domain would apply only if the court held that the mills

served a public purpose. The court did not hesitate to make that holding even though most Wisconsin mills were privately owned. “Why [should] the legislature not favor their construction, especially in a new country, among a scattered population and where capital is limited?” asked Judge Levi Hubbell, writing for the majority.[5]

Wisconsin extended free labor and instrumentalist principles to large enterprises as well as small ones. In 1848, as railroads began to appear in the state and preparations were made for statehood, Wisconsin’s founders inserted an “improvements clause” in the state’s new constitution, prohibiting state subsidies for railroads and other internal improvements. The founders inserted this clause because they did not want Wisconsin to go deeply into debt as other Midwestern states had done for rail projects that might or might not succeed.[6] But the supreme court recognized that Wisconsinites could not prosper without railroads and that railroads could not be built without local subsidies. Accordingly, in *Bushnell v. Beloit* (1859), the court construed the improvements clause narrowly, holding that it applied to state subsidies only and not to municipal subsidies. The court did so even though many Wisconsin municipalities had been ruined by subsidizing rail lines that became insolvent during the depression of 1857. Justice Orsamus Cole, who had been a member of the state constitutional convention, admitted frankly that if the convention had known of the problems municipal subsidies would cause, it probably would have expanded the improvements clause to prohibit such subsidies. However, said Cole, “the [railroads’] rights and interests vested on the faith of [municipal subsidies] are so important … [that] it seems rather late to raise the objection that this policy has been all wrong from the beginning.”[7]

The court continued to be solicitous of railroads during and after the Civil War. Many Wisconsinites had mortgaged their homes and farms to purchase railroad stock that later was rendered worthless by the 1857 depression, and the legislature repeatedly tried to protect these mortgagors from foreclosure. The supreme court held that mortgagors could not assert fraudulent promises by the railroads as a defense to liability because the railroads had sold most of the mortgages to Eastern and European financiers and the financiers were holders in due course.[8] The court also struck down laws intended to delay or thwart foreclosure proceedings. For example, the 1861 legislature enacted a law requiring testimony in foreclosure cases to be taken outside court and presented in writing to the trial court. The supreme court struck down the law, concluding that it went beyond a mere modification of legal remedies and unconstitutionally impaired creditors’ property rights.[9]

In 1871, the court finally imposed modest limits on municipal railroad subsidies by holding that direct subsidies would be allowed only for railroads directly controlled by government. (The court continued to allow indirect municipal subsidies, such as stock purchases, for all railroads.) Justice Byron Paine objected to even this modest restriction because he believed railroads were indispensable to further the free labor ideal of a prosperous, entrepreneurial working class. He noted that railroads “have added, vastly and almost immeasurably to the general business, the commercial prosperity and the pecuniary resources of the inhabitants of the cities, towns, villages and rural districts through which they pass.” “Railroads,” Paine lyricized, “are the most marvelous invention of modern times. … They take a train of inhabited palaces from the Atlantic coast, and with marvelous swiftness deposit it on the shores that are washed by the Pacific seas. … And yet, notwithstanding all these tremendous results, … we are now told that the public has not sufficient interest in the construction of a railroad to sustain an exercise of the taxing power!”[10]

Free Labor in the Industrial Age

In his 1859 Wisconsin speech, Abraham Lincoln argued that free labor promoted autonomy as well as prosperity. Most workers, he said, were “neither hirers or hired” but were farmers or small businessmen who worked for themselves and by so doing acquired a dignity unavailable to slaves.[11] But Lincoln also alluded to a darker side of the free labor doctrine. He noted that many of the doctrine’s adherents “say … [that if] any continue through life in the condition of the hired laborer, it is not the fault of the system, but because of either a dependent nature which prefers it, or improvidence, folly, or singular misfortune.” In other words, free labor advocates looked on wage labor with suspicion. In their view, wage labor should be only a step toward the goal of entrepreneurial labor. A lifetime of wage labor was neither desirable nor respectable.

This aspect of the free labor doctrine took center stage after the Civil War. Between 1865 and 1910, Wisconsin and much of the rest of the United States completed the transition from an agricultural economy, in which most business transactions were local, to a mixed economy increasingly dominated by large industries selling to national and international markets. Such industries required large numbers of wage workers and thus reduced the number of Wisconsinites who followed the free labor ideal by operating their own farms or shops. The imbalance of economic power between large employers and workers became increasingly obvious, and after 1870 the union movement rose to prominence as workers tried to redress the imbalance through collective action.[12] The trend toward wage labor and collective action conflicted with the free labor ideal of worker dignity through autonomy. Because free labor adherents viewed wage labor with suspicion, they believed that workers and employers could and should negotiate terms of employment individually, without collective action and without government interference. The tension between traditional free labor views and industrial realities shaped much of Wisconsin’s legal history in the late 19th century and continues to influence Wisconsin law to this day.

The “Bay View Riots” of 1886 provided a striking illustration of this tension. In May of that year, thousands of Milwaukee workers paraded in support of a national movement for an eight-hour work day. The demonstrations turned into an impromptu strike that reached a climax when state militia, who had been called out to preserve order, fired on strikers at a plant in the Bay View section of the city, killing five of them. The killings triggered a heated debate over the proper balance of power between management and labor. When the legislature met the following winter, Gov. Jeremiah Rusk, a firm free labor advocate, urged it to discourage collective action and preserve free labor principles. “The great majority of our people,” said Rusk, “employ themselves [and] plan for themselves. … Among them there are no strikes or riots. … Everyone’s right to work for himself, or for anyone else, on such terms as he may choose to make, must be maintained at all hazards. He who interferes with this principle, tramples upon the most sacred of human rights and upon a consecrated principle of American liberty.”[13]

The legislature took a more modern view than did Gov. Rusk. Shortly after Rusk's speech the legislature passed an anti-combination law as a check on both business and labor,[14] and in subsequent years it provided modest assistance to unions. In 1893 the legislature exempted unions from state antitrust laws[15] and in 1895 and 1899 it passed laws outlawing *yellow-dog contracts*, employment contracts that prohibited workers from joining unions. The legislature also prohibited firings based on union membership.[16]

Wisconsin judges, including a new generation of jurists who had come to adulthood after the Civil War, at first resisted any move away from free labor principles. In *State ex rel. Zillmer v. Kreutzberg* (1902), decided at the dawn of the Progressive era, the supreme court struck down the 1899 yellow-dog law. Justice Joshua E. Dodge criticized "the present … unexampled popular … belief in the widest scope of governmental activity and interference with the individual." He held that the yellow-dog law "invade[d] the liberty of the employer in an extreme degree, and in a respect entitled to be held sacred."[17] In 1904, Judge Aad Vinje of Superior (who later succeeded Dodge on the supreme court) argued that labor laws and other recent reform laws "have attempted to destroy not only the evils incident to the new industrial order but the very order itself."[18]

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In addition a new legal doctrine, known loosely as *substantive due process*, arose in the late 19th century. The core principle of substantive due process was that any law "which imposed any kind of limitation upon the right of private property or free contract immediately raised the question of due process of law." This principle in turn was grounded on the belief that government was not a source of freedom; instead, "liberty was freedom *from* governmental interference." Substantive due process was closely related to the free labor doctrine. Both doctrines prized individual autonomy above all else: To the extent that reform laws interfered with such autonomy, they were constitutionally suspect.[19]

Justice Dodge and Judge Vinje correctly recognized that opposition to traditional free labor principles was growing, although it would be some time before such opposition was fully reflected in Wisconsin law. Between 1901 and 1911, Gov. Robert LaFollette and his fellow Progressives led Wisconsin into the modern regulatory era by reforming the state's electoral process, civil service, tax and public utility laws, and workplace safety rules and other areas of Wisconsin law.[20] Wisconsin's reforms attracted national attention and praise, but at home there was great concern that the Wisconsin Supreme Court would follow the lead of federal courts and use substantive due process to strike down many of the reforms.

In the end the Wisconsin Supreme Court applied substantive due process only sparingly, due largely to the efforts of Chief Justice John Winslow. Winslow, who considered himself a "constructive conservative," made it his task to explain reformers and free labor advocates to each other. Winslow cautioned Progressives that judges are necessarily conservative because they "are sworn to protect and support both the federal and state constitutions as they are, not as they would like to see them."[21] But he also argued to conservatives that "as individual life has more and more given place to crowded community life, the rights and privileges once deemed essential to the perfect liberty of the individual are often found to stand in the way of the public welfare, and to breed wrong and injustice in the community at large."[22] In other words, the free labor doctrine had to be adapted to the times or risk being repudiated completely. In a series of decisions upholding major Progressive reforms, Winslow persuaded most of his colleagues to interpret constitutional rights flexibly to take account of recent social changes. To interpret federal and state constitutions with "an eighteenth century mind in the light of eighteenth century conditions and ideals," he said, "were to command the race to halt in its progress."[23]

This was anathema to Roujet Marshall, the court's leading conservative and Winslow's chief intellectual rival. Marshall, who had ascended from modest origins to the heights of the court largely through sheer hard work, was a devout believer in the virtues of free labor, and he viewed any erosion of the doctrine as a threat not just to constitutional order but to the very fabric of American society. If the courts did not keep regulatory reform within the bounds of reason, Marshall argued, then "liberty and the pursuit of happiness, the incentive to industry, to the acquirement and enjoyment of property, – those things commonly supposed to make a nation intelligent, progressive, prosperous, and great, – would be largely impaired and in some cases destroyed."[24]

Marshall prevailed against Winslow in a few cases but ultimately he lost the ideological war. Winslow, who had been in the majority in *Zillmer* at the beginning of the Progressive era, tacitly repudiated the decision at the end of the era and conceded that "it is quite probable that few working men appreciated the anxiety shown by the courts in [labor] decisions to prevent the restriction of their liberty to make contracts."[25] By 1931, the free labor doctrine appeared to be in eclipse. In that year the legislature enacted the state's first comprehensive labor code and offered a requiem for the free labor doctrine in the area of labor relations. "[T]he individual unorganized worker," said the legislature, "is helpless to exercise individual liberty of contract and to protect his freedom of labor … [t]herefore it is necessary that [he] have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."[26]

But pronouncements of the free labor doctrine's demise turned out to be unfounded. The civil rights and women's rights revolutions of the 1960s and 1970s, together with Wisconsin's shift after 1980 from an industrial economy to one based heavily on service industries and high technology, caused unions and many other forms of collective activity to decline. Such forces also led to a dramatic change in American concepts of liberty. Most citizens came to see liberty in terms of freedom of self-expression and freedom to develop one's own personality, rather than freedom to act collectively to achieve social and economic

goals.[27] In recent decades Wisconsin courts have reflected this trend by upholding freedom of individual expression and choice against challenges based on more communitarian constitutional views. For example, they have overturned the state's World War I-era flag desecration law and university campus-conduct codes as violative of free speech rights.[28] They also have upheld the Milwaukee school choice program and the right of Amish parents to remove their children from school at the time their religion requires rather than at the statutory minimum age for leaving schools, thus favoring the rights of parents to educate their children as they see fit over the state's interest in providing a common education to all students.[29]

The late-20th-century return to celebration of individual autonomy surely would be applauded by most of the original proponents of the free labor doctrine. It is not certain, however, that Abraham Lincoln would be quite so enthusiastic. Lincoln presided over the Union war effort, which at the time was the greatest collective effort in American history. By so doing, he gained a unique appreciation of the limitations of individual effort. And one of Lincoln's hallmarks of greatness was his steadfast determination to keep his mind open to change. For example, in his 1858 speech quoted earlier in this article, Lincoln agreed that American blacks were not the equal of whites "in color" but he would only say that blacks were "*perhaps* [not equal] in many other respects" – a doubt that very few Americans harbored at the time – and he strongly affirmed that "in the right to put into his mouth the bread that his own hands have earned, [every man] is the equal of every other man, white or black."[30]

Likewise, in his Wisconsin speech Lincoln spoke favorably of the free labor doctrine, but he carefully refrained from committing himself irrevocably to the doctrine in its mid-19th-century form. Given Lincoln's sympathy for the right of workers to "put into [their] mouth[s] the bread that [their] own hands have earned," he might well have supported organized labor's cause and changes in the free labor doctrine if he had lived after the Civil War. Surely, Lincoln would be pleased that the free labor doctrine has been constantly tested by worthy opponents like Chief Justice Winslow and has been adapted to the great changes in American life since Lincoln's time.

Endnotes

[1]*See generally* Eric S. Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (1971).

[2]Library of America, *Lincoln: Speeches and Writings 1859-1865*, at 96-97 (1989) (address to Wisconsin State Agricultural Society, Sept. 30, 1859).

[3]Library of America, *Lincoln: Speeches and Writings 1832-1858,* at 478 (1989) (speech at Springfield, Ill., July 17, 1858).

[4]*See* J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* 10-11, 18-20 (1956); Morton J. Horwitz, *The Transformation of American Law 1780-1860*, at vii (1977).

[5]Wis. Territorial Laws of 1839 at 65; 2 Pin. 131, 138 (Wis. 1849).

[6]Wis. Const. (1848) Art. VIII, § 10; Milo M. Quaife, ed., *The Convention of 1846,* at 419-20, 581-82 (1919).

[7]10 Wis. 195, 220, 224 (1859).

[8]Laws of 1858, ch. 49; *Cornell v. Hichens*, 11 Wis. 353 (1860).

[9]Laws of 1861, ch. 88; *Oatman v. Bond*, 15 Wis. 20, 31 (1862).

[10]*Whiting v. Sheboygan & Fond du Lac R. Co.*, 25 Wis. 167, 216, 219-20 (1870) (Paine, J., dissenting).

[11]*Lincoln: Speeches and Writings 1859-1865*, *supra* note 2, at 96-97.

[12]*See* Robert W. Ozanne, *The Labor Movement in Wisconsin: A History* 3-6 (1984).

[13]1887 Wis. Assem. J. 15-16 (Jan. 13, 1887).

[14]Laws of 1887, ch. 349; see Joseph A. Ranney, *Trusting Nothing to Providence: A History of Wisconsin's Legal System* 393-94 (1999).

[15]Laws of 1893, ch. 163.

[16]Laws of 1895, ch. 240; Laws of 1899, ch. 332.

[17]114 Wis. 530, 546, 90 N.W. 1098 (1902).

[18]Aad J. Vinje, "The Legal Aspect of Industrial Consolidations" (Feb. 16, 1904), in *Reports of the Proceedings of the Meetings of the State Bar Ass'n of Wisconsin, 1904-05,* at 167, 171 (1906).

[19]*Id*. at 359-64; Alfred H. Kelly & Winfred A. Harbison, *The American Constitution: Its Origins and Development* 525-26 (4th ed. 1970); Owen M. Fiss, *History of the Supreme Court of the United States*, *Vol. 8: Troubled Beginnings of the Modern State, 1888-1910*, at 178 (1993).

[20]Ranney, *supra* note 14, at 259-390.

[21]John B. Winslow, "The Patriot and the Courts," at 9 (address to Loyal Legion of Milwaukee, Feb. 3, 1909), in Winslow Papers, Wisconsin Historical Society.

[22]*Id*.

[23]*Borgnis v. Falk Co.*, 147 Wis. 327, 349, 133 N.W. 209 (1911).

[24]*State v. Redmon*, 134 Wis. 89, 109, 114 N.W. 137 (1907).

[25]Ranney, *supra* note 14, at 373; John B. Winslow, "Some Tendencies of Modern Legislation and Judicial Decision," at 26-27 (lecture notes, May 3, 1916), in Winslow Papers, Wisconsin Historical Society.

[26]Laws of 1931, ch. 376, § 1.

[27]Lawrence M. Friedman, *Crime and Punishment in American History* 12-13 (1993); Lawrence M. Friedman, *The Republic of Choice: Law, Authority and Culture* 2-3, 29-35 (1990).

[28]*Janssen v. State*, 219 Wis. 2d 362, 580 N.W.2d 260 (1998) (discussing flag desecration as protected political speech); *UWM Post Inc. v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991) (university codes limiting speech).

[29]*State v. Yoder,* 49 Wis. 2d 430, 182 N.W.2d 537 (1971), *aff'd,* 406 U.S 205 (1972); *Davis v. Grover*, 166 Wis. 2d 501, 480 N.W.2d 460 (1992); *State ex rel. Thompson v. Jackson*, 218 Wis. 2d 835, 578 N.W.2d 602 (1998).

[30]*See supra* note 3 and accompanying text.