

The Second Freedmen's Bureau Bill's Constitution

Mark A. Graber*

Introduction

The Civil Rights Act of 1866¹ dominates the Second Freedmen's Bureau Bill of 1866² when conversation turns to the Reconstruction Amendments. The Civil Rights Act of 1866 is the first place commentators look when determining the meaning of Section Two of the Thirteenth Amendment and Section One of the Fourteenth Amendment. Leading works on the post-Civil War Constitution regularly point out that Section One of the Fourteenth Amendment, if not the entire Fourteenth Amendment, was intended to entrench the Civil Rights Act of 1866 and resolve lingering doubts about the constitutionality of that measure.³ Much constitutional debate took place during the late twentieth century over whether the Fourteenth Amendment was limited to entrenching the Civil Rights Act of 1866 or whether entrenching the provisions of that measure was merely a very important purpose of Section One.⁴ The Second Freedmen's Bureau Bill appears in these debates, if at all, only as a precursor to the Civil Rights Act of 1866, as a part of the claim that the Fourteenth Amendment guarantees a right to bear arms, or to demonstrate that Republicans gave their constitutional imprimatur to race-conscious measures that benefited African-Americans.⁵

* Jacob A. France Professor of Constitutionalism, University of Maryland Carey School of Law. Much thanks to Willy Forbath, Joseph Fishkin, the participants in the *Texas Law Review* conference on the constitutional and inequality, and the *Texas Law Review* for encouragement and assistance.

1. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

2. THE AMERICAN NATION: PRIMARY SOURCES 92–94 (Bruce P. Frohnen ed., 2008) [hereinafter AMERICAN NATION].

3. See, e.g., GEORGE RUTHERGLEN, CIVIL RIGHTS IN THE SHADOW OF SLAVERY: THE CONSTITUTION, COMMON LAW, AND THE CIVIL RIGHTS ACT OF 1866, at 73 (2013) (“the Fourteenth Amendment was necessary to secure the constitutionality of [the Civil Rights Act of 1866].”).

4. See, e.g., RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 20, 116 (1977) (stating that “all are agreed” that “it was the purpose of the [Fourteenth] Amendment to embody and protect” the Civil Rights Act of 1866, but offering historical evidence that “militate[s] against a concealed purpose to go beyond the confines of the [Civil Rights Act of 1866]”).

5. See, e.g., Alfreda A. Sellers Diamond, *Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black Colleges or University and Affirmative Action Programs*, 78 TUL. L. REV. 1877, 1899 (2004) (arguing that the Bill is evidence that the drafters of the Fourteenth Amendment intended to approve affirmative action programs); James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 PITT. L. REV.

This focus on the Civil Rights Act of 1866 rather than on the Second Freedmen's Bureau Bill reflects contemporary constitutional practice rather than Republican priorities and thinking during the winter of 1865–1866. The Republicans responsible for the Reconstruction Amendments connected the Civil Rights Act of 1866 and the Second Freedmen's Bureau Bill.⁶ The Civil Rights Act of 1866 enumerated the fundamental rights of free persons and citizens.⁷ The Second Freedmen's Bureau Bill provided former slaves and refugees with the goods and services they needed to make the transition from slavery to full American citizenship and to avoid falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic.⁸ Both measures were central to the Reconstruction effort. Both implemented the Thirteenth Amendment. Both were vigorously objected to by Democrats on constitutional grounds. The power to pass both was confirmed by the Fourteenth Amendment.⁹

The Civil Rights Act of 1866 occupies the place of pride in contemporary analyses of the post-Civil War amendments because contemporary civil rights law and policy are devoted to enumerating the fundamental rights of free persons and citizens—the most important of which is the right to be free from discrimination in the distribution of certain goods and services on the basis of certain traits.¹⁰ Both the Civil Rights Act of 1866 and the Civil Rights Act of 1964¹¹ mandate strong antidiscrimination rules. Neither is directed at the ways in which past or present states of dependency or destitution influence the capacity citizens have to take advantage of formal equalities of opportunity.¹² Destitution and dependency are the focus of contemporary welfare law rather than

421, 525 (1999) (labeling the Second Freedmen's Bill as a “companion bill to the Civil Rights Act”); Stephen P. Halbrook, *Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment*, 5 SETON HALL CONST. L.J. 341, 418 (1995) (discussing the Bill's protection of the right to bear arms).

6. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 297 (1866) (statement of Sen. Stewart) (“There is another bill introduced by the Senator from Illinois which must go along with it.”); *id.* at 322 (statement of Sen. Trumbull); *id.* at 340 (statement of Sen. Wilson).

7. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

8. AMERICAN NATION, *supra* note 2, at 92–94.

9. *See* McDonald v. City of Chi., 561 U.S. 742, 775 (2010) (stating that the Fourteenth Amendment is understood to “provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866”).

10. *See* RUTHERGLEN, *supra* note 3, at 9 (tracing contemporary civil rights interpretation to the 1866 Act's provisions).

11. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

12. *See* RUTHERGLEN, *supra* note 3, at 9–10 (acknowledging that the legislation was ineffective to undo the consequences of slavery, which left continued subordination).

contemporary civil rights law.¹³ For these reasons, the Second Freedmen's Bureau Bill's concern with aiding transitions to freedom and citizenship, as well as preventing regressions into states of dependence, is alien to contemporary constitutional civil rights law. With the exception of the provisions in that measure that anticipate later antidiscrimination rules and freedom from government regulation, the Second Freedmen's Bureau Bill is peripheral to the debates over the meaning of the post-Civil War Constitution.

This Article focuses on the crucial elements of post-Civil War constitutionalism judges and scholars miss when they give the place of pride to the Civil Rights Act of 1866 at the expense of the Second Freedmen's Bureau Bill. The Republicans who framed the Second Freedmen's Bureau Bill understood that judicial action could not eradicate slavery. Their legislative and constitutional program recognized that persons could transition from slaves to full citizens only if Congress aggressively exercised national power under Section Two of the Thirteenth Amendment.¹⁴ Legislation was necessary to provide former slaves with various goods and services, the precise provision of which depended on local circumstances and changing conditions. Given the need for a high degree of nimbleness in the managing of that transition, Congress, rather than the judiciary, had to play the lead role in removing all badges and incidents of slavery in American constitutional life.

The Republicans who passed the Second Freedmen's Bureau Bill interpreted congressional power under Section Two of the Thirteenth Amendment in light of what they believed to be a fundamental constitutional commitment to a national government strong enough to provide for the general welfare.¹⁵ Sections 3 to 6 of that bill, which provided both freedmen and destitute refugees with various goods and services, manifested that constitutional commitment.¹⁶ Republicans believed these provisions, which provided goods and services to persons of all races, fulfilled constitutional obligations to facilitate the transition from slavery to full citizenship and to prevent citizens from transitioning back to a state of dependency as a result of economic destitution.¹⁷ Republican

13. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (noting that economic and social problems are the responsibility of public welfare programs and not the business of the Court).

14. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 298 (1866) (statement of Sen. Stewart) ("I am not in favor of turning the negro over to oppression in the South. I am in favor of legislation . . . that shall secure him a chance to live, a chance to hold property . . .").

15. *E.g.*, *id.* at 631 (statement of Rep. Moulton) ("[I]t is also made the duty of Congress to . . . provide for the common good and for the general welfare."); *id.* at 630 (statement of Rep. Hubbard) ("It is necessary to provide for the general welfare.").

16. AMERICAN NATION, *supra* note 2, at 93–94.

17. See, *e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 335 (1866) (statement of Sen. Guthrie) ("I believe [the effect of the Thirteenth Amendment] is to work the complete freedom of every

arguments for the constitutionality of the Second Freedmen's Bureau Bill insisted that a minimum degree of economic security and education were central conditions of freedom and full citizenship.¹⁸

The Second Freedmen's Bureau Bill was generated by a constitutional order that regarded legislatures and political parties as the institutions primarily responsible for maintaining and implementing constitutional commitments. Republicans, when defending the constitutionality of the Second Freedmen's Bureau Bill, uniformly insisted that Congress was the institution constitutionally charged with realizing the promise of the Thirteenth Amendment, not the Supreme Court of the United States.¹⁹ Republicans did not draft a precise legal code in either 1865 or 1868 because that Congress needed substantial discretion to determine the policies that best ensured that persons of color transitioned from slavery to enjoying the full rights of citizens of a democratic republic and not, as is often maintained, because they could not agree on specifics or were more interested in moral exhortation than precise legal norms.²⁰ Even more so than Congress, the Republican Party enjoyed the place of constitutional honor. The post-Civil War Amendments were framed at a time when the dominant party was considered the primary vehicle for ensuring constitutional fidelity.²¹ Republicans in the Thirty-Eighth Congress assumed that Congress, not the courts, was the institution that would determine the measures constitutionally necessary to realize the promise of the Thirteenth and, later, Fourteenth Amendments.²² Their arguments regarding the Second Freedmen's Bureau Bill highlight the crucial features of American constitutionalism that judges, governing officials, lawyers, and

individual, and to break down every provision . . . which prevents the enjoyment of that freedom.”).

18. *See, e.g., id.* at 630 (statement of Rep. Hubbard) (“Another object is to give them an opportunity to learn to read They ought not to be left to perish by the wayside in poverty . . .”).

19. *E.g., id.* at 474 (statement of Sen. Trumbull) (“In my judgment, Congress has this authority [to “give practical effect to the great declaration that slavery shall not exist in the United States”].”).

20. *See* notes 150–51, below, and the relevant text. *See also* GERALD LEONARD, *THE INVENTION OF PARTY POLITICS: FEDERALISM, POPULAR SOVEREIGNTY, AND CONSTITUTIONAL DEVELOPMENT IN JACKSONIAN ILLINOIS* 16 (2002) (arguing that nineteenth-century politicians “knew that parties . . . became the main interpreters of the Constitution”); WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 51–53 (1988) (explaining that the Joint Committee that drafted Section One of the Fourteenth Amendment “cared less about the section’s precise substantive content than about its well-rounded phraseology”).

21. *See* LEONARD, *supra* note 20, at 15–16 (discussing the role of constitutional interpretation by the political branches in the ordinary course of policy making during the nineteenth century).

22. *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1822 (2010) (“The framers of the Thirteenth Amendment assumed that Congress would define the badges and incidents of slavery and decide what legislation was appropriate to eliminate them, and that the courts would defer to any reasonable construction.”).

citizens miss when they look at the Constitution through the modern lens of judicial supremacy.

The Second Freedmen's Bureau Bill's Constitution provides a distinctive perspective on economic inequalities and American constitutionalism. Contemporary Americans assume that constitutions protect rights by enumerating limits on government power and empowering the national judiciary to enforce those restrictions.²³ The Constitution of the United States is a "charter of negative liberties" because most constitutional rights are phrased as restrictions on federal or state power.²⁴ Welfare is a matter of legislative grace because no provision in the Constitution of the United States enumerates a constitutional right to be fed, clothed, sheltered, or educated by the national government.²⁵ The persons responsible for the original Constitution and post-Civil War Constitution, by comparison, believed that constitutions promote the general welfare by empowering the national government to achieve certain ends. These framers were concerned with economic inequalities or at least basic economic and social needs, but their concerns were not expressed in the form of judicially enforceable rights.²⁶ The Constitution of 1789 and the Constitution of 1868 do not enumerate economic rights because their drafters regarded constitutions as enabling rather than as disabling mechanisms. The persons responsible for the Constitution of 1789 believed that the general welfare would best be promoted if government institutions were structured in ways that fostered a governing class with the combination of interests, values, and capacities necessary to enact and implement legislative programs that enabled (white) Americans to have the resources and capacities to be full and equal citizens of a democratic republic.²⁷ The persons responsible for the post-Civil War Constitution believed the general welfare would best be promoted if the party of the majority of the people who remained loyal

23. See Owen Fiss, *Two Models of Adjudication*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 36 (Robert A. Goldwin & William A. Schambra, eds., 1985) (asserting that adjudication is the primary means through which the Constitution is given meaning and "rights are created and enforced").

24. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

25. Many state constitutions do protect positive rights, most notably rights to education. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 105 (2013) (concluding that state constitutions have had positive constitutional rights since the mid-nineteenth century).

26. For the 1789 Constitution's framers' concerns regarding economic inequality, see CLEMENT FATOVIC, *AMERICA'S FOUNDING AND THE STRUGGLE OVER ECONOMIC INEQUALITY* 2-3 (2015) (arguing that Americans during the founding period "generally agreed that legal and political equality depend[ed] to some degree on economic equality," and that "[t]he use of public policy to minimize or prevent the growth of economic inequality was viewed as a legitimate function of government by a wide spectrum of political actors").

27. See MARK A. GRABER, *DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL* 96-100 (2006) (discussing the framers' political goals in establishing the constitutional framework of government).

during the Civil War had control over all three branches of the national government necessary to enact and implement legislative programs that eradicated all traces of the destitution and dependency that had resulted from slavery and the Civil War.²⁸ The Republicans responsible for the Second Freedmen's Bureau Bill and the post-Civil War Constitution believed destitution and dependency were forms of slavery that the national legislature was constitutionally obligated to alleviate under the Thirteenth Amendment.²⁹ Once we understand the Republican commitment to the general welfare and how they thought the Constitution empowers Congress to promote the general welfare, we can see how the Second Freedmen's Bureau Bill's Constitution, in many ways, was better structured to place economic inequality and dependency at the core of American constitutionalism than the judicially driven constitutionalism of the present.

I. The Second Freedmen's Bureau Bill and the Civil Rights Act of 1866

When the Thirty-Ninth Congress met in December 1865, the Senate Judiciary Committee proposed two bills that exercised congressional power under Section Two of the Thirteenth Amendment.³⁰ Senate Bill 60, the Second Freedmen's Bureau Bill, was intended as temporary.³¹ The purpose of that measure was to provide goods, services, and protection to freedmen and others to ease their transition from slavery to freedom or to prevent them from sliding back into a permanent state of destitution and dependence.³² Senate Bill 61, the Civil Rights Act of 1866, was intended to be permanent.³³ The measure made explicit that former slaves were citizens of the United States and enumerated the rights to be free from official discrimination that Congress regarded as central to full citizenship.³⁴

28. See generally Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355 [<https://perma.cc/85V9-D36Y>] (explaining how post-Civil War Republicans understood the provisions of the Thirteenth and Fourteenth Amendments by reference to Republican hegemonic interpretations of the Constitution).

29. See Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 U. PA. L. REV. 437, 438 (1989) (observing that "[m]any members of Congress envisioned the amendment as a charter for labor freedom, and they defined that ideal in extensive debates. For these members, free labor was not just the absence of slavery and its vestiges; it was the guarantee of an affirmative state of labor autonomy").

30. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865).

31. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 243 (updated ed., 2014) (quoting Senator Trumbull's statement to the Senate that the Freedmen's Bureau was "not intended as a permanent institution").

32. See *id.* (authorizing the Secretary of War to provide aid to "destitute and suffering refugees and freedmen, their wives and children").

33. See FONER, *supra* note 31, at 243-44 (characterizing the bill as an effort "to define in legislative terms the essence of freedom" that also "embodied a profound change in federal-state relations").

34. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981-82 (2012)).

The life of the Second Freedmen's Bureau Bill was short and sweet. That measure passed the Senate after a week of debate on January 25, 1866 by a 37–10 vote and in slightly revised form passed the House after a week of debate on February 6 by a 136–33 vote.³⁵ The Senate agreed to all the House amendments but one on February 8, 1866.³⁶ The House concurred with that one amendment on February 9, 1866.³⁷ President Andrew Johnson vetoed the bill on February 19.³⁸ The next day, the 30–18 vote to override the veto in the Senate fell just short of the constitutionally necessary two-thirds.³⁹ Congress passed a revised Freedmen's Bureau Bill in the summer of 1866, only after sending the Fourteenth Amendment to the states.⁴⁰

The Civil Rights Act of 1866 enjoyed a happier fate. That measure passed the Senate after a week of debate on February 2, 1866 by a 33–12 vote and passed the House in a slightly revised form after two weeks of debate on March 13 by a 111–38 vote.⁴¹ Two days later, the Senate concurred in the revised House bill.⁴² President Johnson vetoed the bill on March 27.⁴³ The next week, on April 6, the Senate, by a 33–15 margin, voted to override that veto.⁴⁴ The House voted to override three days later by 122–41.⁴⁵

The Second Freedmen's Bureau Bill contains nine provisions.⁴⁶ The first two sections concern the duration, scope, and staffing of the Freedmen's Bureau.⁴⁷ Sections 3–6 authorize various government officials to provide various goods and services to freedmen and refugees.⁴⁸ Section 3 authorizes the Secretary of War to provide various goods and services for “destitute and suffering refugees and freedmen,” provided that no recipient of federal aid “could by proper industry and exertion avoid

35. CONG. GLOBE, 39th Cong., 1st Sess. 421, 688 (1866).

36. *Id.* at 747–48.

37. *Id.* at 775.

38. *Id.* at 915–17.

39. *Id.* at 943.

40. Act of July 16, 1866, ch. 200, 14 Stat. 173; CONG. GLOBE, 39th Cong., 1st Sess. 3349 (1866).

41. CONG. GLOBE, 39th Cong., 1st Sess. 606–07, 1367 (1866). The House debate was longer than the Senate debate only because that debate was more frequently interrupted by other matters than the Senate debate.

42. *Id.* at 1413–16.

43. *Id.* at 1679.

44. *Id.* at 1809.

45. *Id.* at 1861.

46. AMERICAN NATION, *supra* note 2, at 92–94.

47. Section 1 extends the life of the Freedmen's Bureau indefinitely, empowered the President to divide the area in which freedmen and refugees existed into twelve districts, and authorized the President to appoint an Assistant Commissioner to each district. Section 2 provides for the staffing of the Freedmen's Bureau in each district. *Id.* at 92–93.

48. *Id.* at 93–94.

such destitution, suffering, or dependence.”⁴⁹ Section 4 authorizes the President to set aside “unoccupied public lands” in the Deep South and rent those lands to “loyal refugees and freedmen,” who would be given the option to purchase at a later date.⁵⁰ Section 5 authorizes those freedmen who occupied southern lands under General Sherman’s authority during the Civil War to retain their right to possession for three years.⁵¹ Section 6 authorizes the Freedmen’s Bureau to “grant or purchase” lands to be used for “asylums and schools.”⁵² Sections 7 and 8 authorize members of the Freedmen’s Bureau in districts where civil courts are not yet opened to punish governing officials and private citizens who discriminate against persons of color with respect to certain rights.⁵³ Section 7 authorizes the Freedmen’s Bureau to “extend military protection and jurisdiction over all cases” in areas where

the ordinary course of judicial proceedings has been interrupted by the rebellion, [whenever] 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 offences⁵⁴

Section 8 provides punishments for persons who violate the provisions of § 7 and declares that the Freedmen’s Bureau’s jurisdiction run only to states where judicial proceedings were interrupted by the Civil War and have not been restored to the Union.⁵⁵ Section 9 repeals all inconsistent federal laws.⁵⁶

The Civil Rights Act of 1866 contains ten provisions.⁵⁷ The first provision establishes birthright citizenship and nationalizes the

49. *Id.* at 93.

50. *Id.*

51. *Id.*

52. *Id.* at 93–94.

53. *Id.* at 94.

54. *Id.*

55. *Id.*

56. *Id.*

57. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

antidiscrimination rules laid down in the Second Freedmen's Bureau Bill.⁵⁸ The legislation declares that every citizen of the United States has the same rights "as [are] enjoyed by white citizens" with respect to contracts, property, access to courts, and criminal punishments, although no reference is explicitly made to the constitutional right of bearing arms.⁵⁹ Section 2 mandates punishments for persons who violate rights set out in § 1.⁶⁰ The last eight sections provide various means for enforcing the rights mandated in § 1 and the penalties mandated in § 2.⁶¹ No provision of the Civil Rights Act of 1866 authorizes government officials to provide goods and services to anyone.⁶²

Although the Second Freedmen's Bureau Bill mandates both federal government provision of vital services and antidiscrimination rules, that bill was not constitutionally controversial among Republicans, even those who found constitutional fault with the antidiscrimination rules of the Civil Rights Act of 1866. Senator Edgar Cowan was the only Republican who raised constitutional objections to the Second Freedmen's Bureau Bill, and he was, for all practical purposes, a Democrat by early 1866.⁶³ Senator William Fessenden of Maine was the only Republican who spoke on the constitutional issues whose remarks expressed less than full confidence that all provisions of that bill were valid exercises of congressional power under Section Two of the Thirteenth Amendment.⁶⁴ Representative John Bingham of Ohio, whose constitutional objections to the Civil Rights Act of 1866 led him to draft Section One of what became the Fourteenth Amendment, had no constitutional qualms about the Second Freedmen's Bureau Bill. In his well-known speech declaring the Civil Rights Act of 1866 an unconstitutional exercise of congressional power under Section Two, Representative Bingham stated that the "bill stands in strange contrast with the solemn action of the Senate and of the House in that just and righteous bill known as the Freedmen's Bureau bill."⁶⁵ The difference between the two bills, Bingham stated, was that the equal rights provisions

58. *Id.* at 27.

59. *Id.*

60. *Id.*

61. *Id.* at 27–29.

62. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (2012)).

63. See CONG. GLOBE, 39th Cong., 1st Sess. 340–43 (1866) (statement of Sen. Cowan) (stressing that by passing the Second Freedmen's Bureau Bill, Congress was exceeding its grant of authority under the Constitution); B. F. Pershing, *Senator Edgar A. Cowan: 1861–1867*, 4 W. PA. HIST. MAG. 224, 232 (1921) (recognizing that "[t]he man who had been elected by the Republican majority in 1861 became the candidate of the Democratic minority in 1867").

64. See CONG. GLOBE, 39th Cong., 1st Sess. 365 (1866) (statement of Sen. Fessenden) (suggesting that the Constitution may not give Congress the power to enact the bill but recognizing the moral need to do so).

65. *Id.* at 1292 (statement of Rep. Bingham).

of §§ 7 and 8 of the Second Freedmen's Bureau Bill would expire "upon the restoration of those insurrectionary States to their constitutional relations with the United States, and the establishment therein of the courts."⁶⁶ In his view, the Civil Rights Act of 1866 was unconstitutional because Congress had no power to enforce antidiscrimination legislation in the states.⁶⁷ Bingham raised no constitutional objections to §§ 3–6 of the Second Freedmen's Bureau Bill, which authorized the federal government to provide freedmen and refugees "in all parts of the United States" with various goods and services.⁶⁸ Bingham's draft of Section One of the Fourteenth Amendment more explicitly provided constitutional foundations for the Civil Rights Act of 1866 than for §§ 3–6 of the Second Freedmen's Bureau Bill, this evidence suggests, because no Republican in the winter of 1866 had substantial doubts about the congressional power under Section Two of the Thirteenth Amendment to pass the Second Freedmen's Bureau Bill.

The different fates of the Second Freedmen's Bureau Bill and the Civil Rights Act of 1866 are better explained by timing and partisan politics than by relative differences in their constitutionality. Conservative Republicans voted for the Second Freedmen's Bureau Bill confident that President Johnson would sign the measure.⁶⁹ When he issued an unexpected veto, many Republicans decided that support for the President was the better course than maintaining a united congressional Republican Party.⁷⁰ Johnson's subsequent speeches and veto of the Civil Rights Act of 1866 marked a far clearer break with Republicans in Congress. The result was by April 1866 fewer Republicans in Congress were willing to break party ranks to support a presidential veto.⁷¹ Had Congress passed the Civil Rights Act of 1866 before the Second Freedmen's Bureau Bill, the latter might have survived the veto, but not the former.

II. The Second Freedmen's Bureau Bill and the Constitution of 1865

The Thirteenth Amendment, the Second Freedmen's Bureau Bill, and the post-Civil War Constitution were products of the distinctive mid-

66. *Id.*

67. *See id.* (arguing that this power properly belonged to the states).

68. AMERICAN NATION, *supra* note 2, at 93; *see also* CONG. GLOBE, 39th Cong., 1st Sess. 321 (statement of Sen. Trumbull) ("[T]he Senator from Indiana says it extends all over the United States.").

69. FONER, *supra* note 31, at 247.

70. *See* CONG. GLOBE, 39th Cong., 1st Sess. 109–11 (1866) (statement of Sen. Stewart) (quoting President Johnson to suggest that he was deserving of Congress's support); FONER, *supra* note 31, at 249 (explaining that after Johnson's veto "moderate party leaders warned against reading Johnson out of the party").

71. *See* FONER, *supra* note 31, at 248–51 (describing how Johnson's veto of the Civil Rights Bill and corresponding veto message, along with his attempt to split the Republican party, resulted in the first Congressional enactment of "a major piece of legislation over a President's veto").

nineteenth century understanding of constitutional authority. Such political leaders as Andrew Jackson, Martin Van Buren, Abraham Lincoln, and Thaddeus Stevens believed that their political party, Democrat or Republican, was the best vehicle by which a majority of Americans could ensure that constitutional norms were respected and realized.⁷² Constitutional disputes were settled by elections that established a dominant political party rather than by judicial decree. Jackson and Lincoln agreed that, despite the Supreme Court's ruling in *McCulloch v. Maryland*,⁷³ Jacksonian electoral victories during the 1830s and 1840s established that the federal government had no power to incorporate a national bank.⁷⁴ Lincoln on the campaign trail and during his first inaugural address insisted that whether *Dred Scott v. Sandford*⁷⁵ was settled constitutional law depended on the results of subsequent national elections.⁷⁶

Republican commitment to partisan supremacy helps explain the enforcement clauses in each of the post-Civil War Amendments. Previous constitutional restrictions on states in Article I, Section 9 lacked enforcement clauses.⁷⁷ Rights under the Contract Clause and Ex Post Facto Clause in the antebellum United States were determined and protected by the federal judiciary. Alexander Hamilton in Federalist 78 declared with respect to those provisions that “[I]mitations of this kind can be preserved in practice no other way than through the medium of the courts of justice”⁷⁸ The novel enforcement clauses in the Thirteenth Amendment, by comparison, allocated primary responsibility for implementing the constitutional ban on slavery to a Congress controlled by

72. See, e.g., Douglas W. Jaenicke, *The Jacksonian Integration of Parties into the Constitutional System*, 101 POL. SCI. Q. 85, 86 (1986) (noting a shift towards political parties being considered “constitutional establishments necessary for the proper working of the Constitution”). Political leaders of the party out of power, such as Henry Clay and Daniel Webster, tended to promote judicial supremacy. Unsurprisingly, Democrats in 1865 adopted early Whig understandings of constitutional authority. See *infra* notes 192–197 and accompanying text (discussing the ways Democrats referenced earlier visions of the national government).

73. 17 U.S. 316 (1819).

74. See Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 576, 576–91 (James D. Richardson ed., 1897) (recording Jackson's veto message to the Senate, rejecting the renewal of the national bank's charter); Abraham Lincoln & Stephen A. Douglas, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 245, 278 (Roy P. Basler ed., 1953) (arguing that Jackson and the Democrats reversed *McCulloch* “as completely as any decision ever was reversed—so far as its practical operation is concerned,” and stating that he, like Jackson, was “bound to support [the Constitution] in the way in which [he understood] it” regarding the *Dred Scott* decision).

75. 60 U.S. 393 (1856).

76. See GRABER, *supra* note 27, at 182–83 (laying out different ways that constitutional controversies such as the *Dred Scott* decision could become settled law).

77. See U.S. CONST. art. I, § 9 (federal restraints on state power without express enforcement clauses).

78. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Garry Willis ed., 1982).

the Republican Party.⁷⁹ No Republican during the debates over the Second Freedmen's Bureau Bill's repeated or rephrased Hamilton's mantra, made reference to *Marbury v. Madison*,⁸⁰ or otherwise invoked federal judicial protection for persons of color.⁸¹ Republicans, through congressional legislation, would determine the parameters of the constitutional ban on slavery, not the Supreme Court.

Republicans in 1866 spoke of the Thirteenth Amendment as empowering courts to act in the general welfare of the country rather than as empowering courts to impose limits on state and federal power. Lyman Trumbull, Henry Wilson, Charles Sumner, and others interpreted the Thirteenth Amendment as mandating that Congress adopt a program, the details of which were necessarily discretionary, that enabled freedmen to transition from slavery to full citizenship.⁸² This transition required legislation rather than litigation because only Congress had the nimbleness and knowledge of conditions on the ground in different places to mandate those policies most likely to work in particular jurisdictions and circumstances, as well as the knowledge necessary to determine when the transition from slavery to full citizenship had been completed. Republicans understood that their constitutional responsibilities mandated by the Thirteenth Amendment included preventing persons who had never been enslaved, white or black, from slipping into a permanent state of destitution and dependence.⁸³ These constitutional commitments required the institutional capacities of a legislature rather than a court.

A. *The Republican Constitution of 1866*

Republicans were ecumenical when providing constitutional foundations for the Second Freedmen's Bureau Bill. A general consensus existed that the measure was a constitutional application of congressional authority under Section Two of the Thirteenth Amendment and the national war powers enumerated in Article I. Several Republicans pointed to congressional power under the Guaranty Clause of Article IV. No Republican who spoke during the debates parsed the Second Freedmen's Bureau Bill into different sections, maintaining that some particular sections and provisions were constitutional applications of one federal power, while others sections and provisions were applications of a different

79. U.S. CONST. amend. XIII, § 2.

80. 5 U.S. 137 (1803).

81. See CONG. GLOBE, 39th Cong., 1st Sess. 209–10, 297–99, 314–23, 334–49, 362–75, 392–403, 415–21, 538–45, 585–90, 624, 627–39, 647–59, 742–48 (1866) (reporting debates over the Second Freedmen's Bureau Bill without mention of federal judicial protection for freedmen).

82. See CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (urging that it is Congress's "duty to see that [the emancipation of freedmen] is wholly done").

83. *Id.* at 1757 (1866).

federal power.⁸⁴ Senator Charles Sumner of Massachusetts, when the bill was first introduced, declared the entire bill could be justified on at least three distinct constitutional grounds:

As to the power of Congress over this question I cannot doubt it. . . . It may be a military power precisely as the Proclamation of Emancipation, and here the authority is as clear and absolute as in the District of Columbia, or it may be in pursuance of the Constitutional Amendment, which provides that Congress may "enforce the amendment by appropriate legislation;" or it may be to carry out the guarantee of a republican form of government.⁸⁵

Representative Samuel Moulton of Illinois when maintaining that "ample and sufficient constitutional authority can be found for every word and every letter in th[e] bill,"⁸⁶ found ten constitutional provisions that provided this authority, arguing that:

The Constitution declares that Congress shall have power to declare war and make rules and regulations concerning captures on land or upon water; that Congress shall have power to raise and support armies; that Congress shall have power to make rules for the government and regulation of the land and naval forces of the United States; that Congress shall have power to provide for calling out the militia to execute the laws, to suppress insurrection, to secure tranquility, and to repel invasion; that Congress shall have power to make all laws necessary and proper for carrying into execution the foregoing powers. And it is also made the duty of Congress to guaranty to each State a republican form of government, and to provide for the common good and for the general welfare. The Constitution also provides that the citizens of each State shall be entitled to all the immunities and privileges of the citizens of the respective States. And last, though not least, the constitutional amendment which has just been ratified for the abolition of slavery provides that Congress shall by proper legislation carry into execution the provisions of that amendment.⁸⁷

The Thirteenth Amendment nevertheless occupied the place of pride when Republicans provided constitutional foundations for the Second Freedmen's Bureau Bill. Every Republican speaker who discussed the constitutionality of that measure claimed that every provision passed constitutional muster under Section Two. Senator Henry Wilson of

84. See CONG. GLOBE, 39th Cong., 1st Sess. 209–10, 297–99, 314–23, 334–49, 362–75, 392–403, 415–21, 538–45, 585–90, 624, 627–39, 647–59, 742–48 (1866) (cataloguing the debates over the Second Freedmen's Bureau Bill without a Republican attempt to justify different sections of the bill with different constitutional provisions).

85. *Id.* at 91 (1865) (statement of Sen. Sumner).

86. *Id.* at 631 (1866) (statement of Rep. Moulton).

87. *Id.*

Massachusetts, who shepherded the Second Freedmen's Bureau Bill in the Senate, derived the provisions of the bill entirely from the Thirteenth Amendment. "The constitutional amendment has been adopted," he informed the Senate, "and I have introduced a bill this morning based upon that amendment."⁸⁸ Representative Samuel Hubbard of Connecticut urged dissenting Democrats "to read the second section . . . of the immortal amendment of the Constitution giving to Congress power to pass all appropriate laws and make all appropriate legislation for the purpose of carrying out its provisions."⁸⁹ Republicans insisted that the Enforcement Clause provided constitutional foundations for federal laws forbidding racial discrimination, providing goods and services to freedmen, and providing the same goods and services to destitute white refugees. Representative Charles Phelps of Maryland stated "that legislation of the general scope and character embodied in the pending bill is 'appropriate legislation' toward enforcing the total abolishment of slavery, is a proposition not requiring argument."⁹⁰ "I think [the Thirteenth] [A]mendment does confer authority to enact these provisions into law and execute them," Senator Lyman Trumbull of Illinois bluntly declared.⁹¹

Republicans insisted that the Constitution of 1865 entitled the federal government to prohibit the badges and incidents of slavery, as well as human bondage. Numerous Republicans maintained that Section Two constitutionally empowered Congress to abolish the entire slave system. Sumner declared, "Slavery must be abolished not in form only, but in substance."⁹² Trumbull agreed that "[w]ith the abolition of slavery should go all the badges of servitude which have been enacted for its maintenance and support."⁹³ In his view, "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."⁹⁴ Trumbull's speeches defending the constitutionality of the Second Freedmen's Bureau

88. *Id.* at 111 (1865) (statement of Sen. Wilson). *See also id.* at 297 (1866) (statement of Sen. Stewart) ("I am in favor of this bill. It goes to the utmost extent that I think we are entitled to go under the constitutional amendment."). Senator William Pitt Fessenden of Maine was the only Republican who expressed even mild skepticism about the Section 2 argument. *Id.* at 366 (statement of Sen. Fessenden) (stating that "if everything else failed I might even perhaps agree with my friend, the honorable chairman of the Committee on the Judiciary, that under the second provision of the constitutional amendment, giving power to enforce the previous provision granting the freedom of the negro, we might do all that we judged essential in order to secure him in that liberty the enjoyment of which we have conferred upon him").

89. *Id.* at 630 (1866) (statement of Rep. Hubbard).

90. *Id.* at app. 75 (statement of Rep. Phelps).

91. *Id.* at 322 (statement of Sen. Trumbull).

92. *Id.* at 91 (1865) (statement of Sen. Sumner).

93. *Id.* at 323 (1866) (statement of Sen. Trumbull).

94. *Id.* at 322.

Bill elaborated at some length the legal reforms necessary to eradicate “the incidents to slavery.”⁹⁵ He argued:

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, goes with it.⁹⁶

Representative Ignatius Donnelly of Minnesota joined the chorus of voices demanding that Congress exercise constitutional powers to eradicate the slave system as well as slavery. “Having prohibited slavery,” he insisted, “we must not pause for an instant until the spirit of slavery is extinct, and every trace left by it in our laws is obliterated.”⁹⁷

This constitutional obligation to destroy the slave system entailed a constitutional obligation to provide freed slaves with all the rights of free persons. “We have given him freedom,” Senator William Stewart of Nevada stated, “and that implies that he shall have all the civil rights necessary to the enjoyment of that freedom.”⁹⁸ Representative Samuel McKee of Kentucky agreed that, “[a]s freedmen they must have the civil rights of freemen.”⁹⁹ Prominent Republicans defined both slavery and freedom broadly. Proponents of the Second Freedmen's Bureau Bill regarded slavery as consisting of any denial of fundamental rights for any period of time rather than the denial of all fundamental rights at all times. Donnelly stated:

[S]lavery is not confined to any precise condition. . . .

Slavery consists in a deprivation of natural rights. A man may be a slave for a term of years as fully as though he were held for life; he may be a slave when deprived of a portion of the wages of his labor

95. *Id.*

96. *Id.*

97. *Id.* at 585 (statement of Rep. Donnelly).

98. *Id.* at 298 (statement of Sen. Stewart).

99. *Id.* at 654 (statement of Rep. McKee).

as fully as if deprived of all; he may be held down by unjust laws to a degraded and defenseless condition as fully as though his wrists were manacled; he may be oppressed by a convocation of masters called a Legislature as fully as by a single master. In short, he who is not entirely free is necessarily a slave.¹⁰⁰

Freedom under the Thirteenth Amendment, in this view, necessarily entailed a robust set of rights. Representative James Garfield of Ohio rejected the notion that freedom was “a mere negation.”¹⁰¹ Such a freedom was “a bitter mockery, a cruel delusion.”¹⁰² The future President insisted freedom was “the realization of those imperishable truths of the Declaration ‘that all men are created equal,’ that the sanction of all just government is ‘the consent of the governed.’”¹⁰³

Republicans during the debate over the Second Freedmen’s Bureau Bill insisted that the Thirteenth Amendment made former slaves citizens who enjoyed the full rights of citizens. Representative Thomas Eliot of Massachusetts, who shepherded the Freedmen’s Bureau Bill in the House of Representatives, stated “[t]he slave becomes freedman, and the freedman man, and the man citizen, and the citizen must be endowed with all the rights which other men possess.”¹⁰⁴ This equal citizenship placed an affirmative obligation on Congress to root out laws and practices that had previously supported racial subordination. Donnelly declared, “we must make all the citizens of the country equal before the law; that we must break down all walls of caste; that we must offer equal opportunities to all men.”¹⁰⁵ “[W]e demand that . . . no portion of the population of the country shall be degraded or have a stain put upon them,” Wilson maintained.¹⁰⁶ Wilson summed up the consensual Republican understanding that the Thirteenth Amendment protected both the substantive and equality rights of a full American citizen when he asserted:

[W]e must see to it that the man made free by the Constitution of the United States, sanctioned by the voice of the American people, is a freeman indeed; that he can go where he pleases, work when and for whom he pleases; that he can sue and be sued; that he can lease and buy and sell and own property, real and personal; that he can go into the schools and educate himself and his children; that the rights and guarantees of the good old common law are his, and that he walks

100. *Id.* at 588 (statement of Rep. Donnelly). *See also id.* at 589 (“Having voted to give the negro liberty, I shall vote to give him all things essential to liberty.”).

101. *Id.* at app. 66 (statement of Rep. Garfield).

102. *Id.*

103. *Id.*

104. *Id.* at 513 (statement of Rep. Eliot). *See also id.* at app. 66 (statement of Rep. Garfield) (“The abolition of slavery added four million citizens to the Republic.”).

105. *Id.* at 589 (statement of Rep. Donnelly).

106. *Id.* at 340 (statement of Rep. Wilson).

the earth, proud and erect in the conscious dignity of a free man, who knows that his cabin, however humble, is protected by the just and equal laws of his country.¹⁰⁷

The Republican consensus on the rights of free persons broke down when the discussion turned to the ballot. Many Republicans during the debate over the Freedmen's Bureau Bill maintained that voting rights were among the liberties of full citizens that Congress should protect under Section Two of the Thirteenth Amendment or other constitutional provisions. Others insisted either that granting voting rights was premature or that the Thirteenth Amendment empowered Congress to protect only civil rights. Divided, Republicans postponed consideration of suffrage until a greater party consensus could be reached.¹⁰⁸

The more radical Republicans in the Thirty-Ninth Congress repeatedly sought to include voting rights in legislation passed to protect freedmen under Section Two of the Thirteenth Amendment. Senator Benjamin Wade of Ohio reasoned, "[I]f it was the verdict of the war that slavery should be abolished, was it not also the verdict, if it was further necessary for the security of the country, that suffrage should be awarded to the colored people that you had set free?"¹⁰⁹ Donnelly regarded voting rights as the defining right of a full republican citizen. He declared, "The right to vote is the right of self-protection, through the possession of a share in the Government."¹¹⁰ In his view, "Without this a man's rights lie at the mercy of other men who have every selfish incentive to rob and oppress him. This is the great central idea of a republican Government."¹¹¹ Garfield worried that freedmen denied the right to vote would soon come under the thumb of their former owners. He stated:

If they are to be disfranchised, if they are to have no voice in determining the conditions under which they are to live and labor, what hope have they for the future? It will rest with their late

107. *Id.* at 111 (1865); *see also id.* at 91 (statement of Sen. Sumner) (including among the rights of free persons, "first, in the right of family and the right of contract; secondly, in the right of property, including a homestead; thirdly, in complete Equality in the courts; fourthly, in Equality in political rights; fifthly, in Equality at schools and in Education; and finally, all these safeguards are crowned by declaring that they cannot lose their rights or be punished except after judgment according to fixed rules; thus completely fulfilling that requirement of our fathers, that 'government should be a government of laws and not of men'"); *id.* at 298 (1866) (statement of Sen. Stewart) ("I am in favor of legislation under the constitutional amendment that shall secure to him a chance to live, a chance to hold property, a chance to be heard in the courts, a chance to enjoy his civil rights, a chance to rise in the scale of humanity, a chance to be a man.").

108. *See* Act of July 16, 1866, ch. 200, 14 Stat. 173 (providing support for freedmen without granting suffrage).

109. CONG. GLOBE, 39th Cong., 1st Sess. 298 (1866) (statement of Sen. Wade); *see also id.* at 92 (1865) (statement of Sen. Sumner) (arguing that all persons should be treated equally, "whether in the court-room or at the ballot-box").

110. *Id.* at 589 (1866) (statement of Rep. Donnelly).

111. *Id.*

masters, whose treason they aided to thwart, to determine whether negroes shall be permitted to hold property, to enjoy the benefits of education, to enforce contracts, to have access to the courts of justice—in short, to enjoy any of those rights which give vitality and value to freedom.¹¹²

Senator John Henderson of Missouri thought that if persons of color had voting rights, the need for a Freedmen's Bureau would cease.¹¹³

Other Republicans disagreed, insisting that persons of color did not need voting rights to make the transition from slaves to full citizens of the United States. Trumbull questioned whether access to the ballot would alleviate the suffering of destitute freedmen. "You have got on your hands [today] one hundred thousand feeble, indigent, infirm colored population that would starve and die if relief were not afforded," he said in response to Henderson, "and the Senator from Missouri tells you, 'This is all nonsense; give them the right of suffrage, and that is all they want.'"¹¹⁴ Others insisted that the revised Constitution did not authorize Congress to enfranchise anyone. Stewart asserted:

Was the issue of negro suffrage ever involved? Was it involved by the emancipation proclamation? Was it involved by any resolution of Congress? Was it involved by the constitutional amendment? If you intended that it should be involved when you passed the constitutional amendment abolishing slavery, why did you not incorporate it in that measure?¹¹⁵

A few Republicans matched the racism of their Democratic rivals. Representative Charles Phelps of Maryland described African-American suffrage as a "monstrous burlesque and parody of republicanism . . ."¹¹⁶

Republicans who disputed the precise powers Congress possessed under Section Two nevertheless agreed that the Thirteenth Amendment was grounded in a constitutional vision of a national government with the powers necessary to achieve the general welfare. When Republicans spoke of fundamental constitutional values, their language was that of the

112. *Id.* at app. 67; *see also id.* at 589 (statement of Rep. Donnelly) ("[W]hat white man would consider himself safe without the right to vote, especially if the Government was exercised exclusively by a hostile race?").

113. *See id.* at 745 (statement of Sen. Henderson) (arguing that voting offers a person the best and entire protection one could need, so if suffrage were offered to persons of color, the Freedmen's Bureau would be unnecessary and could be repealed).

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

115. *Id.* at 297 (statement of Sen. Stewart).

116. *Id.* at app. 75 (statement of Rep. Phelps); *see also id.* at 298 (statement of Sen. Stewart) ("I believe the Anglo-Saxon race can govern this country. . . . I believe it because it is the only race that has ever founded such institutions as ours. I believe it because we have a peculiar situation, peculiar education, peculiar qualifications which are not common to other sections or other races of the world. I believe the white man can govern it without the aid of the negro; and I do not believe that it is necessary for the white man that the negro should vote.").

Federalist Papers rather than that of the Jackson Bank Veto. The Republican Constitution of 1866 was the Constitution of the Virginia Plan, which empowered the national government to “[l]egislate in all cases, to which the Separate States are incompetent or in which the harmony of the United States may be interrupted, by the exercise of individual Legislation.”¹¹⁷ Hubbard spoke the language of late-eighteenth-century federalism when maintaining:

I read in the Constitution that Congress has been at all times charged with the duty of providing for the public welfare, and if Congress shall deem that the public welfare requires this enactment, it is the sworn duty of every member to give the bill his support.

Sir, there is an old maxim of law in which I have very considerable faith, that regard must be had to the public welfare; and this maxim is said to be the highest law. It is the law of the Constitution, and in the light of that Constitution as amended I find ample power for the enactment of this law.¹¹⁸

“This would be a marvelous misfortune, if true,” Eliot noted when responding to claims that Congress had no power to enact the Freedmen's Bureau Bill, “and would prove that our Constitution, ordained to promote the general welfare and to secure the blessings of liberty, had not within itself the power to do its work.”¹¹⁹ Members of the party of Lincoln repeatedly emphasized that national action was necessary when states were unwilling to protect fundamental rights and national power was necessary when states were threatening fundamental rights. Garfield insisted:

[W]e must see to it, that hereafter, personal liberty and personal rights are placed in the keeping of the nation; that the right to life, liberty, and property shall be guaranteed to the citizen in reality as they now are in the words of the Constitution, and no longer left to the caprice of mobs or the contingencies of local legislation.¹²⁰

In his view, “[t]he bill now before the House is one of the means for reaching this desirable result.”¹²¹

This constitutional commitment to a government with the power to advance the general welfare entailed a constitutional commitment to a government that provided for destitute and dependent populations. Trumbull observed, “Whenever, in the history of the Government, there has been thrown upon it a helpless population which must starve and die but for

117. Edmund Randolph, *The Virginia Plan*, in 1 AMERICAN CONSTITUTIONALISM: STRUCTURES AND POWERS 67 (Howard Gillman, Mark A. Graber, and Keith E. Whittington eds., 2013) (emphasis added).

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

119. *Id.* at 656 (statement of Rep. Eliot).

120. *Id.* at app. 67 (statement of Rep. Garfield).

121. *Id.*

its care, the Government has never failed to provide for them.”¹²² “Our authority to take care of them is founded in the Constitution; else it is not worthy to be our great charter,” Representative Josiah Grinnell of Iowa declared.¹²³ This constitutional commitment to alleviating destitution and dependence extended to all persons within the jurisdiction of the United States. Immediately before considering the Freedmen’s Bureau Bill, Congress passed a measure providing relief for destitute Native Americans.¹²⁴ Several Republicans referred to the commitment to the general welfare underlying that measure as providing constitutional foundations for the Freedmen’s Bureau Bill. Grinnell pointed out that the Constitution “gives authority to feed Indians tribes, though our enemies, and a just interpretation cannot restrain us in clothing and feeding unfortunate friends.”¹²⁵ Several prominent Republicans interpreted Section Two of the Thirteenth Amendment as codifying a perceived national duty under the customary law of nations to make provision for those incapable of making provision for themselves. Trumbull insisted:

[T]hat as one of the nations of the earth, as an independent Power, clothed with the attributes of sovereignty, it would be our duty, our duty by the law of nations as well as the obligations imposed upon us by humanity, to take care of [all refugees] temporarily and provide for them lest they should suffer and die for the want of care and protection.¹²⁶

The Republican Constitution of 1866 regarded the Freedmen’s Bureau Bill as placing little emphasis on limited government or state rights, particularly when those Jacksonian constitutional commitments conflicted with Republican constitutional commitments to the general welfare. No Republican treated Section Two or the Freedmen’s Bureau Bill as an exception to the principle that federal powers should be narrowly construed.¹²⁷ No Republican who spoke on the Tenth Amendment

122. *Id.* at 319 (statement of Sen. Trumbull).

123. *Id.* at 652 (statement of Rep. Grinnell).

124. *See id.* at 319 (statement of Sen. Trumbull) (“At this very session, within the last thirty days, both Houses of Congress have voted half a million dollars to feed and clothe people during the present winter. Who were they? Many of them were Indians who had joined the rebellion and had slain loyal people of the country.”).

125. *Id.* at 652 (statement of Rep. Grinnell).

126. *Id.* at 370 (statement of Sen. Trumbull). *See also id.* at 365 (statement of Sen. Fessenden) (“I would have gentlemen to reflect upon one thing, that as a part of the constitution, written or unwritten, of all Governments, stand the laws of nations necessarily, inevitably, from the relations which all communities bear to each other and from the contingencies to which they are exposed. That being the case, and that unwritten law of nations being actually a part of our written law, we accept, as we must accept, all the consequences which follow from it.”).

127. *See* CONG. GLOBE, 39th Cong., 1st Sess. 209–10, 297–99, 314–23, 334–49, 362–75, 392–403, 415–21, 538–45, 585–90, 624, 627–39, 647–59, 742–48 (1866) (transcribing debates over the Second Freedmen’s Bureau Bill without suggestion that Section Two of the Thirteenth Amendment should be construed more broadly than other federal powers).

articulated a strong commitment to state sovereignty.¹²⁸ Garfield, the Republican who addressed state rights issues at the greatest length, scorned Democratic talk of states' rights. In his view, "The word 'State' which they discussed is no more applicable to Ohio than to Hamilton county. The States and counties of this Union are equally unknown to international law."¹²⁹ "Ohio cannot make war; cannot conclude peace; cannot make a treaty with any foreign Government, cannot even make a compact with her sister States; cannot regulate commerce; cannot coin money; and has no flag," Garfield observed, when responding to Democratic innovations of local self-government.¹³⁰ "These indispensable attributes of sovereignty the State of Ohio does not possess," he concluded, "nor does any other State of the Union."¹³¹

The champions of the Second Freedmen's Bureau Bill maintained Congress was the institution responsible for implementing the particular constitutional commitments to the general welfare of the nation made by the Thirteenth Amendment. Republicans spoke of the constitutional ban on slavery as empowering the national government to pass a legislative program more often than Republicans spoke of the Thirteenth Amendment as an individual right to be protected by federal courts. Sumner spoke of a "pledge[] to maintain the emancipated slave in his freedom," a pledge that "must be performed by the national government."¹³² He declared, "The power that gave freedom must see that this freedom is maintained."¹³³ "[W]hat makes this constitutional amendment a practical, living thing," Stewart stated, "is the power given to Congress to enforce it by appropriate legislation."¹³⁴ In his view, "it must for years be the effective power of Congress, cooperating with the Executive, that will protect the freedmen from oppression."¹³⁵ Moderate and radical Republicans agreed that the constitutional ban on slavery provided the national government with a mandate to pass a wide-ranging legislative package directed at eradicating all traces and consequences of human bondage. Trumbull declared:

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

128. *See id.* (1866) (recording debates over the Second Freedmen's Bureau Bill without mention by a Republican of a strong commitment to state sovereignty).

129. CONG. GLOBE, 39th Cong., 1st Sess. at app. 65 (1866) (statement of Rep. Garfield).

130. *Id.*

131. *Id.*

132. *Id.* at 91 (1865) (statement of Sen. Sumner).

133. *Id.*

134. *Id.* at 110 (statement of Sen. Stewart).

135. *Id.*

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.¹³⁶

“So long as oppression continues,” Donnelly maintained, “the Government must intervene in behalf of justice and liberty, and through what machinery can it better intervene than through this bureau?”¹³⁷

Congressional leadership was vital, Republicans recognized, because implementing the constitutional project of transitioning slaves to full citizens required affirmative and costly programs that could be enacted and implemented only by legislative and executive officials. The national government would have to appropriate substantial funds to transform the Southern labor system, and such appropriations could be made only by the national legislature. Donnelly asserted:

Let not the objection of expense be made. No outlay is too great which is necessary to the safety of the people, since in that is involved all the wealth of the country. It is a madman’s economy to save money by rendering the people unfit for self-government and then lose all in the misgovernment which is sure to follow.¹³⁸

Donnelly and other Republicans repeatedly explained that the Thirteenth Amendment could not be entirely self-enforcing. Litigation, they repeatedly insisted, could not destroy the badges and incidents of slavery or the slave system. When Cowan suggested that litigation was sufficient to protect persons of color, Wilson responded, “the Senator says that the Constitution of the United States protects these people. I agree that it does so far as the Constitution can do it; and the amendment to the Constitution empowers us to pass the necessary legislation to make them free indeed.”¹³⁹ Donnelly stated, “a grand abstract declaration, unenforced by the arm of authority, is not a protection.”¹⁴⁰

The Republican sponsors of the Second Freedmen’s Bureau Bill believed the primary role of the federal judiciary was to administer federal legislation implementing the Thirteenth Amendment. On the rare occasions Republicans spoke of judicial power under the Thirteenth Amendment, they assigned the federal courts only a secondary role. Wilson stated, “the ideas embodied in this bill are to go upon the statute-book of the nation; they are to be enforced—enforced by the President, enforced by the judiciary, enforced by the Army, and enforced by the voice of the regenerated nation.”¹⁴¹ No Republican during the debates over the Second Freedmen’s

136. *Id.* at 322 (1866) (statement of Sen. Trumbull).

137. *Id.* at 586 (statement of Rep. Donnelly).

138. *Id.* at 590.

139. *Id.* at 340 (statement of Sen. Wilson).

140. *Id.* at 588 (statement of Rep. Donnelly).

141. *Id.* at 112 (1865) (statement of Sen. Wilson).

Bureau Bill celebrated or even alluded to any independent judicial power to directly enforce Section One of the Thirteenth Amendment or to define the constitutional meaning of slavery and the slave system.¹⁴²

The congressional power under Section Two to implement the constitutional ban on slavery was broadly defined. Congress had the power to determine what would be considered the badges and incidents of slavery, the elements of a slave system, and what legislative measures were necessary to erase completely the stain of slavery and the slave system from the American constitutional order. Trumbull delineated the substantial constitutional authority the Thirteenth Amendment vested in Congress when he declared:

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 amendment amounts 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 it becomes its duty to do so.¹⁴³

Donnelly called for Congress to “inaugurate sweeping measures of reform, and regenerate and rejuvenate the South.”¹⁴⁴

Republicans who identified Congress as the institution constitutionally responsible for realizing the commitments made by the Thirteenth Amendment described the Freedmen's Bureau Bill as fulfilling a constitutional obligation rather than as an act of legislative grace. Eliot stated:

142. See CONG. GLOBE, 39th Cong., 1st Sess. 209–10, 297–99, 314–23, 334–49, 362–75, 392–403, 415–21, 538–45, 585–90, 624, 627–39, 647–59, 742–48 (1866) (cataloguing debates over the Second Freedmen's Bureau Bill without mention of independent judicial power to enforce Section One of the Thirteenth Amendment).

143. *Id.* at 322 (statement of Sen. Trumble).

144. *Id.* at 586 (statement of Rep. Donnelly).

[T]he second section of that amendment confers the power and so creates the duty for just such legislation as this bill contains, to give them shelter, and food, to lift them from slavery into the manhood of freedom, to clothe the nakedness of the slave, and to educate him into that manhood that shall be of value to the State.¹⁴⁵

The congressional power to enforce the constitutional ban on slavery, Eliot and his partisan allies agreed, mandated legislative action providing certain destitute and dependent persons with basic necessities. Grinnell described the passage of the Freedmen's Bureau Bill as "a high, solemn, and religious duty."¹⁴⁶ Senator John Sherman of Ohio stated, "We are bound by every consideration of honor, by every obligation that can rest upon any people, to protect the freedmen from the rebels of the southern States . . ."¹⁴⁷ Responding to President Johnson's claim that no constitutional power supported the Freedmen's Bureau Bill, Trumbull asserted:

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.¹⁴⁸

This legislative duty to implement a constitutional command differed from a judicial duty to implement a constitutional command because Section Two gave Congress a greater choice of appropriate means for achieving constitutional ends than would have been the case if the Thirteenth Amendment was designed to be implemented primarily by the federal judiciary. Republicans never described their proposals to assist destitute freedmen as a discretionary use of federal power or act of legislative grace. They believed that Congress had a constitutional obligation to transition slaves to full citizens, but that the best means for that transition were for the national legislature to determine. Discretion was limited to the means and policies that best enabled former slaves to develop the capacities necessary to exercise the rights of full and equal citizens of a democratic republic. After declaring that "[t]he Government . . . is bound to take care of [freedmen]," Trumbull stated:

The Government having that power has, in my judgment, the power to adopt any means which it thinks best adapted to accomplish that end; and if in the opinion of Congress the best means which can be adopted to take care of these people is to buy land and put them on it,

145. *Id.* at 656 (statement of Rep. Eliot).

146. *Id.* at 652 (statement of Rep. Grinnell).

147. *Id.* at 744 (statement of Sen. Sherman).

148. *Id.* at 942 (statement of Sen. Trumbull).

I think we may do it, for the obligation to take care of them is a constitutional obligation imposed upon us as a Government.¹⁴⁹

Representative Henry Raymond of New York made a similar distinction between constitutionally mandated ends and discretionary means when he observed that “the general purpose of this bill seems to be one that this Congress has no right to refuse to take some steps to attain. We owe, as a duty to those who have been set free, the protection which this bill affords.”¹⁵⁰

The proponents of the Second Freedmen's Bureau Bill believed that Congress needed to take two kinds of legislative actions to carry out its constitutional obligation to transform former slaves into full, equal, and independent citizens. Legislation laying down the fundamental rights of free citizens was one step Republicans believed necessary for fulfilling congressional responsibilities under the Thirteenth Amendment.¹⁵¹ This task was accomplished primarily by the Civil Rights Act of 1866, but also by §§ 7–8 of the Second Freedmen's Bureau Bill. During the debate on the latter measure, Republicans repeatedly stressed the importance of equality under law as essential to full citizenship. Sumner called for a bill declaring:

That in all States lately declared to be in rebellion there shall be no oligarchy . . . , invested with peculiar privileges or powers, and there shall be no denial of rights, civil or political, on account of color or race; but all persons shall be equal before the law, whether in the court-room or at the ballot-box.¹⁵²

Legislation facilitating the transition from slavery to full citizenship was the other step Republicans believed necessary for fulfilling congressional responsibilities under the Thirteenth Amendment. This task was to be accomplished by §§ 3–6 of the Second Freedmen's Bureau Bill which, unlike the Civil Rights Act of 1866, guaranteed to freedman and destitute refugees certain goods and services.¹⁵³ Proponents of that measure placed particular emphasis on land as the good and education as the service that would enable persons of color to avoid dependency and enable them to exercise intelligently the rights of full citizens. Grinnell urged Congress “to take lessons of the Czar of the Russias, who, when he enfranchised his people, gave them lands and school-houses, and invited schoolmasters from all the world to come there and instruct them.”¹⁵⁴

The distinguishing provisions of the Second Freedmen's Bureau Bill authorized executive department officials to provide freedmen and refugees

149. *Id.* at 323.

150. *Id.* at 655 (statement of Rep. Raymond).

151. *See supra* notes 121–22 and accompanying text.

152. CONG. GLOBE, 39th Cong., 1st Sess. 592 (1866).

153. AMERICAN NATION, *supra* note 2, at 93–94.

154. *Id.* at 652 (statement of Rep. Grinnell).

with good and services. Sections 3–6, as noted above, guaranteed destitute citizens the resources they needed to make the transition from slavery to full citizenship (or to prevent them from sliding back into conditions of dependency inconsistent with full citizenship).¹⁵⁵ Trumbull called for “laws and the inauguration of measures to elevate, develop, and improve the negro.”¹⁵⁶ During the debate over these sections Republicans placed special emphasis on how government assistance would increase the capacity of former slaves to escape enforced dependency and develop the capacities necessary to exercise the rights of full and equal citizens. “[C]an we not provide for those among us who have been held in bondage all their lives,” the powerful chairperson of the Senate Judiciary Committee asked, “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?”¹⁵⁷ “If degradation and oppression have, as it is alleged, unfitted him for freedom, surely continued degradation and oppression will not prepare him for it,” Donnelly asserted.¹⁵⁸ He continued:

If he is, as you say, not fit to vote, give him a chance; let him make himself an independent laborer like yourself; let him own his homestead; let the courts of justice be opened to him; and let his intellect, darkened by centuries of neglect, be illuminated by all the glorious lights of education.¹⁵⁹

Following the Jeffersonian tradition, Republicans maintained that a freehold was vital to independent citizens.¹⁶⁰ Sumner specifically noted that a homestead was one of the rights of property that the abolition of slavery guaranteed to freedmen.¹⁶¹ Freeholds enabled citizens to be economically independent, and economic independence was vital for political independence. Land was particularly valuable, Trumbull declared, because

a homestead is worth more to these people than almost anything else; that if you will make the negro an independent man he must have a home; that so long as the relation of employer and employ[ee] exists between the blacks and the whites, you will necessarily have a dependent population.¹⁶²

155. *See supra* notes 49–53 and accompanying text.

156. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull).

157. *Id.* at 939.

158. *Id.* at 589 (statement of Rep. Donnelly).

159. *Id.*

160. *See* DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 126–27 (1980) (indicating Jefferson’s belief that land ownership is critical to an individual’s economic independence).

161. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (statement of Sen. Sumner).

162. *Id.* at 299 (1866) (statement of Sen. Trumbull).

Republicans vigorously insisted that the Thirteenth Amendment obligated Congress to pass measures educating former slaves. Trumbull stated, "The cheapest way by which you can save this race from starvation and destruction is to educate them. They will then soon become self-sustaining."¹⁶³ In his view, "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."¹⁶⁴ Donnelly, in the House of Representatives, echoed this belief that legislation providing for education was a vital means for developing capacities necessary for full citizenship. He stated:

We are interfering in behalf of the negro; let us interfere to educate him. We thus strike out at one blow a large proportion of the ignorance of the South; we shame the whites into an effort to educate themselves, and we prepare thus both classes for the proper exercise of the right of suffrage.¹⁶⁵

Donnelly and more radical Republicans connected the provision of education to voting rights. "If it is, then, true that we must make the freedmen fully free, and if the right of suffrage is necessary to this freedom, then it is equally necessary that education should accompany freedom," Donnelly asserted.¹⁶⁶ Committed to the proposition that "[u]niversal education must go hand in hand with universal suffrage," Donnelly regarded education as a service Congress was constitutionally obligated to guarantee without regard to race.¹⁶⁷ He informed Congress:

We cannot leave the population of the South, white or black, in the condition they are now in. We must educate them. When you destroy ignorance you destroy disloyalty; for what man with a free, broad scope of mind, and with a knowledge of all the facts, can fail to love this just, benevolent, and most gentle Government?¹⁶⁸

Republicans ultimately relied on a theory of constitutional authority best described as partisan supremacy when justifying their power to interpret the Thirteenth Amendment as creating a constitutional obligation to provide freedmen with land, education, and other goods and services. Partisan supremacy, first articulated by Martin Van Buren and Andrew Jackson, regards constitutional authority as vested in any political party whose constitutional vision gains the sustained assent of electoral majorities

163. *Id.* at 321–22.

164. *Id.* at 322.

165. *Id.* at 587 (statement of Rep. Donnelly).

166. *Id.* at 589.

167. *Id.* at 590.

168. *Id.* at 588.

over time.¹⁶⁹ “If different interpretations are put upon the Constitution by the different departments, the people is the tribunal to settle the dispute,” Van Buren declared.¹⁷⁰ “Each of the departments is the agent of the people, doing their business according to the powers conferred; and where there is a disagreement as to the extent of these powers, the people themselves, through the ballot-boxes, must settle it.”¹⁷¹ Jackson believed that he was constitutionally authorized to remove deposits from the national bank because Americans had sustained his constitutional objections to the national bank in the 1832 election.¹⁷² The proponents of the Second Freedmen’s Bureau Bill believed that the Republican Party was constitutionally authorized to interpret the Thirteenth Amendment because the Republican Party had demonstrated that their coalition was the party of choice for the majority of Americans who remained loyal to the United States during the Civil War and who demanded the abolition of slavery. The logic of partisan supremacy was best articulated by Abraham Lincoln¹⁷³ before the Civil War and by Republicans during the debates over the Fourteenth Amendment.¹⁷⁴ Nevertheless, prominent Republicans during the debates over the Second Freedmen’s Bureau Bill also spoke of constitutional partisanship as the best vehicle for maintaining constitutional commitments and realizing constitutional aspirations. Wilson referred to the “[h]eaven-assigned work” of the Republican Party.¹⁷⁵ McKee explained government by the Republican Party was the only means for securing government under the Constitution:

But gentlemen say that this war was waged for the purpose of preserving the Union, and that now at the end of the war the policy seems to be to perpetuate the Republican party. Now, sir, this war

169. For a general discussion of partisan supremacy, see Mark A. Graber, *Separation of Powers*, in THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION (John Compton & Karen Orren eds.) (forthcoming 2016).

170. MARTIN VAN BUREN, INQUIRY INTO THE ORIGINS AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES 330 (Augustus M. Kelley Publishers 1967) (1867).

171. *Id.*

172. See Andrew Jackson, Removal of the Public Deposits (Sept. 18, 1833), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, *supra* note 74, at 5, 7 (1896) (“Whatever may be the opinions of others, the President considers his reelection as a decision of the people against the bank.”).

173. See Abraham Lincoln, Fragment on the Formation of the Republican Party (Feb. 28, 1857), in 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 75, at 391, 391 (“Upon those men who are, in sentiment, opposed to the spread, and nationalization of slavery, rests the task of preventing it. The Republican organization is the embod[i]ment of that sentiment.”).

174. See CONG. GLOBE, 39th Cong., 1st Sess. 74 (1865) (statement of Rep. Stevens) (emphasizing the need for a constitutional amendment that would “secure perpetual ascendancy to the party of the Union; and so as to render our republican Government firm and stable forever”). This thesis will be developed in Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355 [<https://perma.cc/85V9-D36Y>].

175. CONG. GLOBE, 39th Cong., 1st Sess. 344 (1866) (statement of Sen. Wilson).

was waged for the Union; it was waged by the Republican party for the Union. Now, at the end of the war, when we have crushed out armed treason in the field, do the gentlemen who opposed this war desire this great Republican party now to put the Government into the hands of those whom they have crushed? What loyal man desires that traitors again resume the helm of state? I desire to see the Government continued in the hands of loyal men who stood under their flag and fought against treason and traitors everywhere.¹⁷⁶

In Republican eyes, the persons who championed the Second Freedmen's Bureau were constitutionally entitled to interpret the constitutional ban on slavery as they thought best because they were the persons responsible for the Northern victory in the Civil War and the ratification of the Thirteenth Amendment. Wilson asserted:

[T]he loyal men of this nation who voted their treasure and offered up their blood, who gave their sons to the preservation of the menaced Union and the imperiled cause of liberty, have sworn it, they have written it on the lids of their Bibles, they have engraved it on their doorposts, that these enfranchised men shall be free indeed, not serfs, not peons, and that no black laws nor unfriendly legislation shall linger on the statute-book of any Commonwealth in America.¹⁷⁷

When Democrats accused Republicans of substituting partisan for constitutional commitments, Republicans responded that their partisan commitments during and immediately after the Civil War were necessary for maintaining constitutional commitments. That the Second Freedmen's Bureau Bill was part of a legislative and constitutional package that strengthened the Republican Party was a virtue of that measure. Statutory provisions that provided assistance for former slaves who would become good Republicans were constitutional means both for satisfying the constitutional obligation to transform former slaves into equal citizens and for maintaining the only political party that recognized the constitutional obligation to preserve the Union and transform former slaves into equal citizens. Stewart declared:

Shall we not rather seek the perpetuation of the Union party by the accomplishment of the objects for which it was organized? Nothing but our own folly can deprive us of the rewards due to the services which that organization has rendered to the country and to the cause of liberty and humanity. The preservation of the Union, the repudiation of secession, and the abolition of slavery, the parent of

176. *Id.* at 653 (statement of Rep. McKee).

177. *Id.* at 112 (1865). *See also id.* at 341 (1866) (“[T]he people of the loyal States, who have given their sons and their blood to the putting down of this rebellion, desire that the southern people shall come back again . . .”).

secession, are great deeds; and the party that has achieved them, so long as it adheres to the principles it has vindicated, will be remembered and sustained by a generous and patriotic people.¹⁷⁸

Constitutional authority, in his view and that of other partisan supremacists during much of the nineteenth century, was “sustained by a generous and patriotic people”¹⁷⁹ rather than generated by a judicial tribunal that “may truly be said to have neither Force nor Will, but merely judgment.”¹⁸⁰

B. The Democratic Constitution of 1866

Democrats (and the rare very conservative Republican) vigorously contested every dimension of the Republican Constitution of 1865. The Democratic Constitution of 1865 was largely the Jacksonian Constitution of 1832, with two major exceptions. Democrats before and after the war remained committed to white supremacy, limited national power, and states’ rights. Democrats acknowledged, with varying enthusiasm, that the Thirteenth Amendment abandoned inherited constitutional commitments to protecting slavery, but they insisted congressional power under Section Two be limited to legislation prohibiting one person from owning another.¹⁸¹ Broader interpretations, Jackson’s descendants feared, would undermine what they believed were inherited constitutional commitments to local self-governance over domestic affairs. Democrats abandoned completely the antebellum Jacksonian suspicion of courts. The leading opponents of the Second Freedmen’s Bureau Bill insisted that the Thirteenth Amendment was best interpreted as imposing judicially enforceable legal limits on both the states and federal government. Democrats asserted that the judiciary was the institution that best protected the freedmen’s right not to be enslaved and the right of local majorities not to have Congress interfere with their efforts to regulate race relationships.¹⁸²

Democrats limited the Thirteenth Amendment to property rights in human beings. Congress, in their view, could forbid one person from owning the labor of another person, but the Thirteenth Amendment said nothing about municipal legislation delineating the economic, social, and political rights of state and local residents. Senator Willard Saulsbury of Delaware asserted:

178. *Id.* at 111 (1865) (statement of Sen. Stewart). *See also id.* at 365 (1866) (statement of Sen. Fessenden) (“[W]e hope the party in power now will continue long enough to set things right . . .”).

179. *Id.* at 111 (1865) (statement of Sen. Stewart).

180. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982).

181. *See* CONG. GLOBE, 39th Cong., 1st Sess. 638 (1866) (statement of Rep. Shanklin) (arguing that the Thirteenth Amendment permitted Congress to pass legislation prohibiting one person from owning another but did not grant Congress further power to legislate on the subject).

182. *See infra* notes 193–97 and accompanying text.

Slavery is a *status*, a condition; it is a state or situation where one man belongs to another and is subject to his absolute control. The slave can own no property of his own; he cannot work for himself, but he is subject to the command of his owner. Cannot that *status* or condition be abolished without attempting to confer on all former slaves all the civil or political rights that white people have? . . . The amendment abolishing slavery, abolishing the *status*, the condition of slavery; but there is nothing in your amendment which gives Congress the power to enter my State and undertake to regulate the relations existing between classes and different conditions in life.¹⁸³

Constitutional slavery, Jackson's successors repeatedly declared, concerned only the labor relationships on southern plantations before the Civil War. Representative Samuel Marshall of Illinois maintained that the Thirteenth Amendment "referred to slavery only as it was known in the southern States, the system by which one man held another as his

183. CONG. GLOBE, 39th Cong., 1st Sess. 113 (1865) (statement of Sen. Saulsbury). *See also* *id.* at 318 (1866) (statement of Sen. Hendricks) ("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."). President Johnson implicitly relied on this notion of human bondage when he declared in his veto message that "[t]he institution of slavery . . . has been already effectually and finally abrogated throughout the whole country by an amendment of the Constitution of the United States." Andrew Johnson, Veto Message (Feb. 19, 1866), in VETO MESSAGES OF THE PRESIDENTS OF THE UNITED STATES WITH THE ACTION OF CONGRESS THEREON 289, 292 (Ben Perley Poore ed., 1886); CONG. GLOBE, 39th Cong., 1st Sess. 363 (1866) (statement of Sen. Saulsbury) ("An amendment abolishing the *status* or condition of slavery, which is nothing but a *status* or condition which subjects one man to the control of another, and gives to that other the proceeds of the former's labor. Cannot that amendment be carried into effect, and the *status* of freedom established, without exercising such a power as this?"); *id.* at 623 (statement of Rep. Kerr) ("Slavery was a domestic relation, not a public relation. It was a relation between individuals which gave to one of them the power to control the will and conduct of the other. The severance of that relation puts an end to slavery, and was the beneficent object of this amendment. But the regulation of the ordinary civil relations of the negro to the society in which he lives, by the enactment of laws of a local and merely municipal character to control his contracts, and bestow upon him civil privileges having no necessary connection with his personal freedom, are wholly unauthorized by any warrant in any part of the Constitution."); *id.* at 634 (statement of Rep. Ritter) ("[T]he powers of this bureau are extended to every State in this Union. Why is it, sir, that this almost unlimited power should be extended everywhere? Why extend it to the northern States? . . . I cannot think that the people of the northern States require that they should be interfered with in the management of their own affairs."); *id.* at 638 (statement of Rep. Shanklin) (arguing that Section Two of the Thirteenth Amendment "was only intended to carry out and secure to the negro his personal freedom, such as all the free negroes then enjoyed; that they and the friends of the amendment was as much opposed to negro equality or negro suffrage or to conferring the power on Congress to extending these privileges to the negro, as those that opposed the amendment; that the section was not susceptible of any such construction").

property.”¹⁸⁴ Federal power under the Thirteenth Amendment ceased once property rights were adjusted. “That system of slavery is abolished, and the Federal Government has the right to see that men are not reduced to that system of slavery,” Marshall continued, “and they have no power beyond that under that clause of the Constitution.”¹⁸⁵ “Nothing can be claimed under that second section of the amendment except to give to these people their right to their freedom,” Representative Lawrence Trimble of Kentucky agreed.¹⁸⁶

Democrats regarded the Second Freedmen’s Bureau Bill as part of an ongoing Republican effort to subvert the Constitution of 1789. Party members who chanted, “The Constitution as it was” immediately after the Civil War, chanted variations on “The Constitution as it was minus slavery” during the debates over the Second Freedmen’s Bureau Bill.¹⁸⁷ Saulsbury stated, “we are a conservative people, and we wish to preserve the Constitution of our country as it was handed down to us by our fathers. We wish to preserve the form and system of government which they established.”¹⁸⁸ “The Constitution was to them sacred”¹⁸⁹ Senator Edgar Cowan of Pennsylvania, the most conservative Republican in the Senate, agreed “it had preserved and protected them; it had given them prosperity unparalleled for a period of seventy-five years, and they are for preserving it; and they are not for venturing themselves upon this sea of experiment and this flood of innovation which is to end nobody knows where.”¹⁹⁰

The Constitution of 1789 that Democrats sought to preserve more resembled the Constitution of Andrew Jackson and Martin Van Buren than the Constitution of Alexander Hamilton and the Virginia Plan. Staying true to their prewar heritage, Democrats during the debates over the Second Freedmen’s Bureau Bill insisted that the most fundamental constitutional commitments remained preserving limited national power and fostering local self-government. Senator Garrett Davis of Kentucky maintained, “The first [principle] is that our Constitution creates a Government of limited powers. The second is, that every power not conferred by the Constitution upon the United States is reserved to the people or the States

184. CONG. GLOBE, 39th Cong., 1st Sess. 628 (1866) (statement of Rep. Marshall).

185. *Id.*

186. *Id.* at 649 (statement of Rep. Trimble).

187. FONER, *supra* note 31, at 31.

188. *Id.* at 114 (1865) (statement of Sen. Saulsbury); *see also id.* at 539 (statement of Rep. Dawson) (“We must see to it that the grand features of our political system, conceived in such wisdom by the fathers, and the liberties of the American citizen, inherited mainly from our ancestors, may be preserved in their purity and vigor, without any taint of feebleness or stain upon their luster.”); *id.* at app. 78 (statement of Rep. Chanler) (“The people of the North love liberty and cherish all the safeguards our fathers threw around it, as embodied in the Constitution.”).

189. *Id.* at 342 (1866) (statement of Sen. Cowan).

190. *Id.*

respectively.”¹⁹¹ Representative John Dawson of Pennsylvania stated, “[I]t has ever been maintained by the Democratic party, that the State-rights doctrines, properly stated, present the true theory of the Government.”¹⁹² Representative Michael Kerr of Indiana spoke of the “sacred and inalienable right” states possessed “to control and govern their own people in all matters relating to their domestic and local interests.”¹⁹³

Senator Thomas Hendricks of Indiana, who led the Democratic fight in the Senate against the Second Freedmen's Bureau Bill, was astonished at the scope of federal power asserted by that measure. Like many Democrats, Hendricks directed most of his ire at §§ 3–6. He asked:

Upon what principle can you authorize the Government of the United States to buy lands for the poor people in any State of the Union? . . . 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. . . . If we can go so far, I know of no limit to the powers of Congress.¹⁹⁴

191. *Id.* at 394 (statement of Sen. Davis). *See also id.* (statement of Sen. McDougall) (celebrating “[t]hat party which believes that the Federal Government is a concession by the people of the United States, with powers limited by the concession; that party which believes that the State governments are clothed with all sovereign power except that which has been given to the Federal Government”).

192. *Id.* at 539 (statement of Rep. Dawson).

193. *Id.* at 626 (statement of Rep. Kerr). *See also id.* at 627 (statement of Rep. Marshall) (“It is a fundamental principle of American law that the regulation of the local police of all the domestic affairs of a State belongs to the State itself . . .”).

194. *Id.* at 317 (statement of Sen. Hendricks). Senator Hendricks did assert that the congressional power over federal lands provided constitutional foundation for the provision in the Freedmen's Bureau Bill that “set apart three million acres of the public lands for the benefit of these people.” *Id.* at 318. What he objected to was “appropriating money to buy lands that the Government may become the landlord and thousands of people the tenants under it.” *Id.*; *see also id.* at 343 (statement of Sen. Wilson) (“[I]t is right to preserve the frame of Government as nearly as we can which was bequeathed to us by our ancestors.”); *id.* at 370 (statement of Sen. Davis) (“It is a principle of our system of government, and the Senator from Illinois cannot overturn or shake it, that every State is bound to provide for its own paupers, whether they be black or white, whether those paupers have been slaves liberated and emancipated under the laws of the States before the rebellion, or whether they have been manumitted by the operation of the amendment to the Constitution.”); *id.* at 371 (“And yet we are told that this limited Government, created by a Constitution which especially provides that every power not therein delegated to the General Government is reserved to the people or to the States respectively, may expand and multiply its powers upon the principle of necessity.”); *id.* at 372 (statement of Sen. Johnson) (denying the federal government has “the authority to clothe and educate and provide for all citizens of the United States who may need education and providing for”); *id.* at 397 (statement of Sen. Willey) (“I believe Congress has no power to vest the President with any such authority as is given to him in this bill, has no power to purchase lands, has no power to make itself a landlord and to receive the black men as tenants under it, has no power to purchase land to build schools and asylums.”); *id.* at 627 (statement of Rep. Marshall) (“I deny at the very outset that this Federal Government has any authority to become the common almoner of the charities of the people. I deny that there is any authority in the Federal Constitution to authorize us to put our hands into their pockets and take therefrom a part of their hard earnings in order to distribute them as charity. I deny that the

The Second Freedmen's Bureau Bill, in Hendricks's view, violated constitutional commitments to limited national power, local self-government, and state equality. Hendricks informed the Senate: "[T]his was a Government, a confederation of equal States, each State secure, under the Constitution, in the control of its domestic affairs. Its domestic institutions were not at all to be controlled by the Federal Government."¹⁹⁵

Democrats who regarded the Constitution as an instrument for limiting government power championed the federal judiciary as the institution responsible for implementing the constitutional limits imposed by the Thirteenth Amendment. They called on newly freed slaves who experienced constitutional wrongs to litigate rather than seek favorable legislative constructions of the post-Civil War Constitution. Cowan declared, "The Supreme Court of the United States is sitting here for that purpose to-day, and the freedman is just as much entitled to the benefit of its protection, as I read the laws, as if he were a man of the fairest complexion and of the brightest Saxon mold."¹⁹⁶ President Andrew Johnson's veto message similarly urged former slaves to turn to courts rather than Congress. He maintained, "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."¹⁹⁷ The Second Freedmen's Bureau Bill, at best, Democrats insisted, was pointless, given that federal courts stood ready to enforce all rights granted by the Thirteenth Amendment. Senator James Guthrie of Kentucky asked: "What can be more effective than the national will expressed in the Constitution? What legislation is needed to aid and assist it?"¹⁹⁸ In his view:

Federal Government was established for any such purpose, or that there is any authority or warrant in the Constitution for the measures which are proposed in this most extraordinary bill."); *id.* at 647 (statement of Rep. Trimble) ("Where is the authority under the Constitution for such a power to buy and take land, to distribute land to this unfortunate class of people?"); Johnson, *supra* note 183, at 292-93 ("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.").

195. CONG. GLOBE, 39th Cong., 1st Sess. 368 (1866) (statement of Sen. Hendricks).

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

197. Johnson, *supra* note 183, at 294.

198. CONG. GLOBE, 39th Cong., 1st Sess. 346 (1866) (statement of Sen. Guthrie).

Every act under an unconstitutional law infringing upon the rights of individuals, whether white or black, is null and void. Holding this doctrine, believing it to be the true doctrine, and that none other can possibly be true, what is the use of our declaring and legislating those laws void which the Constitution of the United States has made void; and what kind of respect will the people suppose we pay to the Constitution when we are making an act in aid of it, to destroy or repeal that which has already been destroyed and fallen before it?¹⁹⁹

Democrats expressed confidence that courts would interpret the Thirteenth Amendment as imposing legal limits upon Congress as well as upon the states. Jacksonians who had learned the virtues of judicial supremacy called on the same courts sworn to prevent reenslavement by law to strike down the Second Freedmen's Bureau Bill as an exercise of national authority far beyond the limited scope of the Thirteenth Amendment. Saulsbury stated, "When the passions of the maddened hour shall die away and reason shall resume its throne, and the clear-headed jurists of the land shall sit in judgment upon such a question as this, I have no doubt as to what the decision shall be."²⁰⁰

Members of the party of Jackson were aghast when Republicans celebrated partisanship. Their constitution of limited government enforced by nonpartisan justices had no place for party rule. Davis asserted that the only necessity for the Freedmen's Bureau Bill was "that the fortunes of the Republican party are imperiled," and that the bill was "one of the bold, reckless, and unconstitutional system of measures devised by the radical

199. *Id.*

200. *Id.* at 113 (1865) (statement of Sen. Saulsbury); *see also id.* at 335 (1866) (statement of Sen. Guthrie) ("[S]uch an act would be held void by any judicial tribunal imbued with the principles of the Constitution and understanding its provisions.").

Democrats also objected to the provision in the Freedmen's Bureau Bill giving military officers the power to determine when freedmen were victims of unconstitutional discrimination. Senator Garrett Davis of Kentucky stated:

[T]he whole jurisdiction with which this bill attempts to invest the bureau is in direct conflict with the Constitution; it is unconstitutional; it invests the bureau with judicial powers when the Constitution itself partitions the powers of the Government and assigns the judicial power to another branch exclusively, to the courts established by the Constitution and such inferior courts as Congress may from time to time establish. My position is that no Department, no magistracy under our Government can exercise judicial functions and powers unless it be a part of the judicial branch of the Government

Id. at 347–48 (statement of Sen. Davis); *see also id.* at 417 ("The idea of Congress of the United States organizing a court of the Freedmen's Bureau and authorizing the President to assign Army officers as judges of the court! Do you call that a court? I offered an amendment providing that from that court, miserable, farcical, and grotesque as it would be, there should be allowed a writ of error or appeal from its decisions to the district or circuit court of the United States and then to the Supreme Court."); *id.* at 393 (statement of Sen. McDougall) ("I know the chairman of the Committee on the Judiciary to be a good and astute constitutional lawyer. . . . I know, too, that when he undertakes to legislate the property of a citizen into the possession of a stranger, he goes without the authority of the Constitution").

party to enable it to hold on to power and office.”²⁰¹ “I am not disappointed,” Representative Lovell Rousseau stated, “except when I come into this Hall and hear the venerable gentleman from Pennsylvania [Mr. Stevens] tell us that the organic law of the Union must be amended to keep the Republican party in power.”²⁰²

Conclusion

The Second Freedmen’s Bureau Bill provides an attractive history for progressives who believe government has an obligation to ensure all citizens have the capacities necessary to exercise the rights of full and equal citizens of a democratic republic.²⁰³ If the First Congress is considered the best authority on the meaning of the Constitution of 1787, then the Thirty-Ninth Congress—a majority of whose members were also members of the Thirty-Eighth Congress that approved the Thirteenth Amendment—is the best authority on the meaning of the Constitution of 1865.²⁰⁴ That Constitution, Republicans agreed in early 1866, vested Congress with the constitutional responsibility for defining the rights of free and equal citizens and the constitutional obligation to provide former slaves with the resources they needed to make the transition from slavery to freedom. The proponents of the Second Freedmen’s Bureau Bill regarded welfare as integral to constitutional civil rights policy, and not as an entirely independent branch of law. Persons without homesteads and education, Charles Sumner, Lyman Trumbull, and their political allies maintained, would be unable to develop the capacities necessary to exercise the rights of full and equal citizens of a democratic republic.

Proponents of constitutional welfare obligations might nevertheless consider a softer originalism that emphasizes continuity with important strands of American constitutionalism over a harder originalism that insists that the framers of constitutional provisions mandated precise answers to any constitutional question that might trouble Americans at any time and in

201. *Id.* at 371, 402 (1866) (statement of Sen. Davis); *see also id.* at 415–19 (articulating reasons supporting his belief that the Second Freedmen’s Bureau Bill was unconstitutional); *id.* at 113 (1865) (statement of Sen. Saulsbury) (describing the Second Freedmen’s Bureau Bill as “amending the fundamental law of the land . . . rapidly . . . inconsiderate[ly] and hast[ily]”).

202. *Id.* at app. 72 (1866) (statement of Rep. Rousseau).

203. *See* MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 64–65 (2011) (suggesting that just governments must actively and affirmatively support people’s capabilities).

204. *See* *Myers v. United States*, 272 U.S. 52, 136 (1926) (relying on the interpretation of the First Congress when determining the extent of presidential powers); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439–40 (1968) (attributing great significance in the interpretation of the Thirteenth Amendment to the views of Lyman Trumbull and other congressional Republican leadership as expressed in 1866).

any place.²⁰⁵ Constitutional commitments in the wake of the Civil War were volatile.²⁰⁶ Whether congressional Republicans in early 1866 shared the same constitutional understandings as the Republicans (and Democrats) who drafted and ratified the Thirteenth Amendment is unclear. Americans during the late nineteenth century experienced a transition from a constitutional order in which constitutional authority was vested in the dominant political party to a constitutional order in which constitutional authority was vested in the federal judiciary.²⁰⁷ Whether constitutional provisions designed in one constitutional order to be implemented by Congress can be translated into rights provisions designed in a different constitutional order to be implemented by courts is a complex issue. Progressives seeking to do some justice to history should be satisfied with highlighting the important strands of Republican constitutionalism that support constitutional obligations to provide persons with the resources necessary to develop and maintain the capacities required for active democratic citizenship and sharply criticizing the disturbing tendency of the Roberts Court to repeat postbellum Democratic slogans when analyzing the meaning of the post-Civil War Constitution.

The Second Freedmen's Bureau Bill's Constitution mandates federal responsibilities to provide goods and services to destitute and dependent citizens. Republicans, when defending §§ 3–6 of that measure, insisted that Congress had a constitutional obligation to feed, clothe, shelter, and educate former slaves and other Americans who lacked the capacities necessary to be independent citizens. Section Two of the Thirteenth Amendment gave Congress the ability to choose the best means for alleviating destitution and dependency, but the proponents of the Second Freedmen's Bureau Bill insisted that the responsibility for alleviating destitution and dependency was not a matter of legislative discretion. Lyman Trumbull spoke for the Republicans who championed the Thirteenth Amendment when he declared that “the obligation to take care of them is a constitutional obligation imposed upon us as a Government.”²⁰⁸ Racist Democrats were the only members of the Thirty-Ninth Congress who anticipated Chief Justice William Rehnquist's claim in *Deshaney v. Winnebago Cty. Dept. of Social Services*²⁰⁹ that the Constitution did not guarantee “certain minimal levels of safety and security” for anyone.²¹⁰

205. See Cass R. Sunstein, *Five Theses on Originalism*, 19 HARV. J.L. & PUB. POL'Y 311, 312–13 (1996) (contrasting “hard” and “soft” versions of originalism).

206. See FONER, *supra* note 31, at 602–03 (remarking that a new constitutional framework was created immediately following the war that would at times be flagrantly violated and at times be the basis for strong federal intervention).

207. Graber, *supra* note 169, at 4–5.

208. CONG. GLOBE, 39th Cong., 1st Sess. 323 (1866) (statement of Sen. Trumbull).

209. 489 U.S. 189 (1989).

210. *Id.* at 195.

The proponents of the Second Freedmen's Bureau Bill conceptualized the constitutional obligation to feed, clothe, shelter, and educate dependent citizens as among the powers of the national legislature rather than as an individual right. The constitutional ban on slavery, the leaders of the Thirty-Ninth Congress maintained, was primarily designed to empower Congress. Republicans, when debating the Second Freedmen's Bureau Bill, spoke of the Thirteenth Amendment as requiring Congress to enact a legislative program delineating the rights of full and equal citizens and providing former slaves and other dependent Americans with the goods and services they needed to transition to full and equal citizens. A Thirteenth Amendment bereft of such congressional measures, in their view, would do little to dismantle the dependencies and inequalities that marked the antebellum slave system. On the rare occasion Republicans spoke of judicial power, they maintained that the federal court system would contribute to the effort to root out the badges and incidents of slavery by implementing congressional declarations on the rights of full and equal citizenship. No Republican during the debate on the Second Freedmen's Bureau Bill or, for that matter, on the Fourteenth Amendment, maintained that the federal judiciary had the authority (or lacked the authority) to interpret independently the rights of full and equal citizens of a democratic republic or the capacities necessary to exercise those rights.²¹¹

So understood, the Second Freedmen's Bureau Bill's Constitution inverts the institutional relationships mandated by contemporary constitutional law. Republicans in 1866 regarded Congress and the Republican Party as responsible for identifying and realizing the promise of the Thirteenth Amendment. They expected the national legislature to determine the rights of full and equal citizens, which included, as a matter of constitutional civil rights policy, the goods and services dependent and destitute citizens needed to develop the capacities necessary to exercise their rights as full and equal citizens. The role of the judiciary was to implement congressional civil rights policy. In contemporary constitutional law, the federal judiciary defines the rights of full and equal citizens. Congress is limited to remedying, identifying, and preventing violations of the judicially defined rights of full and equal citizens.²¹² Questions about the goods and services persons need to develop the capacities necessary for

211. For Republican commentary on the federal judiciary during the debates over the Fourteenth Amendment, see generally Mark A. Graber, *Constructing Constitutional Politics: Thaddeus Stevens, John Bingham, and the Forgotten Fourteenth Amendment* (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2483355 [<https://perma.cc/85V9-D36Y>].

212. See *United States v. Morrison*, 529 U.S. 598, 619 (2000) (stating that congressional power under Section Five of the Fourteenth Amendment is not unlimited); *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (declaring that Congress lacks constitutional authority "to determine what constitutes a constitutional violation").

full and equal citizens are matters for welfare policy, not constitutional civil rights law.²¹³

That Republicans placed Congress at the center of their constitutional vision helps explain the broad language employed by the post-Civil War Amendments. The proponents of the Second Freedmen's Bureau Bill regarded the Constitution as an instrument for enabling the national government to pursue the general welfare.²¹⁴ The commitment to the public welfare required government to be sufficiently nimble when reacting to changing times and circumstances. As John Marshall declared in *McCulloch v. Maryland*²¹⁵ with respect to the Constitution of 1789, "Its nature . . . requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."²¹⁶ "To have prescribed the means by which government should, in all future time, execute its powers," Marshall declared a few pages later, "would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."²¹⁷ Republicans derived the language of Section Two of the Thirteenth Amendment from *McCulloch*.²¹⁸ More generally, Republicans in 1865 and 1866 drafted constitutional language more similar to the general provisions in Article I, Section Eight that empowered the national government than the specific provisions in Article I, Sections Nine and Ten that limited federal and state power because they wished to vest Congress with the discretion to choose the program that best enabled persons of color to become and remain free and equal citizens, and did not believe the federal judiciary, armed with hard, inflexible rights provisions, to be the appropriate institution for leading the charge for racial justice and political equality.²¹⁹

Whether the Second Freedmen's Bureau Bill's Constitution of early 1866 was the Constitution of 1865 is a fair question. Republican interpretations of the post-Civil War Amendments changed with every

213. See *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (recognizing the "principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy").

214. See *supra* notes 118–19 and accompanying text.

215. 17 U.S. 316 (1819).

216. *Id.* at 407.

217. *Id.* at 415.

218. CONG. GLOBE, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 825 (1999).

219. See Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808–09 (2010) (suggesting the enforcement clauses of the Thirteenth, Fourteenth, and Fifteenth Amendments granted Congress the power to "establish national standards to protect basic rights and liberties").

election and election return. Section Two of the Thirteenth Amendment was not discussed at length during the ratification process and Republicans during that limited debate reached no consensus.²²⁰ During the debates over the Second Freedmen's Bureau Bill, the Civil Rights Act of 1866 and the Fourteenth Amendment, Republicans interpreted the enforcement provisions broadly. Republicans in Congress tended to champion more narrow understandings of congressional power after the election of 1867, although the precise scope of the enforcement power varied at different times and among different Republicans.²²¹ How Republicans in state legislatures interpreted Section Two of the Thirteenth Amendment and Section Five of the Fourteenth Amendment is unclear. The literature on the ratification of the Fourteenth Amendment suggests that different Republicans in the same state legislatures had different understandings of the meaning of that text and that the dominant understanding varied from state to state.²²² In short, Section Two does not appear to have ever had a clear or stable original public meaning during the drafting, ratification, or in the immediate implementation period.

Restoring the original meaning of Section Two is also complicated by a fundamental change in how the Constitution works. Republicans drafted language that they believed empowered Congress to enact a legislative program. That language, for almost a century, has been interpreted as providing judicially enforced limits on a legislature. Inevitably, something is lost in translation. Republicans, when passing the Second Freedmen's Bureau Bill, made judgments about what goods and services the national legislature was constitutionally obligated to provide to different populations. Courts lack the legislative capacity to be flexible in light of different places and circumstances. As responsibility for implementing the constitutional commitment to giving persons the rights and capacities necessary for full and equal citizenship shifted from Congress to the courts, legal norms replaced discretionary powers. Courts looked to the antidiscrimination provisions of the Civil Rights Act of 1866 as the model for what the Civil War Constitution protected because those provisions could easily be translated into hard, inflexible legal rules. The welfare provisions of the Second Freedmen's Bureau Bill fell by the wayside partly because judges and justices felt they lacked the capacity to translate those

220. See MICHAEL VORENBERG, *FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT* 114 (2001) (noting the limited debate over the enforcement clause in the Senate and the "meager consideration" in the House).

221. See Michael Les Benedict, *The Rout of Radicalism: Republicans and the Elections of 1867*, 18 CIV. WAR HIST. 334, 335 (1972) (identifying the different views concerning Reconstruction measures among radical and conservative Republicans).

222. See generally JOSEPH B. JAMES, *THE RATIFICATION OF THE FOURTEENTH AMENDMENT* (1984) (offering a detailed historical account of the ratification process of the Fourteenth Amendment).

constitutional obligations into judicially enforceable rules. “In such a complex arena” as public school financing, Justice Lewis Powell wrote in *San Antonio Independent School District v. Rodriguez*,²²³ “the Court does well not to impose too rigorous a standard of scrutiny”²²⁴

The technical problems with treating the Second Freedmen's Bureau Bill's Constitution as the Constitution of 1865–1866 pale beside the historical impossibility of regarding the Constitution of the Roberts Court and allied federal judges as anything more than the Constitution of postbellum Democrats shorn of any commitment to white supremacy. To a remarkable degree, all the basic principles of the Roberts Court and conservative constitutional jurisprudence were anticipated by Andrew Johnson, Thomas Hendricks, Willard Saulsbury, and other Democrats who bitterly fought against the Second Freedmen's Bureau Bill. Postbellum Democrats defended a constitutional commitment to limiting the power of the national government. Chief Justice John Roberts in *NFIB v. Sebelius*²²⁵ defended the view that “[i]n our federal system, the National Government possesses only limited powers; the States and the people retain the remainder.”²²⁶ Postbellum Democrats declared that officials are under no constitutional obligation to feed, clothe, shelter, or educate anyone. Judge Richard Posner declared that our “Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”²²⁷ Postbellum Democrats asserted that permitting the Freedmen's Bureau to exercise authority in some states but not others violated the constitutional commitment to equal state sovereignty. Roberts, in *Shelby County v. Holder*,²²⁸ asserted that the preclearance requirements of the Voting Rights Act, which applied to some jurisdictions but not others, were a “dramatic departure from the principle that all States enjoy equal sovereignty.”²²⁹ Postbellum Democrats maintained that Congress, under the Thirteenth Amendment, could only prohibit practices that federal courts, without the aid of legislation, would declare unconstitutional. Justice Antonin Scalia's dissent in *Tennessee v. Lane*²³⁰ maintained, “Nothing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or ‘remedy’ conduct that does not *itself* violate any provision of the Fourteenth Amendment. So-called ‘prophylactic legislation’ is reinforcement rather

223. 411 U.S. 1 (1973).

224. *Id.* at 41.

225. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

226. *Id.* at 2577.

227. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

228. 133 S. Ct. 2612 (2013).

229. *Id.* at 2618.

230. 541 U.S. 509 (2004).

than enforcement.”²³¹ Postbellum Democrats insisted that legislation favoring persons of color violated constitutional commitments to equality. Roberts, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,²³² insisted, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²³³

The best approach for progressives, after chiding strong originalists for arguments that lack any plausible historical foundation in the post-Civil War Constitution, is to move to a softer originalism that does not require constitutional commentators to engage in selective history in order to make their constitutional vision the official law of the land. Almost immediately after the Thirteenth Amendment was ratified, the persons responsible for drafting the constitutional ban on slavery interpreted Section Two as mandating that Congress adopt a legislative program that would enable former slaves to transition into full and equal citizens of a constitutional democracy. The persons who drafted Section Two within months after the Thirteenth Amendment was ratified also interpreted that provision as authorizing them to provide resources to other Americans of any race, who, because of destitution, risked reverting to a slave-like dependency. If we find this version of the Second Freedmen’s Bureau Bill’s Constitution attractive, that measure’s very close proximity to both the Thirteenth and Fourteenth Amendments ought to provide sufficient foundations to make that vision the contemporary constitutional law of the land.

231. *Id.* at 559 (Scalia, J., dissenting).

232. 551 U.S. 701 (2007).

233. *Id.* at 748.