

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 6: The Civil War and Reconstruction—Equality/Race/Implementing the Thirteenth Amendment

The Debate over the Second Freedmen's Bureau Act (1866) (expanded)

The Second Freedmen's Bureau Act was a Republican effort to extend the life and expand the duties of the Freedmen's Bureau that was established by law in March 1865. Republicans hoped to provide persons of color with the economic and educational opportunities they thought necessary to equal citizenship. The constitutional debate over the measure was partisan. Republicans insisted that the Second Freedmen's Bureau Act was a legitimate exercise of both the war power and Section 2 of the Thirteenth Amendment. Democrats rejected both claims. President Andrew Johnson and other Democrats further insisted that the provisions in the bill authorizing the federal government to obtain land and use military commissions violated the due process clause of the Fifth Amendment and the right to a jury trial guaranteed by the Sixth Amendment. The Second Freedman's bill easily passed both Houses of Congress, but was vetoed by President Johnson on February 19, 1866. Congress failed to override that veto. Within six months, Republicans passed a slightly revised version of the Second Freedmen's Bureau Bill and successfully overrode President Johnson's veto.

The following excerpts focus on congressional power under Section 2 of the Thirteenth Amendment. Note that the Freedmen's Bureau Act refers to "refugees and freedmen." Eric Schnapper, a prominent contemporary proponent of affirmative action, maintains these references demonstrate that Reconstruction Republicans approved those racial classifications that they believed promoted racial equality. He writes,

From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.¹

Schnapper correctly claims that opponents of the Freedmen's Bureau Bill repeatedly condemned that proposal for unconstitutionally giving special treatment to persons of color. Does he also correctly characterize proponents of the measure as championing race-conscious measures? Does the text of the Freedmen's Bill rely on racial classifications? To what extent did Senator Trumbull interpret the bill as providing benefits to all persons of color as opposed to all former slaves?

The Proposed Second Freedmen's Bureau Act²

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¹ Eric Schnapper, "Affirmative Action and the Legislative History of the Fourteenth Amendment," *Virginia Law Review* 71 (1985):753.

² *Congressional Globe*, 39th Cong., 1st Sess. App. (1866), 83.

Sec. 3. *And be it further enacted*, That the Secretary of War may direct such issues of provisions, clothing, fuel, and other supplies, including medical stores and transportation, and afford such aid, medical or otherwise, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen, their wives and children, under such rules and regulations as he may direct: *Provided*, That no person shall be deemed "destitute," "suffering," or "dependent upon the government for support," within the meaning of this act, who, being able to find employment, could by proper industry and exertion avoid such destitution, suffering, or dependence.

Sec. 4. *And be it further enacted*, That the President is hereby authorized to reserve from sale or from settlement, under the homestead or pre-emption laws, and to set apart for the use of freedmen and loyal refugees, male or female, unoccupied public lands in Florida, Mississippi, Alabama, Louisiana, and Arkansas, not exceeding in all three millions of acres of good land; and the Commissioner, under the direction of the President, shall cause the same from time to time to be allotted and assigned, in parcels not exceeding forty acres each, to the loyal refugees and freedmen, who shall be protected in the use and enjoyment thereof for such term of time and at such annual rent as may be agreed on between the Commissioner and such refugees or freedmen. . . .

Sec. 6. *And be it further enacted*, That the Commissioner shall, under the direction of the President, procure in the name of the United States, by grant or purchase, such lands within the districts aforesaid as may be required for refugees and freedmen dependent on the government for support; and he shall provide or cause to be erected suitable buildings for asylums and schools. . . .

Sec. 7. *And be it further enacted*, That whenever in any State or district in which the ordinary course of judicial proceedings has been interrupted by the rebellion, and wherein, in consequence of any State or local law, ordinance, police or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms, are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude, or wherein they or any of them are subjected to any other or different punishment, pains, or penalties, for the commission of any act or offence, than are prescribed for white persons committing like acts or offences, it shall be the duty of the President of the United States, through the Commissioner, to extend military protection and jurisdiction over all cases affecting such persons so discriminated against.

*The Congressional Debate*³

SENATOR THOMAS HENDRICKS (Democrat, Indiana)

... If they have been made free and brought into the class of citizens, upon what principle can you authorize the Government of the United States to buy homes for them? Upon what principle can you authorize the Government of the United States to buy lands for the poor people in any State in the Union? They may be very meritorious; their cases may appeal with great force to our sympathies; it may almost appear necessary to prevent suffering that we should buy a home for each poor person in the country; but where is the power of the General Government to do this thing? Is it true that by this revolution the persons and property of the people have been brought within the jurisdiction of Congress and taken from without the control and jurisdiction of the States? I have understood heretofore that it has never been disputed that the duty to provide for the poor, the insane, the blind, and all who are dependent upon society, rests upon the States, and that the power does not belong to the General Government. What has occurred, then, in this war that has changed the relation of the people to the General Government to so

³ *Ibid.*, 314-23, 544, 941-942.

great an extent that Congress may become the purchaser of homes for them? If we can go so far, I know of no limit to the powers of Congress. . . .

...
It is claimed that under this second section Congress may do anything necessary, in its judgment, not only to secure the freedom of the negro, but to secure him all civil rights that are secured to white people. I deny that construction, and it will be a very dangerous construction to adopt. The first section abolishes slavery. The second section proves that Congress may enforce the abolition of slavery "by appropriate legislation." What is slavery? It is not a relation between the slave and the State; it is not a public relation; it is a relation between two persons whereby the conduct of the one is placed under the will of the other. It is purely and entirely a domestic relation, and is so classed by all law writers; the law regulates that relation as it regulates other domestic relations. This constitutional amendment broke asunder this private relation between the master and his slave, and the slave then, so far as the right of the master was concerned, became free; but did the slave, under that amendment, acquire any other right than to be free from the control of his master? The law of the State which authorized this relation is abrogated and annulled by this provision of the Federal Constitution, but no new rights are conferred upon the freedman.

Then, sir, to make a contract is a civil right which has ordinarily been regulated by the States. The form of that contract and the ceremonies that shall attend it are not to be regulated by Congress, but by the States. Suppose that it becomes the judgment of the State that a contract between a colored man and a white man shall be evidenced by other solemnities and instruments than are required between two white men, shall not the State be allowed to make such a provision? Is it a civil right to give evidence in courts? Is it a civil right to sit upon a jury? If it be a civil right to sit upon a jury, this bill will require that if any negro is refused the privilege of sitting upon a jury, he shall be taken under the military protection of the Government. Is the right to marry according to a man's choice a civil right? Suppose a State shall deny the right of amalgamation, the right of a negro man to intermarry with a white woman, then that negro may be taken under the military protection of the Government; and what does that mean? . . .

...
My judgment is that under the second section of the [Thirteenth] Amendment we may pass such a law as will secure the freedom declared in the first section, but that we cannot go beyond that limitation. If a man has been, by this provision of the Constitution, made free from his master, and that master undertakes to make him a slave again, we may pass such laws as are sufficient in our judgment to prevent that act; but if the Legislature of the State denies to the citizen as he is now called, the freedman, equal privileges with the white man, I want to know if that Legislature, and each member of that Legislature, is responsible to the penalties prescribed in this bill? It is not an act of the old master; it is an act of the State government, which defines and regulates the civil rights of the people.

SENATOR LYMAN TRUMBULL (Republican, Illinois)

...
[W]hat was the object of the Freedmen's Bureau, and why was it established? It was established to look after a large class of people who, as the results of the war, had been thrown upon the hands of the Government, and must have perished but for its fostering care and protection. Does the Senator mean to deny the power of this Government to protect people under such circumstances? . . .

[W]e have thrown upon us four million people who have toiled all their lives for others; who, unlike the Indians, had no property at the beginning of the rebellion; who were never permitted to own anything, never permitted to eat the bread their own hands had earned; many of whom are without any means of support, in the midst of a prejudiced and hostile population who have been struggling to overthrow the Government. These four million people, made free by the acts of war and the constitutional amendment, have been, wherever they could, loyal and true to the Union; and the Senator seriously asks, what authority have we to appropriate money to take care of them? What would he do with them? Would he allow them to starve and die? Would he turn them over to the mercy of the men who, through their whole lives, have had their earnings, to be enslaved again? It is not the first time that

money has been appropriated to take care of the destitute African. For years it has been the law that whenever persons of African descent were brought to our shores with the intention of reducing them to slavery, the Government should, if possible, rescue and restore them to their native land; and we have appropriated hundreds of thousands of dollars for this object. . . .

...
[T]he Senator from Indiana says it extends all over the United States. Well, by its terms it does, though practically it can have little if any operation outside of the late slaveholding States. If freedmen should congregate in large numbers at Cairo, Illinois or at Evansville, Indiana, and become a charge upon the people of those States, the Freedmen's Bureau would have a right to extend its jurisdiction over them, provide for their wants, secure for them employment, and place them in situations where they could provide for themselves. . . .

...
. . . The cheapest way by which you can save this race from starvation and destruction is to educate them. They will soon become self-sustaining. The report of the Freedmen's Bureau shows that today more than seventy thousand black children are being taught in the schools which have been established in the South. We shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them land upon which they can make a living for themselves.

...
. . . I think [the Thirteenth] Amendment does confer authority to enact these provisions into law and execute them. . . . What was the object of the constitutional amendment abolishing slavery? It was not, as the Senator says, simply to take away the power of the master over the slave. Did we not mean something more than that? Did we mean that hereafter slavery should not exist, no matter whether the servitude was claimed as due to an individual or the State? The constitutional amendment abolishes just as absolutely all provisions of State or local law which make a man a slave as it takes away the power of his former master to control him.

If the construction put by the Senator from Indiana upon the amendment be the true one, and we have merely taken from the master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound," and the promised freedom is a delusion. Such was not the intention of Congress, which proposed the constitutional amendment, nor is such the fair meaning of the amendment itself. With the destruction of slavery necessary follows the destruction of the incidents to slavery. When slavery was abolished, slave codes in its support were abolished also.

Those laws that prevented the colored man going from home, that did not allow him to buy or to sell, or to make contracts; that did not allow him to own property; that did not allow him to enforce rights; that did not allow him to be educated, were all badges of servitude made in the interest of slavery and as a part of slavery. They never would have been thought of or enacted anywhere but for slavery, and when slavery falls they fall also. The policy of the States where slavery has existed has been to legislate in its interest; and out of deference to slavery, which was tolerated by the Constitution of the United States, even some of the non-slaveholding States passed laws abridging the rights of the colored man which were restraints upon liberty. When slavery goes, all this system of legislation, devised in the interests of slavery and for the purpose of degrading the colored race, of keeping the negro in ignorance, of blotting out from his very soul the light of reason, if that were possible, that he might not think, but know only, like the ox, to labor, go with it.

Now, when slavery no longer exists, the policy of the Government is to legislate in the interest of freedom. Now, our laws are to be enacted with a view to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve that principle which the great Author of all has implanted in every human breast, which is susceptible of the highest cultivation, and destined to go on enlarging and expanding through the endless ages of eternity.

I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendments amount to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article

