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# The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination

John M. Bickers\*

## I. INTRODUCTION

*We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."*<sup>1</sup>

These words of the late Chief Justice William Rehnquist, seemingly beyond argument, nonetheless announced another pivotal change in the understanding of the Constitution. Although the stakes in *United States v. Lopez* were seemingly minor – a sentence to six months of confinement for the possession of a .38 caliber handgun and five bullets by a high school senior<sup>2</sup> – the constitutional change wrought by the Court's opinion was dramatic. The 1995 case signaled the end of one of the longer

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1. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

2. *Id.* at 551-52.

trends in American judicial history, a deference to Congress that had begun in 1937.<sup>3</sup> A decade later, as the Rehnquist Court ended, it was clear that one of the primary features of that Court was the revival of a more activist role in assessing the powers of Congress.<sup>4</sup>

At one level, there is nothing at all controversial about the Chief Justice's assertion of first principles. The observation of James Madison he quoted may represent the single most settled doctrine in the annals of United States Constitutional Law. Agreement is virtually complete that the government of the United States is a federal one, that it exercises only limited powers. The characterization of a particular power as belonging to Washington or the States, however, has been anything but settled. Prodigious amounts of ink have been spilt trying to sort out what the proper boundaries of the federal system are, and what institutions are responsible for policing those borders. All sides in this perpetual debate in our nation's history concede that power has ebbed and flowed between the federal government and

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3. See *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

4. Not all commentators agree, of course. See, e.g., MARK TUSHNET, *A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW* 252 (2005) ("From 1937 to the Rehnquist Court federalism meant nothing as a restriction on Congress's power. The Rehnquist Court's federalism revolution consisted of replacing that zero with something more than zero. But not much more."). It remains true, however, that the Court in *Lopez* applied scrutiny to an action by Congress under the Commerce Clause, which was far stricter than any that had been applied since the New Deal. The revolution that was to follow has admittedly taken place only sporadically. The Court did strike down the Violence Against Women Act, see *United States v. Morrison*, 529 U.S. 598 (2000), but it found that Congress had the authority to enact the Family and Medical Leave Act (FMLA), *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), and the Americans with Disabilities Act, *Tennessee v. Lane*, 541 U.S. 509 (2004). Although the relevant power of Congress in the latter two cases was the enforcement power of the fifth section of the Fourteenth Amendment, it is worth noting that even one of the dissenters in those cases noted that the FMLA was "likely a valid exercise of Congress' power under the Commerce Clause." See *Hibbs*, 538 U.S. at 759 (Kennedy, J., dissenting). More recently, the Court found that the power of States to permit medicinal use of marijuana was preempted by the Controlled Substances Act, finding that Congress might even regulate an item that was not itself in commerce pursuant to a regulatory scheme. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005).

state capitals, but disagree about whether such shifts have been right.

Indeed, something of a canonical history has grown up about these shifts between central and state power. Every American law student learns the story of the limitations stressed by Publius in the effort to have the Constitution ratified,<sup>5</sup> and of the expansive reading given the powers of Congress by the Great Chief Justice, John Marshall, in cases like *Gibbons v. Ogden*<sup>6</sup> and *McCulloch v. Maryland*.<sup>7</sup> Typical analysis of the Constitution then skips ahead to the end of the nineteenth century, when the Supreme Court was devoted to a doctrine of laissez-faire economics. That activist Court batted down attempts by Congress,<sup>8</sup> and even by state legislatures,<sup>9</sup> to regulate the American economy. The traditional story then tells of the Court's reversal: the decision – whether as part of an intentional constitutional revision in response to popular demand,<sup>10</sup> or a

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5. Publius, of course, was the nom de plume of Alexander Hamilton, John Jay, and James Madison, whose editorials seeking New York's ratification of the Constitution were collected as THE FEDERALIST PAPERS.

6. 22 U.S. 1 (1824). In finding Congress's power to regulate commerce among the states extended even to waterways within states, such as the Hudson River, Marshall in one stroke transformed the interstate commerce clause into a potential source of real power.

7. 17 U.S. 316 (1819). Marshall's famous decision that federal instrumentalities were immune from state taxation provided some slight breathing room for the National Bank; although it would die at the hands of President Jackson, this decision, too, would become extraordinarily significant due in large part to the Chief Justice's phrasing of the proper test for evaluating a federal power: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 420.

8. *Hammer v. Dagenhart*, 247 U.S. 251 (1918). Ignoring the methodology of *McCulloch*, the Court in that case struck down congressional limitation of the transport in interstate commerce of goods made with child labor. In responding to the argument that elimination of congressional regulation of this kind would today be called a race to the bottom, the Court pronounced that "there is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition." *Id.* at 273. This was particularly ironic, considering that the Court had sharply cut back on state regulatory power, see *infra* note 9.

9. *Lochner v. New York*, 198 U.S. 45 (1905). Here, the right of bakers to work more than sixty hours a week was held to be "part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Id.* at 53.

10. See 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 333-42

thoughtful development of doctrine<sup>11</sup> – to reverse those cases and recognize a very broad power of Congress to regulate interstate commerce.<sup>12</sup> This newly discovered – or rediscovered – deference to Congress led to perhaps the tale's most astounding chapter. For in the 1960's, Congress passed a series of civil rights laws, based in part on the Commerce Clause. The Court accepted this interpretation of federal power,<sup>13</sup> a power that now seemed unchecked, and was, perhaps, uncheckable.<sup>14</sup> That deference may have ended in 1995, although it is probably still too early to tell.

This canonical story of ebbing and waning power of the federal government is, though, incomplete. The emphasis in this telling is on the courts, especially the Supreme Court. This is an understandable focus of lawyers in common law systems, trained since Bracton to find the law in the pronouncements of the judiciary.<sup>15</sup> But it does not fairly capture the intricacies of our system: if the acts of Congress and the actions of the Executive are taken seriously only when they make their way onto the crowded and limited docket of the Supreme Court, our constitutional system will never be truly understood.<sup>16</sup>

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(1998).

11. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998).

12. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Darby*, 312 U.S. 100 (1941).

13. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

14. Indeed, by the mid-1980s, one constitutional scholar could theorize that "federalism" has all but ceased to be a meaningful word-concept in the vocabulary of American jurisprudence." MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 319 (1986). As late as 1990, a textbook referred to the commerce power as making "federal regulation possible in virtually every conceivable circumstance." MALCOLM M. FEELEY & SAMUEL KRISLOV, *CONSTITUTIONAL LAW* 178 (2d ed. 1990).

15. "By the time of the treatise called 'Bracton' (c. 1220-50), the influence of judicial decisions is apparent on the face of the text. The author of the preface expressly stated that he had written in order to prevent the newer generation of judges from unwittingly leaving the right course settled by their wise predecessors." J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 171 (2d ed. 1979). Professor Baker used the name Bracton for the treatise rather than its author in deference to the modern scholarship that suggests Henry de Bracton merely amended, rather than authoring it. See *id.* at 161.

16. This idea, which is today unorthodox in many American law schools,

As a mild tonic against this focus on courts only, this Article proposes to examine our federal Constitution by considering the example of one of the odder entities in American legal history: the Bureau of Refugees, Freedmen, and Abandoned Lands. This agency, more commonly called the Freedmen's Bureau, existed from the late days of the Civil War through the end of Reconstruction. It did extraordinary, unprecedented things. It spent all of its days in turmoil, beset by enemies on many sides.<sup>17</sup> It is now, unfortunately, largely forgotten.<sup>18</sup>

The Freedmen's Bureau, like the rest of Reconstruction, was subjected to a withering historical criticism in the late years of the nineteenth century and much of the twentieth.<sup>19</sup> More recent historians have reevaluated the period, puncturing the stereotypes of the Carpetbagger and the Scalawag that have dominated mainstream thinking for too long.<sup>20</sup> The Freedmen's Bureau has not been exempt from this review: although recent historians have been rightly unwilling to mask its flaws and limitations, they have embraced a more even-handed review of its legitimate achievements in attempting to accomplish a very difficult mission.<sup>21</sup>

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has probably counted among its adherents Thomas Jefferson, Andrew Jackson, and Abraham Lincoln.

17. ROBERT J. KACZOROWSKI, *THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876*, at 22-23 (2005).

18. The Bureau has recently received the benefit of more serious scholarship, due to a long-overdue bit of legislation. This recent statute is designed to preserve the records of its work, records of vital importance to genealogical studies of the African-American community as well as social historians of this pivotal period. See *Freedmen's Bureau Records Preservation Act of 2000*, Pub. L. No. 106-444, 114 Stat. 1929 (2000).

19. The classic texts include such works as PAUL SKEELS PEIRCE, *THE FREEDMEN'S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* (Scholarly Press 1970) (1904) and GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN'S BUREAU* (1955) [hereinafter BENTLEY]. Although such works are not as consistently critical of the Bureau as some histories of other aspects of Reconstruction, they assume it to have done at least as much evil as good. Bentley, for example, concludes that the Bureau "sought too much for the Negro too soon" and thus "fed the flame of race hostility." BENTLEY, at 214.

20. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877* (1988); RICHARD NELSON CURRENT, *THOSE TERRIBLE CARPETBAGGERS* (1988); GEORGE C. RABLE, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* (1984).

21. E.g., *THE FREEDMEN'S BUREAU AND RECONSTRUCTION*:

Less frequently investigated has been the struggle that occurred over the founding of the Bureau. It is unsurprising that this new federal agency, given a broad mandate to remedy some of the evils of slavery, aroused opposition among border state politicians, former slave owners, and other defenders of the status quo. More surprising are the concerns raised even by some of its supporters in Congress, concerns over not only the practical nature of its operation but, importantly, the constitutional bases on which it rested.

Such concerns were inevitable considering the nature of the Freedmen's Bureau. Put simply, the Bureau was designed to operate in a wholly new frontier of American law. For the first time, the federal government would operate directly in the personal lives of a large body of citizens: it would review private contracts, settle labor and property disputes, operate schools, and even serve as a licenser of marriages. These activities were virtually, if not entirely, unknown before – and some of them since – within what the Framers had called the general government.

This Article will examine the arguments in Congress over that extension of federal power. It will review the arguments of opponents and supporters as to the appropriateness of the Bureau within the framework of the constitutional system. It will attempt to derive some constitutional principles from that debate which may be of value for the future as we continue our endless dialogue about the nature of the federal system.

One caveat must be noted before beginning a brief survey of the history of the Bureau. This Article will deliberately avoid a cynical approach to the operation of the political branches of government. It might be said of the Freedmen's Bureau – and indeed, it was sometimes said during the debates – that the acts of the Reconstruction-era Congresses represented no constitutional thinking at all. The Radical Republicans had a sufficient numerical majority not only to enact legislation but also to brush aside presidential vetoes. Their work may have been an exercise of raw political power rather than principled constitutional interpretation.<sup>22</sup>

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RECONSIDERATIONS (Paul A. Cimbala & Randall M. Miller eds., 1999) [hereinafter RECONSIDERATIONS].

22. Indeed, some Radical Republicans made this argument themselves.

Yet it is possible to take seriously the actions of the Republicans. All had sworn an oath to the Constitution, and it is not unreasonable to take historical figures at their word in such matters, at least until evidence shows otherwise. During the debates, they consistently declared a real interest in and devotion to the Constitution. Indeed, at least one Republican soon to be elected to the House of Representatives spent much time in 1860 re-reading *The Federalist Papers*, as well as the thoughts of Edmund Burke on the nature of revolution.<sup>23</sup> As will be seen, the Republicans made arguments for the Bureau both on constitutional and policy grounds. As they appeared to take their duties seriously, so we should take their actions seriously.

## II. THE NEED FOR A FREEDMEN'S BUREAU

### A. "Contrabands"

In some ways, it was the actions of the South that made the Civil War a contest over slavery. From the secession of South Carolina upon the election of the "Black Republican" Abraham Lincoln through the Confederate pronouncements about the terrible fate awaiting Union soldiers who fought with black troops,<sup>24</sup> the paranoia about slavery among the masters helped

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Consider, for example, the remarks as that of Thaddeus Stevens concerning the admission of West Virginia:

[W]e may admit West Virginia as a new state, not by virtue of any provision of the Constitution, but under an absolute power which the laws of war give us. I shall vote for this bill upon that theory; for I will not stultify myself by supposing that we have any warrant in the Constitution for this proceeding.

*A Traitor Congress and a Traitor President*, 2 THE OLD GUARD, Jan. 1863, at 13, available at [http://cdl.library.cornell.edu/moa/moa\\_browse.html](http://cdl.library.cornell.edu/moa/moa_browse.html) (original emphasis removed). Such comments are not typical of the majority of the Republicans, who seemed to have been more solemn about the Constitution.

23. MARTIN RIDGE, IGNATIUS DONNELLY: THE PORTRAIT OF A POLITICIAN 48 (1963).

24. In his engaging description of his travels through the Confederacy, Lieutenant Colonel Arthur Fremantle of the Coldstream Guards reported this chilling anecdote: "News arrived this evening of the capture of Helena by the Confederates, and of the hanging of a Negro regiment with forty Yankee officers. Every one expressed sorrow for the blacks, but applauded the destruction of their officers." ARTHUR JAMES LYON FREMANTLE, THE FREMANTLE DIARY 116 (Walter Lord ed., 1954) (1863). Fremantle discovered later that the mass execution had not, in fact, occurred. *Id.*



convince their slaves that the war was one for freedom. It is unsurprising, then, that from early in the war escaping slaves ran to the Union Army as a deliverer.<sup>25</sup>

Desperate to keep the United States intact and especially to maintain the allegiance of the Border States, President Lincoln's military devised a series of reactions that was both confused and counterproductive. In the early days of the war, fiercely Republican Union General John C. Fremont summarily emancipated every slave of a Confederate in Missouri, a policy so far ahead of the White House that Lincoln encouraged him to rescind it.<sup>26</sup> The subsequent official policy of noninterference with slavery was itself resented by many commanders. Oliver O. Howard, who was to rise to Corps Command and later become the Commissioner of the Freedmen's Bureau, described a scene in 1861 in occupied Virginia when a slave made her way to his brigade headquarters.<sup>27</sup> When her owner arrived shortly thereafter, he bitterly agreed to return the woman and her child to her mistress, but refused to provide an army escort, which meant that the slave immediately re-escaped.<sup>28</sup>

It was General Benjamin Butler, a decidedly unorthodox political general from Massachusetts, who ultimately provided the resolution of the status of escaped slaves. Although neither an early advocate of abolition nor a particularly able military officer, Butler's legal analysis proved irresistible. It was he who, accepting the South's definition of slaves as property, argued that any property used by the enemy in perpetuation of the war could legitimately be seized by a belligerent as "contraband of war."<sup>29</sup> His refusal to return slaves to slave owners was thus simultaneously radical and conservative. This characterization was wholly unsurprising as applied to horses or guns; that it had never been used by the American military to refer to humans did not detract from its apt fit with the problem at hand. As more and

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25. FONER, *supra* note 20, at 3.

26. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 352-53 (1988).

27. 2 OLIVER O. HOWARD, *AUTOBIOGRAPHY OF OLIVER OTIS HOWARD* 165-66 (1907).

28. *Id.*

29. HERMAN HATTAWAY AND ARCHER JONES, *HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR* 34 (1983).

more of these "contrabands" flocked to Butler's command at Fortress Monroe, Virginia, other commanders began to imitate the Butler experiment.<sup>30</sup>

### B. *Emancipation*

During the war, the President's ideas about slavery evolved from his attempted noninterference of his First Inaugural Address in 1861,<sup>31</sup> to his sweeping condemnation of it in his Second Inaugural Address in the month before his death.<sup>32</sup> But in 1862 his decision to order a presidential emancipation was far less a moral decision than one designed to weaken the Confederacy militarily and cripple it diplomatically. When, after the battle of Antietam, he proclaimed that anyone enslaved in territory still in rebellion on January 1, 1863, would be "forever free,"<sup>33</sup> he asserted a constitutional power hitherto unseen in American history.<sup>34</sup>

After the proclamation, the stream of escaping slaves coming to the army became a flood. General Sherman, on his march through Georgia, described black men and women fleeing to him and mixing his name up with those of Moses and the president.<sup>35</sup> Sherman's problem in dealing with this wave of humanity colliding with his army was repeated in other theaters with other commanders: what was to be done with the "contrabands"? General Butler's classification had perfectly resolved the issue created by a few able-bodied escaped slaves; it was entirely inadequate for the "human cloud that clung like remorse on the

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30. FONER, *supra* note 20, at 5.

31. "I have no purpose, directly or indirectly, to interfere with the institution of slavery in the States where it exists. I believe I have no lawful right to do so, and I have no inclination to do so." THE PORTABLE ABRAHAM LINCOLN 195 (Andrew Delbanco ed., 1992).

32. If we shall suppose that American Slavery is one of those offences which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offence came, shall we discern therein any departure from those divine attributes which the believers in a Living God always ascribe to Him?

*Id.* at 321.

33. *Id.* at 271; 1 SHELBY FOOTE, THE CIVIL WAR: A NARRATIVE 704 (1958).

34. CONG. GLOBE, 39th Cong., 1st Sess. 2723 (1866).

35. FONER, *supra* note 20, at 70.

rear of those swift columns.”<sup>36</sup>

### III. EARLY IDEAS

In the absence of a clear political answer to that question, regional military authorities became laboratories of different ideas about how to solve the crises of homeless and hungry refugees who began to clog their supply lines. The officers involved varied in both their ability and their political viewpoints; it is unsurprising, then, that their solutions represented a wide range of possibilities. Further complicating the issue, the Treasury Department was also involved, as Congress had given that department ultimate responsibility for abandoned lands that had fallen into the custody of the Army.<sup>37</sup>

The coastal islands off the coast of the Carolinas became an early and odd exemplar of possibilities for the future. The combined efforts of the United States Navy and a small Army force led by General Thomas W. Sherman liberated the islands from Confederate control in 1861.<sup>38</sup> By the time the Army took control, the white plantation owners had completely fled.<sup>39</sup> Into this “Port Royal experiment” came the Treasury agents now responsible for the land, Army officers responsible for law and order, and abolitionists and educators sent by benevolent associations of the North to help order a new and slavery-free society.<sup>40</sup> Government representatives paid for the work of the former slaves and began teaching self-government.<sup>41</sup> The Sea Islands experience was undoubtedly paternalistic, but was genuinely directed at improvement of the condition of the freedmen, and their integration into meaningful citizenship.<sup>42</sup>

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36. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* 48 (Bedford Books 1997) (1903).

37. CONG. GLOBE, 38th Cong., 1st Sess. 2799 (1864) (statement of Sen. Sumner). This arrangement may have been based on a personal relationship: Sumner’s greatest friend in the Administration was Treasury Secretary Salmon P. Chase, who he had once called “a tower of strength,” for his work in the anti-slavery movement. See DORIS KEARNS GOODWIN, *TEAM OF RIVALS* 146 (2005).

38. BENTLEY, *supra* note 19, at 5.

39. *Id.* at 6.

40. *Id.* at 12.

41. *Id.* at 10.

42. *Id.*; FONER, *supra* note 20, at 51-54.

Arguably even more responsive to the future of the freedmen was the "negro paradise" of Davis Bend.<sup>43</sup> This area of Mississippi River property was built on the landholdings of Jefferson Davis and his family.<sup>44</sup> General U.S. Grant ordered the Confederate President's land set aside for the sole settlement of freedmen.<sup>45</sup> Under the supervision of his Chaplain, John Eaton, freedmen's councils were organized and empowered to decide local issues.<sup>46</sup> More committed to *laissez faire* than the Port Royal Experiment, the lack of paternalism in Mississippi showed both a trust that the freedmen could stand on their own feet, and a desire to be rid quickly of the duties inherent in reconstruction of the slave states.<sup>47</sup>

Yet a third model appeared in Louisiana upriver of New Orleans. Under the command first of Benjamin Butler, and later of Nathaniel Banks, a troubling replication of slavery began to take shape. Faced with a huge number of escaping slaves, and seeking to maintain the wealth-producing plantations of the area, these generals proved themselves much more interested in order than liberty. Butler went so far initially as to turn away any fugitives who could not be employed by the Army.<sup>48</sup> Sadly, Louisiana's large and sophisticated free black community, the Creole population of New Orleans, did not initially object to this treatment of the freedmen. Some observers noted the tragic way in which this literate, Francophone group rejected commonality with the slaves of rural Louisiana.<sup>49</sup> Whether because of lack of opposition from Louisiana Unionists, or racism, venality, or mere shortsightedness of those implementing the system, the state experienced the introduction of a system that abolitionists criticized as a new form of slavery. Before the introduction of the Freedmen's Bureau, Louisiana saw military enforcement of mandatory annual labor contracts, the return of supervision by overseers, and prosecution for vagrancy of freedmen who dared to

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43. FONER, *supra* note 20, at 59.

44. *Id.* at 58.

45. *Id.* at 59.

46. *Id.*

47. *See id.* at 58-60.

48. Caryn Cosse Bell, "Une Chimere": *The Freedmen's Bureau in Creole New Orleans*, in RECONSIDERATIONS, *supra* note 21, at 140, 143.

49. FONER, *supra* note 20, at 47-48.

leave their plantations.<sup>50</sup> Ironically, the codification of such ideas in the "black codes" after the war provided a major incentive for the expansion of the Freedmen's Bureau, the first Civil Rights Act, and ultimately the Fourteenth Amendment.

Chaos resulted from these differing systems. Benevolent societies faced real difficulties in accommodating the different requirements of theater commanders, and the nation developed a growing awareness that military half-measures and charitable contributions simply could not resolve the problems inherent in mass emancipation.<sup>51</sup> The President and Congress began to receive petitions calling for a federal solution to what was obviously a federal problem.<sup>52</sup> When the War Department stood up the American Freedmen's Inquiry Commission to study the problem in 1863, they came to the same conclusion.<sup>53</sup> The commission sought a national response, a Bureau of Emancipation, which would protect the freedmen, but would be a temporary measure and not a permanent agency of the government.<sup>54</sup>

#### IV. THE FIRST FREEDMEN'S BUREAU STATUTE AND ITS PROBLEMS

The course of Congress's solution to the problem was a tortuous but instructive one. Over the life of the Bureau of Abandoned Lands, Refugees, and Freedmen, the legislative history is a kaleidoscope of idea and counter-idea, challenge and response. This reflects the multifaceted nature of the problems facing the freedmen, the limited means for solving the difficulties, and the disparate goals of the interested parties.

Starving freedmen needed food, of course. Refugee camps needed medicine and doctors. More than that, though, the freedmen wanted the things they had ever been denied as slaves: their own land, the liberty to travel, the right to marry, the independence not to have to grovel when in the presence of whites. Their desires, expressed to Congress by representatives of benevolent societies and other advocates, were for land, for

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50. Bell, *supra* note 48, at 144.

51. HOWARD, *supra* note 27, at 197.

52. *Id.*; CONG. GLOBE, 38th Cong., 1st Sess. 571-72 (1864) (letter from the Freedmen's Societies of Boston, New York, Philadelphia, and Cincinnati).

53. FONER, *supra* note 20, at 68.

54. *Id.* at 68-69.

education, for civil protection.<sup>55</sup>

The Army, on the other hand, wanted more than anything to be released from the refugee problem. Particularly during the major offensives of 1864, army commanders saw the waves of freedmen as impairments on their transportation resources and drains on their logistical supplies. Through the intermediary of the Freedmen's Inquiry Commission, general officers were able to communicate their frustration to Congress.<sup>56</sup> Particularly disturbing to them, it seems, was the fact that different departments had responsibility for the freedmen and the lands on which they worked.<sup>57</sup>

Congress's first attempt to respond came from the pen of Representative Thomas Eliot of Massachusetts. The chairman of the Committee on Emancipation, Eliot's first bill was a relatively brief and simple tool. It authorized an agency in the War Department, headed by a Presidentially-appointed commissioner, staffed by army officers, and empowered to make all the rules necessary for the "general superintendence" of slaves freed by military or government action.<sup>58</sup> The Senate responded by passing a substitute bill, one which stood up an agency in the Treasury Department with a much more detailed list of responsibilities.<sup>59</sup>

The first attempt at compromise created by a joint committee established a wholly independent department of the government, answerable to neither War nor Treasury. After narrow passage in the House, the compromise failed in the Senate. Representative Eliot continued to struggle, and after a second joint committee hammered out another compromise, his bill passed.<sup>60</sup> This first Freedmen's Bureau law provided for an agency in the War Department with authority to provide food and shelter for immediate relief of both freedmen and white refugees of the war.<sup>61</sup>

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55. HOWARD, *supra* note 27, at 197-98; BENTLEY, *supra* note 19, at 30.

56. See CONG. GLOBE, 38th Cong., 1st Sess. 2800 (1864).

57. *Id.*

58. CONG. GLOBE, 38th Cong., 1st Sess. 573 (1864) (statement of Rep. Eliot).

59. *Id.* at 2798. The Senate bill was largely the work of Charles Sumner, see *supra* note 37.

60. CONG. GLOBE, 39th Cong., 1st Sess. 513 (1866).

61. An Act to Establish a Bureau for the Relief of Freedmen and Refugees, ch. 90, 13 Stat. 507 (1865).

It also gave the Commissioner and his assistants the power to divide land, both abandoned and confiscated, into lots for rental to the freedmen.<sup>62</sup> After three years, the tenants could then buy the land from the government.<sup>63</sup> The Bureau was to last throughout the rebellion, and for one year past it.<sup>64</sup>

#### V. THE STATUTE, THE PROBLEMS, AND GENERAL HOWARD

This statute was rather vague, even for a time of less-specific legislation than is customary today. In part because of Eliot's desperate hurry to accomplish *something* and in part because the proponents were not in complete accord about what they wanted, the statute was deliberately blank in several areas. It would be left to the Bureau to attempt to fill in the blanks itself.<sup>65</sup>

From the beginning, the Bureau's first and only Commissioner attempted to do just that. General Oliver Otis Howard, appointed by President Johnson shortly after the assassination of Abraham Lincoln, was known to have been the late president's choice for the job.<sup>66</sup> Not an abolitionist before the war, Howard had instead expressed real sympathy for Southern whites.<sup>67</sup> Nevertheless, during the war he became a strong proponent of the need of the Army to care for the freedmen. Although it could be argued that his work as a corps commander was less than superb at both Chancellorsville<sup>68</sup> and Gettysburg,<sup>69</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. BENTLEY, *supra* note 19, at 49.

66. Hans L. Trefousse, *Andrew Johnson and the Freedmen's Bureau*, in RECONSIDERATIONS, *supra* note 21, at 29-30.

67. BENTLEY, *supra* note 19, at 54.

68. Howard's XI Corps held the right of the Army of the Potomac's line once General Joseph Hooker moved them south of the Rappahannock River. His failure to link his own right to the river, or refuse it toward the Army's center meant that it was "in the air," as discovered by Confederate cavalryman J.E.B. Stuart. This poor positioning was the incentive for General Stonewall Jackson's extraordinarily risky withdrawal from the front of the Union Army and trek through narrow forested paths to the right of the Union line. When Jackson's corps disgorged from the woods upon Howard's unguarded flank, they quickly routed the Federal troops and caused the collapse of the Union right. Howard's fearlessness in attempting to rally his troops in their flight probably prevented his removal from command. See EDWARD J. STACKPOLE, CHANCELLORSVILLE: LEE'S GREATEST BATTLE 220-44 (2d ed. 1988) (1958).

his personal bravery and physical endurance were beyond reproach. His loss of an arm on the battlefield of Fair Oaks, coupled with his very public display of his Christianity,<sup>70</sup> placed him above the criticism of his potential foes. Indeed, throughout the course of the extremely bitter congressional debates over the Freedmen's Bureau, complaints directed to the character of the Commissioner himself were relatively rare.

The assistant commissioners he assembled were a mix of ideologies and abilities, combat leaders, judge advocates and chaplains, and even the son of a Supreme Court Justice.<sup>71</sup> These men, and the agents they supervised, would make the daily decisions of the Freedmen's Bureau, subject only to the guidance and direction from Howard which primarily arrived in the form of Circulars. They would review labor contracts, help establish schools, lease land under their control, and generally assist the newly freed slaves in the pursuit of citizenship.<sup>72</sup> They were never large in number, considering their responsibilities, and faced

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69. As at Chancellorsville, Howard allowed a flank to be exposed. Coming to the rescue of John Reynolds's embattled First Corps on the first day of the battle, his divisions clashed with the hard-driven forces of Jubal Early. Unfortunately for Howard, his lead division, under the command of Francis Barlow, extended considerably north of Carl Schurz's division on his left. When that undefended flank crumbled under the relentless drive of John Gordon's Brigade of Early's Division, the entire Corps withdrew. Because they were not routed as they had been two months earlier, and because Howard's Corps included many German-Americans (viewed with suspicion by many of their nativist comrades), he was once again preserved in his command. See RICHARD WHEELER, *GETTYSBURG 1863: CAMPAIGN OF ENDLESS ECHOES* 177-85 (1999). It is possible that President Lincoln, ever a student of military operations and the capabilities of his generals, suggested Howard for the Freedmen's Bureau in part because he did not think that he would be much missed on the battlefield.

70. *Id.* at 177-78.

71. BENTLEY, *supra* note 19, at 58-61.

72. The assistant commissioners and agents showed both flexibility and originality in accomplishing their vaguely defined missions. They followed no uniform procedure, but frequently adopted ideas which had proved successful in other areas. The dispute resolution model created by Colonel Orlando Brown for Virginia, for example, gained very wide currency throughout the Bureau. Where landowners and tenants argued over the nature of the lease or labor contract, Brown allowed each to choose one judge for a three-member tribunal, with a Bureau agent serving as the third. The tribunal was to follow Virginia law, except where that law discriminated on racial grounds. See DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868*, at 10 (1979).



extreme social hostility as well as violence and the threat of violence that drove many from their duties prematurely.<sup>73</sup>

Battlefield hostilities ceased within the earliest days of the life of the Bureau. This raised the complicated problem of what the Bureau's authority would be and how soon the civil governments of the South would return to power. This latter dispute, which became the source of the bitter contest over Presidential versus Congressional Reconstruction, would prove the most intractable of problems for the Bureau throughout its life. Indeed, Andrew Johnson's personal ambivalence toward the Bureau would prove a major hurdle for its activities. On the one hand, President Johnson was eager to use the threat of Bureau involvement to gain the concessions from Southern states he hoped to readmit under Presidential Reconstruction.<sup>74</sup> On the other, he frequently expressed disapproval of the Bureau's activities, especially in the area of education.<sup>75</sup>

Always pulled between those seeking better enforcement of federal law and those desiring return of the pre-war status quo, the Bureau became the target of critics on both sides. As state legislatures enacted new black codes and local officials attempted to enforce old slave regulations, Bureau agents recognized that legal protection of their charges, although not explicitly provided for in the original statute, was a vital component in the improvement of the freedmen. Further, returning Confederates and other Southern whites sought to use the legal system to obstruct the Bureau's efforts; many suits were filed in state courts alleging the commission of civil wrongs by Bureau agents and other federal officers.<sup>76</sup> By the time the pivotal thirty-ninth Congress convened, Howard noted to Senator Lyman Trumbull the desperate need for new legislation, observing that the President had himself "drifted into positive opposition to the Bureau law."<sup>77</sup>

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73. Randall M. Miller, *The Freedmen's Bureau and Reconstruction: An Overview*, in RECONSIDERATIONS, *supra* note 21, at xiii, xxix-xxx.

74. See NIEMAN, *supra* note 72, at 7.

75. HOWARD, *supra* note 27, at 273.

76. HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, at 322 (1982).

77. HOWARD, *supra* note 27, at 280.

## VI. THE SECOND STATUTE

A. *The Debate and the Bill*

Thus Congress set to the task of enlarging and stabilizing the Bureau. Senator Trumbull, a Republican from Illinois, sought to create a law that would be both radical enough to expand the powers of the Bureau to deal with the problems of Reconstruction, and conservative enough to win the support of the President. His bill declined to set a date for the expiration of the Bureau; it would be continued instead "until otherwise provided by law."<sup>78</sup> In keeping with the standard expectations of its supporters, Senator Trumbull assured his colleagues that the Bureau was "not intended as a permanent institution."<sup>79</sup> Possibly worse, from the perspective of its opponents, Trumbull's bill expanded the Bureau spatially as well, taking in "all parts of the United States,"<sup>80</sup> a phrase seemingly designed to capture Kentucky's enforcement of its old slave code against newly freed blacks.<sup>81</sup> In response to Howard's concerns regarding the injustice perpetrated against freedman and agent alike, the bill specifically granted the Bureau the authority to extend military jurisdiction over any freedmen when they were denied the same civil rights or immunities as white persons.<sup>82</sup> It also extended military jurisdiction over all of the Bureau's agents and employees.<sup>83</sup>

The battles over the bill, discussed in detail below, raged with a severity that exceeded those of the previous Congress. They were intimately tied to the debates over Trumbull's other measure, the Civil Rights Act.<sup>84</sup> They included sharp differences over the meaning of the Constitution as well as soaring hymns to equality and blasts of racial hatred. After extensive legislative struggles in both chambers, majorities were assembled and the

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78. CONG. GLOBE, 39th Cong., 1st Sess. 316 (1866).

79. *Id.* at 319.

80. *Id.* at 316.

81. *See infra* notes 213-215 and accompanying text.

82. An Act to continue in force and to amend "An Act to Establish a Bureau for the Relief of Freedmen and Refugees," and for other Purposes," ch. 200, 14 Stat. 173 (1866).

83. These provisions remained the same in the bill that passed over the President's veto in July 1866. *See id.*

84. HYMAN & WIECEK, *supra* note 76, at 413.

bill passed in February 1866. The bitterness did not cease, though, with the passage of the expansion bill. Immediately following the vote in the Senate, Kentucky's Garret Davis rose to amend the title to:

[A] bill to appropriate a portion of the public land in some of the southern States and to authorize the United States Government to purchase lands to supply farms and build houses upon them for the freed negroes; to promote strife and conflict between the white and black races; and to invest the Freedmen's Bureau with unconstitutional powers to aid and assist the blacks, and to introduce military power to prevent the Commissioner and other officers of said bureau from being restrained or held responsible in civil courts for their illegal acts in rendering such aid and assistance to the blacks; and for other purposes.<sup>85</sup>

#### B. *Johnson's Veto*

To the astonishment of Senator Trumbull, and to the outrage of the Republicans, Andrew Johnson vetoed the Freedmen's Bureau expansion bill. His veto message, delivered to Congress on February 19, 1866, combined constitutional theory and overt foot-dragging. It did not end the legislative war over the Bureau, but its arguments did locate the battlefield for much of the future debate. The veto – the first of Johnson's presidency<sup>86</sup> – raised many of the arguments that had previously been urged in Congress, and some that had not. The president claimed that the bill was not necessary, as the original bill had not yet expired; that the military tribunals it called for were arbitrary and unconstitutional; that although the initial law was a proper act of war, "the rebellion is in fact at an end"; and that nothing in the condition of the country justified the expansion of the Bureau.<sup>87</sup> Johnson further argued that the Constitution never contemplated a system of support for the poor, that the Bureau's cost under the new bill could exceed the cost of the entire federal government

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85. CONG. GLOBE, 39th Cong., 1st Sess. 421 (1866).

86. LaWanda Cox, *Andrew Johnson and His Ghost Writers*, in FREEDOM, RACISM, AND RECONSTRUCTION 76, 76 (Donald G. Nieman ed., 1997).

87. CONG. GLOBE, 39th Cong., 1st Sess. 916 (1866).

under John Quincy Adams, and that the Takings Clause was violated by the bill's land provisions.<sup>88</sup> He claimed that freedmen were perfectly able to take care of themselves, that post-war labor shortages ensured that the States would seek only their well being.<sup>89</sup> In a final argument that had not been heard before, but would be voiced again by opponents of Congressional Reconstruction, he argued that congressional action absent representation of the Southern states was unconstitutional.<sup>90</sup> Johnson even claimed that although Congressmen represented only the constituents of their States, as President he represented all Americans.<sup>91</sup> It was his duty, then, to "present their just claims."<sup>92</sup>

Although the veto message was far ranging and vigorous, it is noteworthy that it might have been even stronger. Noted historian LaWanda Cox has written that one of the drafts proposed by an unidentified advisor to the President included an unequivocal denial of national authority in any matter of "natural rights, civil rights, race relations, education, and relief."<sup>93</sup> Whether because he did not subscribe to language this sweeping, or whether he simply felt it unnecessary, Andrew Johnson did not include it. Nonetheless, the ferocity of the veto put the congressional Republicans on notice that the President was now an overt foe. Johnson confirmed this idea by his speech commemorating Washington's birthday three days later in which he characterized the Republican leadership as "opposed to the Union" and "opposed to the fundamental principles of this Government and . . . laboring to destroy them."<sup>94</sup> The political

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88. *Id.*

89. *Id.* at 917.

90. *Id.*

91. *Id.*

92. *Id.* The last argument was repeated by opponents of the Bureau and other Reconstruction measures thereafter, but Senator Trumbull effectively pointed out its logical inconsistency. "If that objection be valid," he observed, "all our legislation affecting those States is wrong, and has been wrong from the beginning." *Id.* at 942. Indeed, there is no logical reason to treat Reconstruction legislation differently from any other, and this argument should have required the veto of all enactments passed without Southern representation. Trumbull also wondered aloud how many votes Andrew Johnson had received in the Southern States.

93. Cox, *supra* note 86, at 80.

94. RECONSTRUCTION, THE NEGRO, AND THE NEW SOUTH 56 (LaWanda Cox

war thus begun would extend through the veto of the Civil Rights Act, the passage of a new Freedmen's Bureau expansion bill over his veto, Johnson's public rage before supporters in his tactically disastrous "swing around the circle,"<sup>95</sup> and ultimately the impeachment and trial of the President.

## VII. THE ARGUMENTS

The battles over the Freedmen's Bureau simply never ceased during its lifetime. Like the Army of Northern Virginia from 1864 on, the opponents of the Bureau attempted to block and obstruct and delay and fall back; unlike Lee's Army, they were defeated but they never surrendered. A review of the arguments made in Congress during the initial bill, and the various subsequent legislation, reads like a legal version of a complex musical work: themes begin and rise and intertwine, part and are quiet for a time, then reappear suddenly, and in unexpected ways. Because of this progression of arguments in time, the debates over the Bureau will be considered thematically, rather than chronologically. Attention will be given, where appropriate, to particular legislative situations affecting individual voices in the struggle.

### A. *A Doctrine of Enumerated Powers*

The argument that the power of the national government relates "to certain enumerated objects only," leaving the States "a residuary and inviolable sovereignty over all other objects"<sup>96</sup> has always been fundamental to the American understanding of the Constitutional system. It is unsurprising that this principle confronted a Bureau whose chief later wrote that "legislative, judicial, and executive powers were combined in my commission."<sup>97</sup>

Many of the opponents of the Bureau took the position that the entire operation was prohibited because it was not expressly

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& John H. Cox eds., 1973). When the crowd demanded the naming of names, Johnson compared Stevens, Sumner, and Phillips to the Confederacy's Davis, Toombs, and Slidell as foes of the United States. *Id.*

95. FONER, *supra* note 20, at 264-65.

96. THE FEDERALIST No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961).

97. HOWARD, *supra* note 27, at 362-63.

authorized in the plain language of the founding document. Some pointed out precisely the combination of powers that General Howard had referred to; the phrase *imperium in imperio* appears more than once in these complaints regarding the nature of the organization.<sup>98</sup> They objected to what they characterized as the creation of a second government, without the authorization of the Constitution, which would operate only over "a particular class."<sup>99</sup>

Others gave lengthy explanations of their view of the proper roles of the different spheres of the federal and state governments. Repeatedly members of Congress argued that the Freedmen's Bureau was a creation of a "consolidated Government" which would violate the agreement of the "compact of the States."<sup>100</sup> One senator grew vitriolic enough to claim that the bill called up "the blood of a murdered Constitution,"<sup>101</sup> while another, not yet convinced of demise of the founding document, sought to save it by proclaiming death to all of the Constitution's enemies "whether in the form of Jeff. Davis or Abraham Lincoln."<sup>102</sup>

The argument also frequently invoked the explosive term "State's Rights." Members of Congress referred to this principle – that the states were sovereign – as the basis of the entire constitutional system,<sup>103</sup> as the main pillar upon which our national fabric rests,<sup>104</sup> and as the "essential virtue" of the Constitution.<sup>105</sup> One senator even referred to the United States upon its founding as "a confederation of equal states."<sup>106</sup>

Coupled with these expansive statements of general principle, opponents of the Bureau simultaneously raised objections to

98. CONG. GLOBE, 39th Cong., 1st Sess. 334 (1866) (statement of Sen. Cowan); *Id.* at 626 (statement of Rep. Kerr). Indeed, even W.E.B. DuBois called the Bureau "the new government – for a government it really was." DUBOIS, *supra* note 36, at 51.

99. CONG. GLOBE, 38th Cong., 1st Sess. 3346 (1864) (statement of Sen. Hendricks).

100. *Id.* at 799 (statement of Rep. Dawson).

101. CONG. GLOBE, 38th Cong., 1st Sess. 2969 (1864) (statement of Sen. Saulsbury).

102. *Id.* at 3344 (statement of Sen. Davis).

103. CONG. GLOBE, 38th Cong., 2d Sess. 891 (1865) (statement of Rep. Pendleton).

104. CONG. GLOBE, 39th Cong., 1st Sess. 639 (1866) (statement of Rep. Shanklin).

105. *Id.* at 342 (statement of Sen. Cowan).

106. *Id.* at 368 (statement of Sen. Hendricks).

specific features of the bills as going beyond the legislative power of Congress. In the early days of the struggle, these complaints tended to be focused on the relief efforts themselves. Some argued, for example, that the federal government simply had no role to play in philanthropy.<sup>107</sup> They frequently insisted that only private charities could perform such work; one representative importuned the "honey-tongued humanitarians of New England" to "go into the camps of the contrabands . . . and lift them out of the mire."<sup>108</sup> Others argued that the Southern States, no less concerned with the well-being of the freedmen than any other part of their population, were the best able to provide any necessary relief.<sup>109</sup> Still others seemed to accept this power of the government only if it were applied universally, one representative denouncing a plan to care for one racial group of people, but not widows and orphans generally.<sup>110</sup> Senator Johnson warned that if Congress could act on philanthropic principles in this case, then there was no limit at all on its potential authority.<sup>111</sup>

A slight variation on this argument dealt with funding: some members of Congress argued that the cost was simply too great to be countenanced within a government of limited powers. Representative Kalbfleisch linked this fiscal argument to an ideological one by claiming that the original bill, in not limiting the spending of the Bureau, endowed this "experiment" with "power more despotic than the imperial Government of Russia."<sup>112</sup> He was immediately followed by his colleague and fellow New Yorker James Brooks, who termed the proposed Bureau vast, described it as having unforeseeable funding requirements, and added Imperial Rome to Russia as fitting comparisons to the tyranny wrought by "the spirit of Massachusetts."<sup>113</sup>

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107. See, e.g., CONG. GLOBE, 38th Cong., 1st Sess. 709 (1864); CONG. GLOBE, 39th Cong., 1st Sess. 628 (1866) (statement of Rep. Marshall).

108. CONG. GLOBE, 38th Cong., 1st Sess. 709 (1864) (statement of Rep. Cox, who called the plan to help the freedmen "sweeping and revolutionary," and maintained that if adopted "our whole system of government is changed"). See also CONG. GLOBE, 39th Cong., 1st Sess. 628 (1866) (statement of Rep. Marshall).

109. *Id.* at 335 (statement of Sen. Guthrie).

110. *Id.* at 2780 (statement of Rep. Le Blond).

111. *Id.* at 372.

112. CONG. GLOBE, 38th Cong., 1st Sess. 760 (1864).

113. *Id.* at 761.

As time went by and the activities of the Freedmen's Bureau multiplied, the educational efforts became an increasingly targeted feature of this limited power argument. The government was called devoid of the right to be a school builder or teacher.<sup>114</sup> This role, too, was said to be an infringement on the rights of the states, and they were alleged to be the responsible guardians of the education of their citizens.<sup>115</sup>

### B. *The Judicial Power*

After the broad attack on it as beyond the power of the federal government, the second most frequently heard arguments in Congress concerned the power of the Bureau to act judicially. Howard noted that one of the most important works his agents faced was "obtaining recognition of the negro as a man instead of a chattel before the civil and criminal courts" of the South.<sup>116</sup> Even under the guidance of the first statute, which did not specifically authorize a judicial role, the Freedmen's Bureau in some states began serving as courts for minor cases.<sup>117</sup> In others the Bureau attempted less direct solutions: in Alabama, for example, assistant commissioner General Wager Swayne allowed state judges to serve as Bureau agents providing they agreed to grant equal rights to the freedmen.<sup>118</sup>

That the Bureau would have to assert military jurisdiction to fulfill its mandate was clearly foreseen by its opponents. Of course, during the war, military tribunals were convened under martial law in the recaptured South, and even, in occasional ill-advised cases, in Northern States.<sup>119</sup> Senator Willard Saulsbury, Sr., the fiery Delawaran who proudly declared himself "one of the last slaveholders in America,"<sup>120</sup> went so far as to propose an amendment to the 1864 bill which would exempt "all white persons in the states not in revolt" from the potential jurisdiction of military commissions.<sup>121</sup>

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114. CONG. GLOBE, 39th Cong., 1st Sess. 648 (1866) (statement of Rep. Trimble).

115. *Id.* at 370 (statement of Sen. Davis).

116. HOWARD, *supra* note 27, at 251.

117. *See supra* note 72.

118. NIEMAN, *supra* note 72, at 17.

119. *See Ex Parte Milligan*, 71 U.S. 2 (1866).

120. CONG. GLOBE, 39th Cong., 1st Sess. 321 (1866).

121. CONG. GLOBE, 38th Cong., 1st Sess. 2933 (1864).



As local courts began harassing agents, and as states attempted to impose and enforce black codes, Congress concluded that it needed to grant the Bureau specific authorization to exercise judicial powers. This decision enraged the Bureau's opponents. Some saw sinister purposes in the use of military commissions, one senator claiming that such tribunals were intended to create a despotic government for the advancement of blacks over whites.<sup>122</sup> Most, however, simply focused on the system itself, decrying the inevitable loss of liberty when ordinary citizens were made subject to military tribunals.<sup>123</sup> The lack of a jury in military proceedings was a central concern,<sup>124</sup> but one senator expanded his criticism to call military justice "the highest terror that can be addressed to the mind of man in this country."<sup>125</sup> Even those who were somewhat more subdued feared the establishment of extraordinary courts not subject to the limitations of the Constitution.<sup>126</sup>

Interestingly, the assertion of military jurisdiction over agents of the Bureau also raised constitutional objections. The grant of jurisdiction over Bureau members was clearly designed to remove agents from the threat of hostile local legal systems. Because most of the Bureau agents were military officers, they were already subject to trial by court-martial for alleged wrongdoing. This jurisdiction, then, was a very minor expansion in terms of actual judicial power over agent malfeasance.

Because of its symbolic value, however, this provision also became the subject of attack. There can be little doubt that the Bureau's opponents realized that the announcement by Congress of military jurisdiction over these men was an announcement of their immunity from harassment by the states. They therefore vehemently argued that this provision was flatly unconstitutional. Several senators pointed angrily to the Fifth Amendment and

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122. *Id.* at 2803 (statement of Sen. Richardson).

123. *Id.* at 3328 (statement of Sen. Davis); CONG. GLOBE, 39th Cong., 1st Sess. 346 (1866) (statement of Sen. Davis).

124. CONG. GLOBE, 38th Cong., 2d Sess. 786 (1865) (statement of Sen. Davis); CONG. GLOBE, 39th Cong., 1st Sess. 416 (1866) (statement of Sen. Davis).

125. CONG. GLOBE, 38th Cong., 1st Sess. 3347 (1864) (statement of Sen. Hendricks).

126. CONG. GLOBE, 38th Cong., 2d Sess. 566 (1865) (statement of Rep. Kernan).

argued that the plain language of the Constitution forbade the trial of anyone not currently in the military without the safeguard of the jury, unknown to military tribunals.<sup>127</sup> One Senator pronounced the ominous threat that if Congress could deem members of the Freedmen's Bureau in the military for jurisdictional purposes, they could do the same to members of Congress or the judiciary or the executive branch.<sup>128</sup>

Congress maintained the jurisdiction provision in the bill, and it ultimately passed over the President's veto. Although it never received the scrutiny of the federal courts, the *Milligan* case<sup>129</sup> and the controversy over Dr. James Watson<sup>130</sup> cast over Bureau courts an aura of illegitimacy. This vague sense of unease later transformed into the source of great libel, as in one history of the Bureau, which blamed the "anomalous judicial system" and its execution by "narrow, misguided, unprincipled, or partisan bureau agents" for "the negro's air of insolence," the growth of the Ku Klux Klan, and the "gulf . . . between black and white."<sup>131</sup>

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127. CONG. GLOBE, 38th Cong., 1st Sess. 3327 (1864) (statement of Sen. Hendricks); CONG. GLOBE, 38th Cong., 2d Sess. 984 (1865) (statement of Sen. Hale); CONG. GLOBE, 38th Cong., 2d Sess. 987 (1865) (statement of Sen. Conness).

128. CONG. GLOBE, 38th Cong., 2d Sess. 990 (1865) (statement of Sen. Johnson).

129. In rejecting an Indiana trial by military commission of a Copperhead, *Milligan* held that martial law could not exist outside of the actual theater of war where courts were unable to function, 71 U.S. 2, 127 (1866). Indeed, the opinion specifically notes that such courts "could have been enforced in Virginia, where the national authority was overturned and the courts driven out." *Id.* Nonetheless, opponents of the Bureau and Reconstruction generally argued that *Milligan* stood for the proposition that military tribunals had no authority to try civilians.

130. In November 1866, Watson, in cold blood, shot a freedman who he felt was not properly respectful one day after their two carriages had collided. VI CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 214 (1971). When a Virginia magistrate released him, the military commander directed his trial by military commission, and refused to obey a state court's writ of *habeas corpus*. *Id.* When the Supreme Court released the *Milligan* decision a month later, the Richmond newspapers crowed that the doctor must be freed for, in the words of the *Dispatch*, "there is not one inch of ground upon which the commission can base a claim of jurisdiction." *Id.* President Johnson ordered Watson's release. *Id.* at 215.

131. PEIRCE, *supra* note 19, at 159.

*C. Land*

After the role of the Freedmen's Bureau to enforce contractual and civil rights, the next most contentious area was probably its role in the land controversy. Early in the debate, one representative termed protecting property rights the "great and paramount object of all Governments."<sup>132</sup> Echoing the battles over the Confiscation Acts, Congressmen argued that land redistribution would imperil the reconciliation sought at the end of the war.<sup>133</sup> Initially, proponents of the legislation were just as adamant that land ownership by the freedmen was the only lasting remedy for slavery.<sup>134</sup>

The initial law had allowed the commissioner to "set apart" land within the rebelling states that was abandoned or had been confiscated by the federal government.<sup>135</sup> Such land could be rented to freedmen at sixty percent of its value for three years.<sup>136</sup> Until the end of the lease the freedman with possession could buy the land for the appraised price, and would receive in return "such title thereto as the United States can convey."<sup>137</sup>

This language, of course, left open the question of just what title the U.S. would be able to convey. If, as some members of Congress argued, the U.S. possessed the property only under the law of war as a belligerent power, it did not itself displace the private ownership of land.<sup>138</sup> Therefore, as soon as the war ended the property must revert to its original owner and the government tenant could be evicted.

Further, some pointed to the provision of the Constitution prohibiting the corruption of blood<sup>139</sup> and claimed that it forbade "the confiscation of the estate of any guilty of treason beyond the traitor's life."<sup>140</sup> To this the Bureau's supporters responded that

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132. CONG. GLOBE, 38th Cong., 1st Sess. 803 (1864) (statement of Rep. Dawson).

133. *Id.* at 2969 (statement of Sen. Saulsbury).

134. *Id.* at 3331 (statement of Sen. Wilson).

135. 13 Stat. 508 (1865).

136. *Id.*

137. *Id.*

138. CONG. GLOBE, 39th Cong., 1st Sess. 619, 625 (1866) (statement of Rep. Kerr).

139. U.S. CONST. art. III, § 3, cl. 2.

140. CONG. GLOBE, 38th Cong., 1st Sess. 3306 (1864) (statement of Sen. Carlile).

the provision in question was inapplicable to wartime,<sup>141</sup> and that it limited only the delegation of power to the courts, and not to the federal government as a whole.<sup>142</sup>

It was in this area of land redistribution that President Johnson most effectively frustrated the will of Congress. His grants of amnesty delivered in 1865 restored many members of the rebel army to their pre-war civil rights.<sup>143</sup> These rights, of course, included the return of the land that they had held, if not the slaves who had worked it.<sup>144</sup> This proved to be doubly effective as a weapon against Reconstruction, as the original plan for the Freedmen's Bureau involved no appropriation of funds. This lack of funding represented no attempt to hamstring the department's efforts. On the contrary, the intent of Congress was that by renting the lands the federal government then held, the Bureau would regain its own operating costs plus the costs of relief supplies for any temporarily imperiled people, black or white.<sup>145</sup>

That the President's liberal policy of forgiving Confederates undercut the Bureau's efforts is seen in the immediate effects of the amnesty: within three years of its announcement, the Freedmen's Bureau went from being responsible for approximately 850,000 acres to about one quarter of that total.<sup>146</sup>

141. *Id.* (statement of Sen. Trumbull).

142. *Id.* at 3308 (statement of Sen. Hale).

143. FONER, *supra* note 20, at 159.

144. Initially, Howard did not think that this was so: in the Bureau's Circular #13 he announced to his assistants that presidential amnesties did not inhibit the Bureau's ability to subdivide and lease land to freedmen. NIEMAN, *supra* note 72, at 50. When Johnson saw the circular, however, he summoned Howard to a meeting, made known his objection, and demanded a revision. When the altered document also displeased him, he had his own staff prepare a new circular and ordered Howard to issue it. HOWARD, *supra* note 27, at 234-35. The new circular required the return of land to any pardoned rebels unless it had already been legally condemned and sold by a federal court. Because such proceedings were both rare and slow, and because most of the sales had not even been completed, the great majority of the land in the Bureau's hands was no longer designated for the freedmen, and was shortly returned to its former owners. *Id.* at 235-36.

145. Indeed, the Senate version of the first bill foresaw a day when the Bureau would not only be self-supporting but could return excess revenue to the Treasury. CONG. GLOBE, 38th Cong., 1st Sess. 2798 (1864).

146. BENTLEY, *supra* note 19, at 102. Bentley notes that much of the remaining land was of little value, and that many owners deliberately declined to seek return of their land from the Bureau to avoid tax liability.

The effect of the loss of this land appears forcefully in the angry response of Representative Eliot to the President's charge that the Bureau had been wasteful of the public money: "if it had not been for the interference of Andrew Johnson, for his persistent and continual opposition, there would have been in the hands of the Bureau under the organization of the law creating it an amount of property which would, without substantially interfering with the Treasury of the United States, have defrayed nearly the whole of the expenses of the Bureau."<sup>147</sup>

In response to the loss of abandoned lands on which to settle the freedmen, the Bureau turned to the category of land clearly amenable for federal title under the law of nations: public land. For while the rights of a conquered people to retain their private property has long been respected by at least the commentators on international law, the right of the victor to the possessions of the vanquished government has never seriously been questioned.<sup>148</sup>

Yet even this feature of the expansion bill in 1866 was attacked as beyond the scope of the legitimate authority of the federal government. Indiana's Senator Hendricks argued that the Confederacy was merely an illegal organization, as the Constitution did not authorize secession.<sup>149</sup> As such a body, its acts could have no legal force; it could not, therefore, acquire land.<sup>150</sup> He claimed, astonishingly, that any attempted transfer from private citizens to the Confederate government was simply a legal nullity, and such land had to be returned to its prewar owner.<sup>151</sup> Although the confiscation of public lands remained a feature of both the vetoed 1866 expansion bill and the law enacted over the following veto, the appearance of this argument on the floor of the Senate indicates the immense burden faced by proponents of the Freedmen's Bureau on even seemingly noncontroversial areas.

#### D. *Reenslavement*

An argument made from both sides of the aisle during the

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147. CONG. GLOBE, 40th Cong., 2d Sess. 1814 (1868).

148. CONG. GLOBE, 39th Cong., 1st Sess. 625 (1866) (citing HALLECK'S INTERNATIONAL LAW).

149. CONG. GLOBE, 39th Cong., 1st Sess. 3411 (1866).

150. *Id.*

151. *Id.*

debates focused on the provision granting the commissioner "superintendence" of the freedmen. Both pro-emancipation Republicans such as James Grimes of Iowa and slavery apologists like Waitman Willey of West Virginia claimed that this provision merely recharacterized slavery from service for a single master to peonage to the commissioner and a group of agents of mixed sympathies.<sup>152</sup>

Opponents used this provision to argue that the Constitution authorized no such supervision by the government over such "poor creatures,"<sup>153</sup> and that the men who would become agents should not be trusted with this responsibility regarding other men.<sup>154</sup> One Senator referred to the Bureau's agents as "broken down politicians and adventurers, and decayed ministers of the gospel."<sup>155</sup> Another predicted opposition from the Southern state governments, desperate to protect their citizens from "these Bureaucrats, these Negro-catchers."<sup>156</sup> Another argued that it created a "bondage . . . more terrible than that of any system of taskmasters the world has known since Israel was captive in Egypt."<sup>157</sup> One even argued that the Freedmen's Bureau itself violated the Thirteenth Amendment.<sup>158</sup>

Carried to its extreme, this argument broke loose from its constitutional moorings and become a statement of extraordinary audacity. Apologists for slavery, conditioned by years of obedience from those whose very lives they controlled, claimed that masters cared about the well-being of their slaves more than abolitionists ever could.<sup>159</sup> Senator Willey, not even the most radical defender

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152. CONG. GLOBE, 38th Cong., 1st Sess. 2971 (1864) (statement of Sen. Grimes); CONG. GLOBE, 38th Cong., 1st Sess. 2933 (1864) (statement of Sen. Willey: "[A]fter as close and careful an examination of this bill as I have been able to give to it, its proper title would be 'A bill to reenslave freedmen.'").

153. CONG. GLOBE, 38th Cong., 1st Sess. 3336 (1864) (statement of Sen. Hicks).

154. "The men who are to go down there and become overseers and negro-drivers will be that description of men who are too lazy to work and just a little too honest to steal." 38th Cong., 2d Sess. 1308 (1865) (statement of Sen. Powell).

155. *Id.* at 985 (statement of Sen. Lane of Indiana).

156. CONG. GLOBE, 38th Cong., 1st Sess. 894 (1864) (statement of Rep. Wadsworth).

157. *Id.* at 3349 (statement of Sen. McDougall).

158. CONG. GLOBE, 39th Cong., 1st Sess. 649 (1866) (statement of Rep. Trimble).

159. "I, for one, am unwilling that my slaves when freed shall become the

of slavery, spoke of how it consoled him to know that his former slaves must pray for him every day "because through me they have been made free."<sup>160</sup> Representative Ritter may have gone still further when he argued that only the work of the Bureau had led the freedmen to the "great error" of believing that their former masters had not always acted in their best interest. Not their enemy, the former slave-owner was, in his opinion, the freedmen's "warmest friend."<sup>161</sup>

Supporters of the Freedmen's Bureau insisted repeatedly that the Bureau did not and would not oppress its charges. Senator Sumner repeatedly referred to the police as exercising "superintendence" over all of the population, and asserted that the Bureau would no more "fetter"<sup>162</sup> the freedmen, than the police of the District of Columbia tyrannized the Congress.<sup>163</sup> This argument, though, remained lively throughout the duration of the Bureau and beyond.

#### E. *Oppression of Whites*

The most chilling arguments to the modern reader are those based on overt notions of white supremacy. A group of Congressmen, which included but was never limited to slave-owners from the Border States, openly argued that the United States had always been a country by and for white people.<sup>164</sup> Before the adoption of the Thirteenth Amendment, such men warned against the "hideous form and repulsive features of abolitionism."<sup>165</sup>

The abolitionists had long referred to the unfulfilled but sweeping rhetoric of liberty in America. To this, opponents of the

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slaves of others." CONG. GLOBE, 38th Cong., 1st Sess. 3336 (1864) (statement of Sen. Hicks). Senator Hicks, a Marylander, also claimed that the cruelest slave drivers were northerners. *Id.*

160. CONG. GLOBE, 38th Cong., 1st Sess. 2975 (1864).

161. CONG. GLOBE, 39th Cong., 1st Sess. 636 (1866).

162. A term used by Kentucky Senator Wadsworth, CONG. GLOBE 38th Cong., 1st Sess. 894 (1864).

163. *Id.* at 2971.

164. CONG. GLOBE, 38th Cong., 1st Sess. 3342 (1864) (statement of Sen. Davis); CONG. GLOBE, 39th Cong., 1st Sess. 541 (1866) (statement of Rep. Dawson).

165. CONG. GLOBE, 38th Cong., 1st Sess. 801 (1864) (statement of Rep. Dawson).

Freedmen's Bureau replied that the Declaration of Independence simply "did not comprehend the Negro" and that the revolution and the writing of the Constitution were "actions that were conducted by the Caucasian race alone in the fulfillment of their own destiny and to secure their own rights."<sup>166</sup>

Opponents of the Bureau warned, too, about a general overturning of the social order: if all men became educated "who would black boots and curry the horses, who would do the menial offices of the world?"<sup>167</sup> They conjured images of a new class of "lazzaroni," a large group of freed blacks enervated by government philanthropy and happily embracing their destiny as locusts upon the harvest of the hard work of America's white citizenry.<sup>168</sup> They dismissed the notion that the Freedmen's Bureau would be self-supporting because "Sambo . . . will raise nothing to pay the rent."<sup>169</sup>

One recurring comment that speaks loudly about the nature of the underlying assumptions of mid-nineteenth-century society was directed to the attendance in the galleries. Several Congressmen who argued that the Bureau made freedmen lazy and unwilling to work for themselves pointed to those in attendance watching the debates. "[L]ook around upon these galleries at any time of the day" said Delaware's Senator Saulsbury, "and you see the beneficiaries of this Freedmen's Bureau crowding your galleries."<sup>170</sup> He claimed that this showed them to be "too lazy or too worthless to support themselves."<sup>171</sup> It seems unlikely that the galleries of the House and Senate were empty of black and white alike before the onset of the Civil War. The modern reviewer cannot but recognize the abhorrent double standard: whites attending legislative sessions must have been doing their civic duty; blacks doing the same were showing

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166. *Id.* at 3342 (statement of Sen. Davis).

167. CONG. GLOBE, 39th Cong., 1st Sess. 342 (1866) (statement of Sen. Cowan).

168. *Id.* at 396 (statement of Sen. Davis). Senator Davis explained this term by making the horrific allegation that "[a] negro will never work when he can keep soul and body together without work. . . . If he can live by begging, he will not work. If he can live by stealing, he will not work." *Id.* See also *id.* at 743 (statement of Sen. Guthrie).

169. *Id.* at 362 (statement of Sen. Saulsbury).

170. *Id.*

171. *Id.*



themselves to be lazy and shiftless and dependent on government handouts.<sup>172</sup> Perhaps the saddest observation regarding this line of arguments is that Congressmen favoring the Bureau did not rise to object that comments on the blacks – but not the whites – in the gallery disclosed racism in the speaker rather than lack of industry in the audience.

The overtly white supremacist arguments may have reached a bizarre high water mark during the speech of a Westerner, Senator McDougall of California. On January 24, 1866, he rose in the well of the Senate and claimed that the Bureau was particularly vicious because it attempted to lift the black man above his station, from which “he may fall so profoundly that he will sink into the nether depths.”<sup>173</sup> Citing the fact that he himself only possessed “red and white blood,” he recognized his kinship with “the Pelasgians, who drove the Egyptians out of Greece, and the Hyperboreans, who became the demigods of that same country, from whom Theseus and Hercules are supposed to have descended, white-haired, great, godlike looking men.”<sup>174</sup> Decrying the “debasement” of mixed bloods, he insisted that the failures of “the Numidian,” “the Carthaginian,” and all of Asia showed fully the superiority of whites.<sup>175</sup> He demanded to know who of “old Norse ancestry” could ever agree to share government with “those who come up out of central Africa.”<sup>176</sup>

An only slightly less shocking argument was based on a principle of alleged equality. Representatives and senators bewailed the oppression of the white man, and urged what would in later years be called a “color-blind” view of the Constitution. Representative Ritter of Kentucky complained that the removal of property from whites would drive that race completely from the affected states, leaving only freed blacks in the land of the former Confederacy.<sup>177</sup> Senator Richardson of Illinois complained that the bill required whites to support blacks, and that both the

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172. *Id.* at 397 (statement of Sen. Willey).

173. *Id.* at 401.

174. *Id.*

175. *Id.*

176. *Id.* McDougall insisted that there was not a single example, not even “Fred. Douglass” who was “a grave, careful, considerate, and high reasoning man.” *Id.*

177. *Id.* at 635.

President and Congress were showing "exclusive regard for the interests of the Negro."<sup>178</sup> He predicted that such efforts would fail because "God has made the negro inferior, and such laws cannot make him equal."<sup>179</sup> Representative Marshall lamented the tragic losses of those who "unfortunately . . . are white men . . . and so the claim which they send up from their impoverished homes is not listened to."<sup>180</sup> Members of the House heard the "plaintive voices" of starving children whose white mothers could not feed them "because all she owns has been turned over to the colored people."<sup>181</sup> They also were asked to leave the freedmen "to make a living in the same way that the poor whites of our country are doing."<sup>182</sup>

The extent to which the arguments were always interwoven appeared in the statement of Senator Johnson. He claimed that no Constitutional authority could be found to provide for the freedmen "because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States."<sup>183</sup> Thus he assumed that the Constitution must be color-blind; in his definition this meant that there could be no legislation which differed by race. From that premise he concluded that if the Bureau existed there could be no limits whatsoever to federal power.

#### VIII. THE RESPONSES

Despite the claim of some opponents that the Radical Republicans put party ahead of national interests and constitutional integrity because of their numerical superiority,<sup>184</sup> the supporters of the Bureau seem to have taken their legislative duties seriously. It was commonly said in the debates by opponents of progressive legislation – whether the Freedmen's Bureau, or the Civil Rights Act, or the Confiscation Acts – that the

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178. CONG. GLOBE, 38th Cong., 1st Sess. 2801 (1864).

179. *Id.* at 2802.

180. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866).

181. *Id.* at 636 (statement of Rep. Ritter).

182. *Id.* at 2780 (statement of Rep. Le Blond).

183. *Id.* at 372.

184. *Id.* at 371 (statement of Sen. Davis).

majority had no regard for the Constitution at all. In 1864 an opponent of the Bureau rose to define his mission as "one and single: the advocacy of civil liberty."<sup>185</sup> By the summer of 1866 that same senator would intone, "I know that it is perfectly useless to appeal to the Constitution of the United States. It is a dead letter."<sup>186</sup>

Contrary to those notions, the proponents of the Bureau appear to have been honest in their advocacy, and repeated their conviction that their commitment was no less than that of their opponents, although their interpretations of the document obviously differed.<sup>187</sup> They grew weary of the repeated Constitutional cloaking of arguments by their foes within Congress throughout the war. By 1868, Thomas Eliot would note with exasperation that "when Fort Sumter was fired upon those same gentlemen found no constitutional ground upon which to justify the shelling of Charleston by the national forces."<sup>188</sup> Nevertheless, throughout the debates over the Freedmen's Bureau its supporters defended their proposals in not only political but also constitutional terms. They did so with a variety of understandings ranging from the conventional to the quite surprising.

#### A. *The War Power*

From the introduction of the very first bill, some defenders consistently based its constitutionality upon the war powers of the federal government. In describing the legitimacy of his proposal, Eliot noted that emancipation had occurred as a war measure, and that freedom came "for our own selfish ends. It was to weaken the enemy. It was as a means of crushing the rebellion."<sup>189</sup> Eliot referred to both presidential and congressional powers in finding the authority for the freeing of the enemy's slaves.<sup>190</sup> He found

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185. CONG. GLOBE, 38th Cong., 1st Sess., 2967 (1864) (statement of Sen. Saulsbury).

186. CONG. GLOBE, 39th Cong., 1st Sess. 3841 (1866) (statement of Sen. Saulsbury).

187. CONG. GLOBE, 38th Cong., 1st Sess. 3306 (1864) (statement of Sen. Trumbull).

188. CONG. GLOBE, 40th Cong., 2d Sess. 1815 (1868).

189. CONG. GLOBE, 38th Cong., 1st Sess. 569 (1864).

190. *Id.* at 572.

that a duty followed inevitably from emancipation: "we had no right to decree freedom and not to guaranty safe guidance and protection."<sup>191</sup>

This theme never lost its significance in the arguments that followed. The Bureau was designed, it was said in 1864, "to shorten the war."<sup>192</sup> A Senator later added that the laws of nations, to include those of war, were an integral part of the Constitution, and of all governments.<sup>193</sup>

By the debates of 1866 the opponents of the Bureau repeatedly asserted that the war was over. They pointed to the President's announcement of the end of hostilities and claimed that there could be no state of war after hostilities ceased.<sup>194</sup> They focused again and again on the factual state of affairs—the disbanding of Confederate armies and return of most U.S. military volunteers to civilian life—and claimed that everyone knew that the war was over.<sup>195</sup>

In response, congressional Republicans noted that there were still federal troops throughout the South,<sup>196</sup> and that the United States Army was routinely required to issue orders to govern affairs there.<sup>197</sup> The House sponsor of the Bureau bill argued that there could never be lasting peace until the rights for which the war was fought were guaranteed.<sup>198</sup>

Some modern commentators have recognized the Freedmen's Bureau's birth in war and continuing "military character" that resulted from being broadly populated by military officers.<sup>199</sup> Indeed, under a conventional limited view of the powers of the federal government, this seems sound footing for the original bill. It became more problematic from 1866 on for a number of reasons. Initially, as the President argued in his veto measure,<sup>200</sup> many

191. *Id.* at 569.

192. *Id.* at 741 (statement of Rep. Cole).

193. CONG. GLOBE, 39th Cong., 1st Sess. 365 (1866) (statement of Sen. Fessenden).

194. *Id.* at 363 (statement of Sen. Saulsbury).

195. *Id.* at 369 (statement of Sen. Hendricks); *Id.* at 335 (statement of Sen. Guthrie).

196. *Id.* at 656 (statement of Sen. Eliot).

197. *Id.* at 631 (statement of Rep. Moulton).

198. *Id.* at 2773 (statement of Rep. Eliot).

199. See, e.g., KACZOROWSKI, *supra* note 17, at 25.

200. See *supra* note 92 and accompanying text.

Americans viewed the war as ending in 1865. More importantly, the expansion bill extended the activities of the Bureau far beyond a wartime rationale in both time and space.<sup>201</sup>

### B. *Treason*

An argument somewhat related to the war powers justification may be found in the response of some exasperated Congressmen to the repeated use of the limited powers argument. Some noted that the states of the Confederacy were the violators of the constitutional order. These Congressmen argued that “necessity has compelled the Government to lay its hand on traitors and to hinder them from pulling down the fabric of our Government.”<sup>202</sup> One was thankful to “God that this nation has risen to the point of using every implement that the Almighty and common sense have put in it[s] hands to crush the rebellion.”<sup>203</sup> Any means by which the rebels could be stopped, and any punishment meted out to them, were therefore legitimate. For these Republicans, the rebellion justified any method used to end it.

Senator Trumbull, certainly no radical in 1864, used this argument in response during the struggle over the initial bill. Opponents challenged Trumbull over the plan to allow the Freedmen’s Bureau to sell confiscated land to freed slaves. They argued that such a permanent deprivation of property from the families of slaveholders violated the Constitution prohibition on attainder of the blood.<sup>204</sup> Asked how he could reconcile such property sales with the Constitution, he bristled “I reconcile it . . . in the same way that I reconcile with it the right to shoot a traitor, to destroy him, to destroy his property and everything that he has for the purpose of putting down this wicked rebellion.”<sup>205</sup>

This justification, then, was based on the notion that the authority to shoot a traitor itself included the right to take any lesser means, such as land redistribution. It was, as noted above, occasionally uttered in debates even by men who primarily relied

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201. See *supra* notes 78-80 and accompanying text.

202. CONG. GLOBE, 38th Cong., 1st Sess. 2967 (1864) (statement of Sen. Ten Eyck).

203. *Id.* at 3349 (statement of Rep. Chandler).

204. U.S. CONST. art. III, § 3, cl. 2.

205. CONG. GLOBE, 38th Cong., 1st Sess. 3304 (1864).

on other explanations, but was never a significant part of the debate. It is easy to see why. On the one hand, the argument was subject to the same limitations as the sounder one based on war powers: it seemed to expire at least in 1866, and could never justify an expansion into states which had not seceded. It had, too, an additional disadvantage not shared by the war powers approach: it smacked of cruelty and revenge, rather than national survival. It was an angry response in an argument, but could never carry much weight as a serious constitutional theory.

### *C. Privileges, Immunities, and the Black Codes*

By the time its advocates sought to expand the powers of the Freedmen's Bureau in 1866, these arguments were less compelling. Many remained convinced that a state of war still existed and would continue to exist until relations between the federal government and the states of the Confederacy were completely normalized; some even took the view that punishment remained to be meted out by the victors. There was nonetheless a feeling of peace across much of the country, and that mood was felt in Congress. Additionally, as the proponents of the Bureau sought to expand its duties into Border States that had never seceded and were thus impossible to justify within the war power, they had to find other bases. One that modern observers might find surprising was based on the Privileges and Immunities Clause.<sup>206</sup>

Although he did not explicitly cite that clause, Representative Donnelly gave a good synopsis of the argument linking it to the expanded power to be given the Bureau to protect the freedman.<sup>207</sup> He noted that "having made the slave a freedman, the nation needs some instrumentality which shall reach to every portion of the South and stand between the freedman and oppression."<sup>208</sup>

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206. CONG. GLOBE, 39th Cong., 1st Sess. 319 (1866) (statement of Sen. Trumbull); U.S. CONST. art. IV, § 2, cl. 1.

207. CONG. GLOBE, 39th Cong., 1st Sess. 585 (1866).

208. *Id.* A Minnesota populist, Representative Donnelly, had no love for Southern institutions, and openly spoke the necessity for a radical cure to the disease of slavery. He warned that if nothing were done to prevent reenslavement in another form, the Civil War would be fought over and over again in Congress; and that "the children of these people would be educated to reverence the leaders of the rebellion, and to place Lee beside Washington in the niches of their hearts." *Id.*

That oppression, in the form of the black codes, had recently made itself manifest. Sometimes merely reworded versions of the old laws designed to preserve slavery, and sometimes wholly new laws designed to ensure the suppression of the freedmen, these codes were widely adopted by the standing legislatures of the South. Such codes allowed for such slavery-like legal constructs as forced apprenticeship of children, a ban on land ownership by blacks, and criminal judgments of vagrancy against freedmen who had not agreed to contracts with plantation owners.<sup>209</sup> Even in a non-seceding state like Kentucky, blacks could not testify against whites or own a firearm, and crimes committed by blacks were subject to far more severe punishment than those committed against them.<sup>210</sup>

Interestingly, although most of the opponents of the Bureau simply ignored the black codes,<sup>211</sup> a few proudly proclaimed them as proof of the allegedly wise policies of state legislatures. Senator Garret Davis, for example, admitted that his state imposed only confinement upon a white man convicted of rape, but “when perpetrated by a negro upon a white woman, it is punishable by death.”<sup>212</sup> He announced to his colleagues that no amount of pressure would make Kentucky change that law, that it would stand “until the last trump blows.”<sup>213</sup> The following day he rose again to refer approvingly to a lynching that occurred a few years earlier in Missouri.<sup>214</sup> Reminding the Senate that his state punished rapists differently based on the color of their skin, he threatened that “the people of Kentucky will punish the black criminal by hanging him, and all the Freedmen’s Bureaus that could be created by Congress will be insufficient to give him immunity from such a just punishment.”<sup>215</sup> Faced by such celebrations of racism even as war power arguments faded, it is unsurprising that the Republicans continued to cast about for some rationale for this bold increase in Congressional power.

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209. *Id.* at 588-89.

210. *Id.* at 651.

211. “The people have ceased to believe ... that the white men are oppressing these colored persons.” CONG. GLOBE, 40th Cong., 2d Sess. 3054 (1868) (statement of Sen. Hendricks).

212. CONG. GLOBE, 39th Cong., 1st Sess. 397 (1866).

213. *Id.*

214. *Id.* at 418.

215. *Id.*

D. *The Thirteenth Amendment*

One place that a few members of Congress found such authorization was the second section of "the Great Amendment."<sup>216</sup> Some Bureau supporters argued that slavery existed in many forms, and that the black codes were simply the outlawed practice in another disguise. Some of the supporters of the expansion bill found their constitutional authorization precisely in that clause.<sup>217</sup> Representative Eliot himself argued that the power to legislate to end slavery would have been implicit even in the first section of the amendment, but the second explicitly gave power to Congress to enact any measure necessary to secure "the great grant of freedom."<sup>218</sup>

This is probably the least surprising basis for the Freedmen's Bureau, or at least its expansion, to modern ears. The Supreme Court has long accepted the notion that the legislative grant contained in the Thirteenth Amendment included the power to eliminate what Senator Trumbull had called "the badges of servitude."<sup>219</sup>

It is odd, then, to find so few references to the Great Amendment in the debates. Despite a seemingly obvious connection of the Bureau to the elimination of a systematic servitude, few members of Congress invoked it in defending Commissioner Howard's beleaguered agency.

Perhaps the reason can be found in the responses to these few proclamations by the Bureau's enemies. Opponents countered that the Amendment, as adopted by the States, did not grant any further power to the national government to regulate "matters of domestic concern."<sup>220</sup> If legal oppression was the same as slavery, asked one, what was to be done regarding California, where

216. U.S. CONST. amend. XIII, § 2 ("Congress shall have the power to enforce this article by appropriate legislation.").

217. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866) (statement of Rep. Hubbard).

218. *Id.* at 2773.

219. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 424 n.31 (1968). It should be noted that the Court in *Jones*, one footnote earlier, referred to the Freedmen's Bureau, although without citing its own constitutional source. *Id.* at 423. The implication that the Bureau was justified under the Thirteenth Amendment is a strong one.

220. CONG. GLOBE, 39th Cong., 1st Sess. 623 (1866) (statement of Rep. Kerr).



“legislation discriminates against a class of Asians” or Illinois, which did not grant “all the privileges and immunities” to blacks that were available for whites?<sup>221</sup> Although an occasional Senator would justify the Bureau as a temporary transition between slavery and freedom,<sup>222</sup> it is possible that the haunting presence of other forms of discrimination prevented some moderate members of Congress from pressing too hard the argument that the Bureau was a legitimate exercise of Thirteenth Amendment authority.

#### E. *Necessity*

Quite the contrary from a Thirteenth Amendment argument that we might well find more persuasive today than they did then, was a more general justification which rang throughout the debates: need. Building upon Thomas Eliot’s observation that the war effort of emancipation created a duty, some Congressmen embraced a theory that the necessity for action created its own justification. Freely admitting that the initial bill opened “a new field for legislation,” Hiram Price agreed with his opponents that there was no explicit authorization for the Bureau.<sup>223</sup> But, he observed, “neither is there for saving the passengers and crew of a sinking ship, or extinguishing a conflagration, or doing a thousand other things that require to be done.”<sup>224</sup>

Probably because his version of the bill would have placed it in the Treasury Department, Charles Sumner focused more on a general necessity theory than the war powers when he introduced the 1864 bill in the Senate. Unlike Eliot, who had cited all of the military provisions of the Constitution in his initial speech, Sumner never referred to that document at all. Instead, he read from report after report documenting the need for relief of the former slaves, and the inability of private aid societies to meet that need.<sup>225</sup> His argument ultimately was built on the ineffectiveness of any organization except the federal government to resolve the problems at hand, and he concluded that “the national Government must interfere in this case precisely as in

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221. *Id.* at 628 (statement of Rep. Marshall).

222. CONG. GLOBE, 38th Cong., 1st Sess. 2798 (1864) (statement of Sen. Sumner).

223. *Id.* at 888.

224. *Id.*

225. *Id.* at 2798-99.

building the Pacific railroad.”<sup>226</sup>

In addition to railroad building, other supporters pointed to support for immigration as an example of a federal power not restricted to enumerated powers. Representative Kelley noted that Congress regularly appropriated funds to care for and educate immigrants.<sup>227</sup> He argued that this action demonstrated the power to bring people into “the great temple of American civilization.”<sup>228</sup> One opponent declared this comparison irrelevant because “[w]e invite the immigrant from abroad,”<sup>229</sup> while fortunes of war thrust the freedman upon the federal government. Significantly, this response does not really contest Kelley’s argument that there are concrete powers which Congress may legitimately pursue which are only tenuously connected to the enumerated powers of Article I; it merely argues that the condition which creates the need must arise from some other government action in order to justify the new exercise of power.

Yet more constitutional evidence was found in the emergency support for Native Americans, especially in winter. In part of a continuing attempt to keep resettled Indians upon reservations, the federal government sometimes provided food and clothing. Congress had appropriated a half million dollar appropriation as recently as a month before the introduction of the Freedmen’s Bureau expansion bill in 1866.<sup>230</sup> From this example, the bill’s sponsor, Senator Trumbull, derived the principle that the federal government was always granted the power to feed a “helpless population.”<sup>231</sup>

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226. CONG. GLOBE, 38th Cong., 1st Sess. 2799 (1864).

227. CONG. GLOBE, 38th Cong., 2d Sess. 692 (1865).

228. *Id.*

229. CONG. GLOBE, 38th Cong., 2d Sess. 693 (1865) (statement of Rep. Chanler).

230. CONG. GLOBE 39th Cong., 1st Sess. 319 (1866).

231. *Id.* At least one scholar views statements like these not as pointing to a generalized role for necessity in constitutional interpretation, but as a demonstration of humanitarian relief as a legitimate congressional function under the Taxing and Spending Clause. See Michele Landis Dauber, *Forum: “Overtaken by a Great Calamity”: Disaster Relief and the Origins of the American Welfare State: The Sympathetic State*, 23 LAW & HIST. REV. 387 (2005). Professor Dauber makes a very compelling argument that the Bureau was part of a tradition of emergency relief, although admittedly it was much greater than what had come before. See *id.* at 408-19. She may well be right that several of the lawmakers I see as setting forth a broad necessity argument were in fact only arguing for a more limited, but still expansive,

Still another example of expansive, unwritten federal power occurred after the outlawing of the slave trade. When, as occasionally happened, a slave ship inadvertently landed on an American shore, federal legislation authorized the Executive Branch to feed them and transport them back to Africa.<sup>232</sup>

Opponents refused to concede that this principle was operative at all in the constitutional system,<sup>233</sup> or argued that the necessity had been caused by the Republican's conduct of the war. Representative Shanklin demanded that no use of necessity be afforded the "fanatical abolitionists" who had "by promises, persuasions, and misrepresentations . . . demoralized the Negroes, who were a contented, quiet, and peaceable class heretofore, well fed and well clothed."<sup>234</sup> He claimed that the Republicans had "dragged" the slavery question into the war, and were therefore estopped from arguing any expansion of federal power be based upon it.<sup>235</sup>

#### IX. THE END OF THE BUREAU AND ITS LEGACY

##### A. *Suffrage*

Even before the passage of the first Freedmen's Bureau bill, voices were raised in favor of extending the vote to freed slaves.

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spending power. Ultimately, though, two arguments seem to me to support the idea that at least some members of Congress viewed this enterprise as outside of the taxing and spending power. Initially, the legislation went far beyond disaster relief, encompassing jurisdiction and labor negotiations that seem an ill-fit under the spending power, see *supra* note 83 and accompanying text. Additionally, by assigning lands seized by the United States to the Bureau, there was an expectation that the Bureau would be wholly self-financing, and would require neither taxes nor appropriations, see *supra* note 145 and accompanying text. Thus I view these comments as pointing to a different constitutional principle than the Spending Clause, although I admit Professor Dauber makes a convincing case that in subsequent years many members of Congress used the Freedmen's Bureau as an example of the spending power of Congress.

232. CONG. GLOBE, 39th Cong., 1st Sess. 323 (1866): A law of 1860 had provided that in such cases the President could lawfully provide "comfortable clothing, shelter, and provisions for a period not exceeding one year from the date of their being landed on the coast of Africa." *Id.* at 370; see also *id.* at 631.

233. *Id.* at 371 (statement of Sen. Davis).

234. *Id.* at 638.

235. *Id.*

Although the two actions had much common ground and ultimately numbered many of the same legislators among their supporters, there were those who viewed the policies as contradictory in nature. Representative of this view was Senator Sprague, who argued consistently that enfranchisement was the only meaningful protection that blacks would ever have.<sup>236</sup> He proposed refusing seceded States return to constitutional relations until they guaranteed that black men could vote. "When a man can vote," he said, "he needs no special legislation in his behalf."<sup>237</sup>

The argument went in the other direction as well. Senator Stewart strongly promoted the expansion of the Freedmen's Bureau as "a practical measure" to protect civil rights. He recoiled, however, from any provision of the right to vote, and denounced those "who are determined to sacrifice the Union and the Constitution unless they can achieve the right of suffrage for the Negro."<sup>238</sup>

In the earliest years of the Bureau, amid the throes of the refugee crisis, proponents of the legislation could argue that the vote would not feed or clothe helpless people.<sup>239</sup> As time went on, the argument for suffrage became more difficult to oppose. Virtually all of the Freedmen's Bureau supporters had always advocated a temporary agency; this made it harder to insist on continuing legislation for the Bureau as war and emancipation receded into the past. One representative specifically assumed that the Bureau – which he supported – was relief of short duration that must be augmented by suffrage or "in a short time the Negro will relapse into oppression."<sup>240</sup>

By the last days of the Bureau, as Congress debated the future organization of its educational activities, suffrage had become a vital part of the argument for its termination. Although still critical of the fact that Congress had "overthrown sovereign States and willfully violated the Constitution of your country to make him a voter," Representative McNeely relied heavily upon

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236. *E.g.*, CONG. GLOBE, 38th Cong., 2d Sess. 960 (1865).

237. *Id.* See also *id.* at 985 (statement of Sen. Lane of Indiana); CONG. GLOBE, 39th Cong., 1st Sess. 745 (1866) (statement of Sen. Henderson).

238. CONG. GLOBE, 39th Cong., 1st Sess. 297 (1866). The Nevadan William Stewart was one of those who did see the Freedmen's Bureau as authorized by Section 2 of the Thirteenth Amendment. *Id.*

239. *Id.* at 746 (statement of Sen. Trumbull).

240. *Id.* at 590 (statement of Rep. Donnelly).

suffrage to argue that blacks should now be unprotected by the Freedmen's Bureau.<sup>241</sup>

### B. *The Aftermath*

Even the final closure of the Bureau did not end the battles over it.<sup>242</sup> All of the parties seemed to understand that the stakes in the fight for the future of the freedmen – and the United States – were high enough that the retrospective battle was important as well. Upon its closure paeans of praise rang out from supporters for the noble work it had done.<sup>243</sup>

Almost immediately, however, the counterattack began. As the Reconstruction chapter of American history closed, the Southern white perspective, which was to give birth to the “Lost Cause” mythology, took particular aim at the Freedmen's Bureau. One of the interesting features of this attack was how frequently it featured ideas first raised during the life of the Bureau by men like Andrew Johnson and Garret Davis. The post-Reconstruction writers argued that the Bureau had been an unconstitutional aggrandizement of congressional power, that it had been unfair to the white people of the South, and that it had been a corrupt political tool of Republican power.

The argument that the Bureau was constructed for narrow political advantage had begun during its life. Senator Hendricks had argued in 1868 that the Bureau was bad for both blacks and whites, but Congress maintained it to ensure that there was a “special partisan” in every county in the South to organize and control that fall's elections.<sup>244</sup> There were even a few contemporaries and supporters who thought that a political role for the Bureau was appropriate; Senator Patterson of New

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241. CONG. GLOBE, 41st Cong., 2d Sess. 1995 (1870).

242. The Bureau ended in a series of legislative contractions. As Southern States were readmitted, it lost judicial authority in those places; its available land continued to shrink precipitously; and ultimately it was reduced to educational activities and assisting black soldiers recover bounties due them for their wartime service, until it was finally closed at the end of June, 1872. PEIRCE, *supra* note 19, at 73-74.

243. CONG. GLOBE, 41st Cong., 2d Sess. 2295 (1870) (statement of Rep. Arnell, prophesying that a historian of the era will “point with wonder and admiration to this lily that grew out of and covered with its blossoms the dank and gaping grave of war”).

244. CONG. GLOBE, 40th Cong., 2d Sess. 3054 (1868).

Hampshire, for instance, saw nothing wrong with agents, in their private capacities, organizing Union leagues to get out the vote for the Republican ticket.<sup>245</sup> As some members of Congress became authors, they repeated the charge: former Representative Cox, who had engaged in a shocking racist screed in 1864,<sup>246</sup> turned historian twenty-four years later to write that the Bureau's purpose had been "to perpetuate the existence of the Republican party."<sup>247</sup>

Throughout much of the twentieth century, the majority view of the Bureau was drawn from the words of its historic opponents. Mainstream historical texts called the Bureau a corrupt abuser of public trust, an unfair judge of oppressed whites, the cause of racial disharmony in the post-war South, and a primarily political organization.<sup>248</sup> In more recent days, a number of revisionist historians, recovering a more balanced view of Reconstruction generally, have reevaluated the Freedmen's Bureau as well.<sup>249</sup>

One ironic feature of the more recent revisionist views of the Bureau is that they have occasionally also adopted the arguments of the Bureau's opponents. Because these modern authors genuinely sympathize with the plight of the freedmen, they express frustration over the limited accomplishments of the Bureau.<sup>250</sup> Although some have noted the persistent opposition by President Johnson and congressional opponents, many have identified corruption and other problems within the Bureau itself.<sup>251</sup> Others have been affected by the reenslavement

245. *Id.* at 3057.

246. Cox ranted about an abolitionist plot to encourage interracial marriage. CONG. GLOBE, 38th Cong., 1st Sess. 712 (1864). He warned that in a year or two a New Englander would seek the establishment of "a department for the hybrids who are cast upon the care of the Government by this system of miscegenation." *Id.* He warned, however, that "the mulatto does not live; he does not recreate his kind; he is a monster." *Id.*

247. PEIRCE, *supra* note 19, at 170.

248. BENTLEY, *supra* note 19, at 202 (claiming that Grant was elected president only because of the black vote, and that the Bureau "thoroughly accomplished one of its original tasks, that of helping the Radical politicians keep their party in power").

249. See, e.g., RECONSIDERATIONS, *supra* note 21.

250. NIEMAN, *supra* note 72, at 222.

251. See, e.g., CLAUDE F. OUBRE, FORTY ACRES AND A MULE: THE FREEDMEN'S BUREAU AND BLACK LAND OWNERSHIP 192-236 (1978) ("[T]he fact remains that the majority of the minor bureau agents were white northerners who felt no moral obligation to the freedmen. Indeed, many were dishonest

argument,<sup>252</sup> arguing that the Bureau was more concerned with the freedmen's willingness to work than their well-being.<sup>253</sup> One author even criticized Congress for taking limited half-measures to implement real freedom, of being more devoted to a conservative reading of the Constitution than to the well-being of black Americans.<sup>254</sup>

### C. *Revival and Respect*

Yet there have always been even-tempered views of the Bureau as well. W.E.B. DuBois offered an early corrective with his review of the Bureau for *Atlantic Monthly* in 1901.<sup>255</sup> Later authors, although not uncritical, noted the Bureau's "daunting" range of duties and extremely limited personnel and funds.<sup>256</sup> LaWanda Cox took particular efforts to correct the notion that the Bureau was a political arm of the Republican Party.<sup>257</sup>

The Freedmen's Bureau's work as an administrative body has recently received praise as well. Serving as it did as the government agency legitimizing and recording marriages,<sup>258</sup> supervising labor contracts, and recording land transfers, its historical value is finally being recognized. For social research as well as personal genealogy, the papers of the Bureau are unique records of a group of Americans in time. Because the records have been subject to a level of neglect analogous to the Bureau's disfavor in twentieth century historiography, it became necessary for Congress, once again, to act. So in 2000, yet one more piece of legislation concerned this unusual Bureau: the Freedmen's

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and used their positions for personal and political gain.").

252. See *supra* notes 153-163 and accompanying text.

253. See, e.g., FONER, *supra* note 20, at 157 ("[T]he Bureau, like the Army, seemed to consider black reluctance to labor the greater threat to its economic mission.").

254. NIEMAN, *supra* note 72, at 222.

255. The article was republished in *SOULS OF BLACK FOLK*, *supra* note 36.

256. FONER, *supra* note 20, at 142-43.

257. LaWanda Cox, *General O.O. Howard and the "Misrepresented Bureau"*, in *FREEDOM, RACISM, AND RECONSTRUCTION: COLLECTED WRITINGS OF LAWANDA COX* 149, 156 (Donald G. Nieman ed., 1997).

258. Congress had never provided for this function, but Howard authorized his subordinates, "in places where the local statutes make no provisions for the marriage of persons of color ... to designate officers who should keep a record of marriages, which might be solemnized by any ordained minister of the gospel." HOWARD, *supra* note 27, at 223.

Bureau Records Protection Act.<sup>259</sup> With this enactment, legislation regarding the Bureau may have finally come to a close.

#### X. A SENSE OF CONSTITUTIONAL IMAGINATION

Ultimately the proponents of the Bureau, and advocates of Reconstruction generally, faced a grave dilemma. It was unquestionably true that the constitutional forms of the nation's history were wholly inadequate to the crisis at hand. It was equally true that the federal government could not simply stand idly by and watch tragedies unfold. In the words of W.E.B. DuBois, the latter always proved to be the unanswerable argument confronting the opponents: that the deeds "manifestly must be done," and that the government *must* therefore have the power to do them.<sup>260</sup> It was in facing this conundrum that these men demonstrated the extent, and limits, of their imagination.

##### A. *Extension of Necessary Powers*

The proponents of the Freedmen's Bureau always had more rhetorical work to do than their opponents did. In addition to the inherent inertial strength of the status quo, advocates of new roles for government in the United States must always contend with the idea that the enumerated powers not only define the federal government, but must be read in a severely limiting way. The Bureau's own supporters divided over this idea. Many thus couched their support for the Bureau in intricate constructions of specific provisions. Some, however, refused to allow their thinking about the American Republic to be limited to repetitions of already accomplished feats.

Representative Cole of California early propounded the view that the past was not a boundary. Asserting that "[p]recedent is only respectable when it accords with right reason,"<sup>261</sup> he avowed

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259. Pub. L. No. 106-444 (2000). The Act appropriated three million dollars for the National Archives to microfiche and index the Bureau's records. As the findings portion of the originally introduced House Resolution noted, the Bureau's documents "contain a wide range of data about the African-American experience during slavery and freedom, including in marriage records, labor contracts, Government rations and back pay records, and indentured contracts for minors." H.R. 5157, 106th Cong. § 2 (10).

260. DuBOIS, *supra* note 36, at 53.

261. CONG. GLOBE, 38th Cong., 1st Sess. 743 (1864).



that his colleagues should not be limited to the past any more than the patriots of the American Revolution had been. Speaking at a time before the Thirteenth Amendment committed the nation to a path of freedom, Cole claimed that slavery had “forfeited every semblance of right to recognition.”<sup>262</sup>

Some Republicans openly embraced a constitutional view that allowed for evolution. William Kelley of Pennsylvania, denouncing stagnation and proclaiming that “mutation is the law of our life,”<sup>263</sup> called upon his colleagues to look to the future. “It is no answer,” he said “to say that there has never been a Freedmen’s Bureau before.”<sup>264</sup> Senator Hale urged his colleagues to stop focusing on the “dead past” and instead make precedents for “our children in coming generations for just such a time as this if it should ever come again.”<sup>265</sup> He compared those demanding limits to enumerated powers to an Episcopal priest refusing to pray for a man gored by a bull because “there was nothing of that sort in the prayer-book.”<sup>266</sup>

Senator Fessenden, later to be the Attorney General, specifically rejected the principle of *expressio unis* in constitutional interpretation. He argued that the “lawyer’s argument” that the statement of one thing necessarily excluded unstated things was wholly inappropriate where the nation faced “a state of facts that could not be contemplated before they arose.”<sup>267</sup> In a colloquy with Senator Hendricks he noted that Congress had also appropriated money for seeds to be distributed by the Agriculture Bureau, an act which was equally without literal support in the Constitution.<sup>268</sup>

Perhaps the grandest statement of imagination of all came from Ignatius Donnelly, the firebrand from Minnesota. In February 1866 he outlined his rejection of the literalist, grudging approach to the founding document:

[T]his is a new birth of the nation. The Constitution will hereafter be read by the light of the rebellion; by the light

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262. *Id.*

263. *Id.* at 772.

264. *Id.* at 775.

265. *Id.* at 3308.

266. *Id.*

267. CONG. GLOBE, 39th Cong., 1st Sess. 366 (1866).

268. *Id.* at 369.

of the emancipation; by the light of that tremendous uprising of the intellect of the world going on everywhere around us. He is indeed fearfully cramped by the old technicalities who can see in this enormous struggle only the suppression of a riot and the dispersion of a mob. This struggle has been as organic in its great meanings as the Constitution itself. It will leave its traces upon our Government and laws so long as the nation continues to exist.<sup>269</sup>

### B. *An Eye to the Future*

Even most Radical Republicans were unwilling to go as far as Ignatius Donnelly; they did go quite far, however, and offer the modern United States a vision of how a constitutional imagination can be put to use. Occasionally the Congressmen who spoke offered moments of rare and real insight. Because they confronted a crisis of great need and little precedent, they had to find new ways to view their situation. One such vision occurred when Representative Hubbard of Connecticut advocated simultaneously a color-blind Constitution *and* a progressive view of the Freedmen's Bureau. He first noted the continuing dangers of racism. "The words caste, race, color, ever unknown to the Constitution, notwithstanding the immortal amendment giving freedom to all, are still potent for evil on the lips of men whose minds are swayed by prejudice or blinded by passion, and the freedmen need the protection of this bill."<sup>270</sup> He justified the protection of the freedmen by linking them to the ideals of "men of all nations, of all kindreds and tongues" who came "to worship at freedom's shrine."<sup>271</sup>

In returning to the ideals of the Declaration of Independence, in resolutely attaching himself to the cause of liberty and

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269. *Id.* at 586. Representative Donnelly may be subject to many criticisms, but lack of imagination is certainly not one of them. After his career in Congress as a Republican he founded his own political party, and wrote books "proving" that Atlantis was a large, long-lasting settlement between Africa and South America, that a terrible comet had struck earth in man's prehistory, and that Francis Bacon wrote the plays attributed to William Shakespeare. RIDGE, *supra* note 23, at 198, 204, 228.

270. CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866).

271. *Id.*

constitutional government, Hubbard offered nothing less than a possible solution to discriminatory problems then and now. His assessment as a legislator was that racial discrimination was real, and pervasive: the freedmen "need schools and protection."<sup>272</sup> Yet he worked within a Constitution he insisted must be free of race and caste. His understanding of these two principles led him to believe that the Constitution did not require blindness of any kind of the legislatures. Indeed, Congress had a duty to see acts of unfairness perpetrated by individuals, or even by the States themselves. In removing racist obstructions, in moving the country to the state of color-blindness required by the Constitution, Hubbard's solution allowed Congress and federal instrumentalities to consider the factual setting of the nation. Indeed, he would demand the government use its powers to create a color-blind society. The end, as envisioned by the Declaration, must be blind as to one's personal race or situation; the means need not be, and probably could not be.

For history needed then to be taken into account. As Thomas Eliot noted, the story of the relation of the races had been that "[w]e have done nothing to them, as a race, but injury."<sup>273</sup> To those who claimed that slavery had Christianized the black people, Eliot responded that the credit for that benefit went to God, not to those who had enslaved other men. He observed that an entire legal system had developed to keep slaves in their place and said of the unfinished work of emancipation "we have struck off their chains. Shall we not help them to find homes? They have not had homes yet. We have not let them know the meaning of the sacred name of home."<sup>274</sup>

Mere emancipation did not remedy the past; rather, it created a need. This, in turn, created a duty. That duty gave rise to a corresponding power. The failures of the Freedmen's Bureau to achieve its goals fully and accomplish its duties perfectly do not take away from the extraordinary innovations inherent in its very existence. For the first time, the federal government entered the lives of individuals on a large scale in an endeavor to feed them, clothe them, educate them, enable them to marry, and protect

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272. *Id.*

273. *Id.* at 2779.

274. *Id.*

them in their legal rights. General Howard himself believed that the humanitarian spirit that led to the Bureau produced real patriotism for the government, as it "was always hard to love a Government which, theoretically, was a mere machine and which could extend no sympathy to people in disaster."<sup>275</sup> He believed that the willingness of the United States to intervene led to a growth of nationalism that would forever bind the country.

If General Howard was right, then the reward for the sense of constitutional imagination shown by the supporters of the Freedmen's Bureau was not in vain. Those men showed themselves willing to think creatively and take risks when facing a crisis of extraordinary magnitude. Congressmen like Thomas Eliot and Lyman Trumbull willed themselves and their colleagues to go beyond the forms of the past not because they wished to experiment with the Constitution, but because they had no choice. They saw a large section of the American public in crisis, and refused to turn away despite the fact that an intervention of this kind had no precedent whatever in American history.

The story of federal power is incomplete without considering the meaning given to the Constitution's short phrases by all of the federal branches. In their unprecedented actions the Reconstruction Congress set forth their understanding of their responsibilities, and the powers that must accompany them. The deeds of the Freedmen's Bureau are at long last gaining some of the credit that they merited. Perhaps it is now time also to acknowledge a debt to the much-maligned radicals and recognize that, at least at some times, Congress has the power to do what "manifestly must be done."

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275. HOWARD, *supra* note 27, at 203.