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 Act[2]

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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)

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. . . 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. . . .

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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? . . .

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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 freedom, 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)

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[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. . . .

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[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. . . .

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. . . 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.

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. . . 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

prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation as it may think proper, so that it be a means to accomplish the end. If we believe a Freedmen's Bureau necessary, if we believe an act punishing any man who deprives a colored person of any civil rights on account of his color necessary—if that is one means to secure his freedom, we have the constitutional right to adopt it. If in order to prevent slavery Congress deem it necessary to declare null and void all laws which will not permit the colored man to contract, which will not permit him to testify, which will not permit him to buy and sell, and to go where he pleases, it has the power to do so, and not only the power, but the duty to do so. . . .

But, says the Senator from Indiana, we have laws in Indiana prohibiting black people from marrying whites, and are you going to disregard these laws? Are our laws enacted for the purpose of preventing amalgamation to be disregarded, and is a man to be punished because he undertakes to enforce them? I beg the Senator from Indiana to read the bill. One of its objects is to secure the same civil rights and subject to the same punishments persons of all races and colors. How does this interfere with the law of Indiana preventing marriages between whites and blacks? Are not both races treated alike by the law of Indiana? Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vica versa*?

REPRESENTATIVE NELSON TAYLOR (Democrat, New York)

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Now, according to my understanding of the meaning of the name refugee as it is used in the bill creating the bureau and the bill now before us, the present proposed legislation is solely and entirely for the freedmen, and to the exclusion of all other persons, whether white or black, be their circumstances what they may.

This sir, is what I call class legislation—legislation for a particular class of the blacks to the exclusion of all whites, and all blacks who in being deprived of the benefits and immunities extended by this bill will have cause to think it misfortunate to have been free.

Such partial legislation, Mr. Speaker, cannot be lasting; it seems to me to be in opposition to the plain spirit pervading nearly every section of the Constitution that congressional legislation should in its operation affect all alike.

No special and discriminating legislation that I am aware of has yet in this Republic stood the test of time, nor do I believe that it ought or will; and I warn the gentlemen in their zeal to elevate and ameliorate the condition of the freedmen not to allow this bill to pass regardless of the great principle, equality before the law, about which so much has been said during the past four years.

In my opinion if they do, the aid which they will render can only be temporary and not permanent, and in the reaction which is sure to follow, the injury and harm which will fall upon the head of the poor black will be greater than the present and temporary good afforded.

It is said that it is a characteristic of zealots and fanatics to carry things to extreme. Many persons in our community have been proclaiming equality before the law so long, taking their text from the institution of slavery, that now there is an opportunity to establish so desirable a principle in our Government, that perhaps it would be well to stop and consider whether or not by passing this bill in its present shape we shall not overleap the mark and land on the other side, and before we are aware of it, not have the freedmen equal before the law, but superior.

PRESIDENT ANDREW JOHNSON, Veto Message (1866)

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I share with Congress the strongest desire to secure to the freedmen the full enjoyment of their freedom and property and their entire independence and equality in making contracts for their labor, but

the bill before me contains provisions which in my opinion are not warranted by the Constitution and are not well suited to accomplish the end in view.

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In time of war it was eminently proper that we should provide for those who were passing suddenly from a condition of bondage to a state of freedom. But this bill proposes to make the Freedmen's Bureau, established by the act of 1865 as one of many great and extraordinary military measures to suppress a formidable rebellion, a permanent branch of the public administration, with its powers greatly enlarged. . . . The institution of slavery, for the military destruction of which the Freedmen's Bureau was called into existence as an auxiliary, has been already effectually and finally abrogated throughout the whole country by an amendment of the Constitution of the United States, and practically its eradication has received the assent and concurrence of most of those States in which it at any time had an existence. I am not, therefore, able to discern in the condition of the country anything to justify an apprehension that the powers and agencies of the Freedmen's Bureau, which were effective for the protection of freedmen and refugees during the actual continuance of hostilities and of African servitude, will now, in a time of peace and after the abolition of slavery, prove inadequate to the same proper ends. If I am correct in these views, there can be no necessity for the enlargement of the powers of the Bureau, for which provision is made in the bill.

The third section of the bill authorizes a general and unlimited grant of support to the destitute and suffering refugees and freedmen, their wives and children. Succeeding sections make provision for the rent or purchase of landed estates for freedmen, and for the erection for their benefit of suitable buildings for asylums and schools, the expenses to be defrayed from the Treasury of the whole people. The Congress of the United States has never heretofore thought itself empowered to establish asylums beyond the limits of the District of Columbia, except for the benefit of our disabled soldiers and sailors. It has never founded schools for any class of our own people, not even for the orphans of those who have fallen in the defense of the Union, but has left the care of education to the much more competent and efficient control of the States, of communities, of private associations, and of individuals. It has never deemed itself authorized to expend the public money for the rent or purchase of homes for the thousands, not to say millions, of the white race who are honestly toiling from day to day for their subsistence. A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another. Pending the war many refugees and freedmen received support from the Government, but it was never intended that they should thenceforth be fed, clothed, educated, and sheltered by the United States. The idea on which the slaves were assisted to freedom was that on becoming free they would be a self-sustaining population. Any legislation that shall imply that they are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects.

There is still further objection to the bill, on grounds seriously affecting the class of persons to whom it is designed to bring relief. It will tend to keep the mind of the freedman in a state of uncertain expectation and restlessness, while to those among whom he lives it will be a source of constant and vague apprehension.

Undoubtedly the freedman should be protected, but he should be protected by the civil authorities, especially by the exercise of all the constitutional powers of the courts of the United States and of the States. His condition is not so exposed as may at first be imagined. He is in a portion of the country where his labor cannot well be spared. Competition for his services from planters, from those who are constructing or repairing railroads, and from capitalists in his vicinage or from other States will enable him to command almost his own terms. He also possesses a perfect right to change his place of abode, and if, therefore, he does not find in one community or State a mode of life suited to his desires or proper remuneration for his labor, he can move to another where that labor is more esteemed and better rewarded. In truth, however, each State, induced by its own wants and interests, will do what is necessary and proper to retain within its borders all the labor that is needed for the development of its resources. The laws that regulate supply and demand will maintain their force, and the wages of the

laborer will be regulated thereby. There is no danger that the exceedingly great demand for labor will not operate in favor of the laborer.

Neither is sufficient consideration given to the ability of the freedmen to protect and take care of themselves. It is no more than justice to them to believe that as they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting for themselves on a proper remuneration, and of establishing and maintaining their own asylums and schools. It is earnestly hoped that instead of wasting away they will by their own efforts establish for themselves a condition of respectability and prosperity. It is certain that they can attain to that condition only through their own merits and exertions.

SENATOR TRUMBULL

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. . . Since the Freedmen's Bureau was organized an amendment has been adopted to the Constitution of the United States declaring that slavery shall no longer exist within the jurisdiction of the United States. By virtue of that enactment millions of slaves have become free. They have become free in the midst of a hostile population. They have become free without any of this world's goods, not owning even the hats upon their heads or the coats upon their backs, without supplies of any kind, not knowing often where to obtain the next meal to save them from starvation. Something must be done to protect them in their new rights, to find employment for the able-bodies, and take care of the suffering; and the Freedmen's Bureau, as originally established, was designed to do that something. . . .

. . . The objection which the President makes is that it has never heretofore been thought that Congress was empowered to pass provisions of this character. The answer to that is that: we never before were in such a state as now: never before in the history of this Government did eleven States of the Union combine together to overthrow and destroy the Union; never before in the history of this Government have we had a four years civil war; never before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for. . . . [C]an we not provide for those among us who have been held in bondage all their lives, who have never been permitted to earn one dollar for themselves, who, by the great constitutional amendment declaring freedom throughout the land, have been discharged from bondage to their masters who had hitherto provided for their necessities in consideration of their services? Can we not provide for those destitute persons of our own land. . . . Sir, they cannot provide for themselves. . . .

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. . . If legislation be necessary to protect the former slaves against State laws which allow them to be whipped if found away from home without a pass, has not Congress, under the second clause of the [Thirteenth] Amendment, authority to provide it? What kind of freedom is that which the Constitution of the United States guaranties to a man that does not protect him from the lash if he is caught away from home without a pass? And how can we sit here and discharge the constitutional obligation that is upon us to pass the appropriate legislation to protect every man in the land in his freedom when we know such laws are being passed in the South if we do nothing to prevent their enforcement? Sir, so far from the bill being unconstitutional, I should feel that I had failed in my constitutional duty if I did not propose some measure that would protect these people in their freedom. . . .