DUTY TO CONTRACT: FREE LABOR IDEOLOGY AND CONTRACTUAL FREEDOM IN THE POSTBELLUM SOUTH, 1865-1867.

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INTRODUCTION

"Of the many questions raised by emancipation," wrote historian Eric Foner in his *magnum opus*, *Reconstruction: America's Unfinished Revolution*, "none was more crucial to the future place of both blacks and whites in Southern society than how the region's economy would henceforth be organized."[1] Few would dispute that the official abolition of slavery by the Thirteenth Amendment brought an end to the Southern economy based primarily on slave labor, but the more difficult question is what a Southern economy based on "free labor" would entail. The natural first step of this transition was to replace a system of private ownership of humans with an impersonal system of bargained-for agreements. Indeed, "contract ostensibly reconciled free choice and social order, and epitomized the principle that legitimate systems of authority must rest upon consent rather than coercion."[2]

This essay explores the ways in which the right to contract interacted with the free labor ideology at this pivotal moment in American legal history. It examines this relationship by looking at the perspectives of four groups of historical actors: grassroots actors such as anti-slavery activists and ordinary laborers, legislatures of the former Confederate states, agents of the Freedmen's Bureau,[3] and federal lawmakers in the 39th Congress. This essay argues that, although Congress legislated some of the key grassroots demands on a system of free labor and the right to contract through constitutional amendments and federal statutes, enforcement by the Freedmen's Bureau

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1 ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 at 50 (1988).

2 *Id.* at 164.

3 The agency was formally known as the Bureau of Refugees, Freedmen, and Abandoned Lands.

deviated from the original legislative intent. For a few years after the ratification of the Thirteenth Amendment and the passage of the Civil Rights Act of 1866, the Freedmen's Bureau—a federal agency established to assist freed people in the former Confederate states—fell short of protecting freed people from the numerous attempts by Southern legislatures to re-enslave them. This essay concludes by discussing potential insights this short episode in history could provide to historians, as well as to private law and public law scholars.

Although this essay concerns only the legal development of the use of contract and free labor ideology in the few years following the Civil War, the important social background within which this development took place cannot be ignored. The War ended military conflicts between the Unionists and the Confederates, but private violence against the black community "raged almost unchecked in large parts of the postwar South."[4] While whites were permitted to, and often did, carry rifles and pistols as a means of intimidation, blacks in many Southern states were prohibited from keeping weapons.[5] In large part, the violence was in response to attempts by freed people to assert their newly acquired rights.[6] Freed people were attacked and killed for disputing contracts, leaving plantations, buying or renting land, and not performing work in the manner ordered by employers.[7] It was within this context that Congress's ambitious plan for economic reconstruction in the South took place.

GRASSROOTS UNDERSTANDINGS

Abolitionists envisioned the legal right to contract as a central pillar in a world without slavery and expected the government to protect that right. In an 1862 article titled "What Shall be Done with the Slaves If Emancipated?," noted activist Frederick Douglass stressed the importance of self-ownership of one's labor. "Give him wages for his work," he explained, "and let hunger pinch him if he don't work . . . . His hands are already hardened by toil, and he has no dreams of ever getting a living by any other means than by hard work."[8] Although Douglass did not use the term "contract," he seemed to

4 FONER, *supra* note 1, at 119.

5 *Id.*; Robert L. Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 VA. L. REV. 272, 279 (1969).

6 FONER, *supra* note 1, at 121.

7 *Id.*

8 Frederick Douglass, *What Shall Be Done with the Slaves If Emancipated?*, Frederick Douglass Project, UNIV. OF ROCHESTER (1862), https://rbscp.lib.rochester.edu/4386.

believe that a system built on free rather than slave labor meant an expansion of choice. "If you see him plowing in the open field, leveling the forest, at work with a spade, a rake, a hoe, a pickaxe, or a bill," Douglass continued, "let him alone; he has a right to work."[9] This "right to work," thus, meant not only being able to contract for one's own labor, but also being able to choose the form of work. Black workers' "right of choice," Douglass argued, deserved as much "respect and protection" as their white counterparts.[10]

Many runaway slaves also believed that free labor encompassed more than the ability to contract one's labor for wages. "I think that everyone ought to work for their own living," said John Quincy Adams, a freedman, "and those that do not wish to work let them pay for it, but not put on style off of the labor of others without paying them for it."[11] Adams believed that "a man works much better for himself than he can for another man for nothing, and every just man will say so too."[12] Jourden H. Banks, an escaped slave, interpreted free labor to mean not only self-ownership but also fair treatment. "The fear that the slaves will not work when freed is a very convenient excuse to avoid meeting the very question of emancipation upon its merits . . . . Treat the labourers kindly, as men whom they have wronged, pay them fairly and not grudgingly," he explained, "and all will go well."[13]

When the emancipation of enslaved people brought about a system of contract and wage labor to the Southern economy, feminists in the North were advancing the idea that marriage contracts must also be reformed to expand and protect the wife's self-ownership in person and labor.[14] Like a commercial contract of labor that freed the slaves to own their persons, labor, and wages, Northern feminists argued that an equal marriage contract ought to achieve the same goals for wives.[15] The marriage contract deprived a woman's right to work outside the home and her personhood independent of her husband.[16] This marriage contract therefore was not free because it

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9 *Id.*

10 *Id.*

11 JOHN QUINCY ADAMS, NARRATIVE OF THE LIFE OF JOHN QUINCY ADAMS, WHEN IN SLAVERY, AND NOW AS A FREEMAN, 21-22 (1872), available at https://docsouth.unc.edu/neh/adams/adams.html.

12 *Id.* at 11.

13 JOURDEN H. BANKS, A NARRATIVE OF EVENTS OF THE LIFE OF J. H. BANKS, AN ESCAPED SLAVE, FROM THE COTTON STATE, ALABAMA, IN AMERICA, 91 (1861), available at https://docsouth.unc.edu/neh/penning/penning.html.

14 AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 179 (1998).

15 *Id.*

16 *Id.* at 184.

denied the woman her right to self-ownership.[17] "In feminism," wrote historian Amy Dru Stanley, "just as in abolitionism, contract freedom represented the opposite of slavery" and "the foundation of all rights."[18]

Martin Delany, abolitionist and a Freedmen's Bureau commissioner in South Carolina, was one of the black leaders who advocated the positive role of labor contracts in advancing free labor in the postwar South. As a bureau official, Delany negotiated and wrote many of the contracts between white employers and black workers for his district.[19] He also urged workers to "renounce alcoholic beverages, [and] established a cotton-gin mill and warehouse . . . that allowed black workers to bypass white factors and increase their profits . . . ."[20] In an 1865 bureau report, Delaney wrote: "Capital, land and labor require a copartnership. The capital can be obtained in the North; the land is in the South, owned by the old planters; and the blacks have the labor."[21] Delany contended that freed people would "readily bring the labor, if only being assured that their services are wanted in so desirable an association of business relations . . . ."[22] He also envisioned that profits would be shared equally, with the laborers receiving one-third of the net earnings.[23]

But suspicion remained regarding the role of contract in transitioning the Southern economy. Unlike Northern wives who did not have the choice to work outside the home, freedwomen in the South lacked the choice to stay and work in the home.[24] The Freedmen's Bureau "deprecated as idle the freedwoman who only did unpaid household work – who refused to turn her labor into a commodity."[25] Works beside contracted-for employment were all considered idleness, and "the bureau denied the virtues of housework also instilled by apostles of free labor."[26]

Freed people's aversion to labor contracts was not an isolated phenomenon in the Postbellum South. Many newly freed slaves refused to be economically dependent on their former masters and deeply distrusted white employers.[27] They feared that by contracting with their former

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17 *Id.*

18 *Id.* at 186.

19 MARTIN R. DELANY: A DOCUMENTARY READER, 379 (Robert D. Levine eds., 2003).

20 *Id.*

21 *Id.* at 401.

22 *Id.*

23 *Id.*

24 STANLEY, *supra* note 14, at 188.

25 *Id.*

26 *Id.* at 189.

27 *Id.* at 41.

masters, they would sign away their freedom again.[28] In the Anderson District of South Carolina, for example, only half of the freedmen had signed labor contracts in 1866.[29] Contract required mutual trust between the parties, yet "neither former masters nor former slaves put much faith in promises made by members of the other race."[30] According to one report, freed people were "so constantly cheated by white men that they [did] not care to trust strangers."[31] Negotiations between former slaves and former masters also did not reflect the rules of equal bargaining. A former slave owner, in trying to convince freed people previously enslaved by him to contract their labor with him, said: "The colored people could never protect themselves among the white people. So you had all better stay with the white people who raised you and make contracts with them to work for one-fifth of all you make."[32] One freedman refused to sign anything: "I might sign to be killed. I believe the white people is trying to fool us."[33]

Perhaps the single strongest explanation behind freed people's aversion to labor contracts was their desire to own land.[34] Many hoped to work for themselves on their own land, hence refusing to contract for low-paying and closely supervised jobs.[35] Freedom, said a freedman from Georgia, not only meant to substitute impersonal labor contracts for the masters' dominance, or the ability to earn a living off of one's own labor, but it also meant to "have land, and turn it and till it by our own labor."[36] This desire for land ownership turned into a well-grounded expectation when, after the War, military proclamations and bureau decrees promised that freed people would acquire ownership of portions of their former masters' land.[37]

Regardless of the disagreements over the role of labor contracts in securing their newly acquired freedom, black people seldom understood the right to contract as an accurate proxy for free and fair labor. Even Martin Delany, who encouraged freed people in the South to enter into labor

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28 CARL SCHURZ, REPORT OF CARL SCHURZ ON THE STATES OF SOUTH CAROLINA, GEORGIA, ALABAMA, MISSISSIPPI, AND LOUISIANA, S. REP. EX. DOC. NO. 2, at 30 (1865).

29 STANLEY, *supra* note 14, at 40.

30 *Id.* at 41.

31 *Id.* at 42.

32 *Id.*

33 *Id.*

34 *Id.* at 41.

35 Karen M. Tani, *Administrative Constitutionalism at the "Borders of Belonging": Drawing on History to Expand the Archive and Change the Lens*, 167 U. PA. L. REV. 1603, 1613 (2019).

36 STANLEY, *supra* note 14, at 41.

37 *Id.*

contracts, insisted on equal treatment in profit-sharing.[38] A right to contract was primarily understood as a vehicle through which fair wages and fair treatment at work might be achieved. When the War ended with a Union victory, freed people around the country were justifiably awaiting government actions to fulfill the long overdue promise of free labor.

INTERPRETING THE THIRTEENTH AMENDMENT

In its plainest and most straightforward sense, the Thirteenth Amendment announced the death of the institution of slavery.[39] But the precise meaning of "involuntary servitude" and the new labor system intended by the 39th Congress remained undefined.[40] After the end of the Civil War in April 1865, the Thirteenth Amendment had two primary interpreters in the former Confederate states: the Southern state legislatures and the Freedmen's Bureau. Motivated by different sentiments and ideologies, both interpreters deviated from the congressional intent behind the language of the Thirteenth Amendment.

Former Confederate lawmakers, having no interest in implementing a system of free labor in the South, passed the Black Codes to keep in place a system of subjugation and exploitation disguised by a right to contract. Mississippi, in a bill ironically titled "An Act to confer Civil Rights on Freedmen," required each freed person to have written proof of an employment contract by January 1866.[41] The absence of such documentation was considered a *prima facie* showing of vagrancy and could subject the laborer to fines, prison sentences, and hard labor.[42] Mississippi also expanded its vagrancy law to criminalize runaways and persons who neglected their work.[43]

In South Carolina, Governor James Orr signed "An Act preliminary to the legislation induced by the emancipation of slaves" in December 1865, believing that newly freed slaves must be "taught the absolute necessity of strictly complying with their contracts of labor."[44] While ostensibly

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38 *See supra* notes 22, 23 and accompanying text.

39 U.S. CONST. amend. XIII, § 1.

40 *Id.*

41 DANIEL A. NOVAK, THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY 2 (1978).

42 *Id.* at 2, 5.

43 *Id.* at 3.

44 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA PASSED AT THE SESSION OF 1864-65, 271 (on file with the author); NOVAK, *supra* note 41, at 4.

conferring all rights and duties of white persons to "persons of color," including the right to make contracts and enjoy the fruits of one's own labor, the Act also provided that these rights would be "subject to the modifications made by this Act and other Acts hereinbefore mentioned."[45] Then, in a following Act governing "the domestic relations of persons of color, and [amending] the law in relation to paupers and vagrancy," South Carolina prohibited any freed person from pursuing independent careers in art, trade, mechanics, and shop-keeping or forming a partnership with a white person without a license from a District Judge.[46] Like in Mississippi, any freed person in South Carolina without "lawful and reputable employment" would be deemed a vagrant and be punished by criminal sentences, fines, or hard labor.[47]

Alabama, Louisiana, Georgia, Virginia, and North Carolina all passed their own versions of the Black Codes containing similarly harsh vagrancy laws.[48] Florida criminalized breach of contract as *prima facie* proof of vagrancy.[49] Tennessee and Arkansas took no significant action and kept their old slave laws in place until a few years after the War.[50] Texas had milder penalties for vagrancy, but counterbalanced the mildness with a draconian anti-enticement statute.[51] It is worth noting that although criminalization of breach of labor contracts had its root in English law, criminalizing the enticement of an employee was an American invention.[52] Several of the former Confederate states put in their Black Codes strict anti-enticement laws, subjecting anyone attempting to entice, employ, or harbor a worker from his current employer to criminal and civil penalties.[53]

The language of the vagrancy statutes did not distinguish between the races and seemingly applied to black and white workers alike.[54] But the Southern states "covertly" attempted "to reintroduce a new, privately enforced slave system."[55] When Major General Carl Schurz finished his tour to South Carolina, Mississippi, Alabama, Georgia, and Louisiana under the

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45 ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF SOUTH CAROLINA PASSED AT THE SESSION OF 1864-65, 271 (on file with the author).

46 *Id.* at 299.

47 *Id.* at 303-304.

48 NOVAK, *supra* note 41, at 5-7.

49 *Id.* at 6.

50 *Id.* at 7.

51 *Id.*

52 *Id.* at 3.

53 *Id.* at 3.

54 Kohl, *supra* note 5, at 279.

55 *Id.* at 280.

order of President Andrew Johnson, he did not hesitate to conclude, in an 1865 report to Congress, that "although the freedman is no longer considered the property of the individual master, he is considered the slave of society, and all independent State legislation will share the tendency to make him such."[56] Schurz observed that many white Southerners believed a black person would not work without physical compulsion, leading lawmakers to introduce elements of corporal punishment into the new labor system.[57] Some planters in South Carolina utilized exploitative sharecropping contracts to attach "all sorts of constructive charges" on black sharecroppers, binding them "to work off the indebtedness they might incur."[58] When commenting on the Black Codes of a Louisiana town named Opelousas, Schurz wrote: "It is true, an 'organization of free labor' upon this plan would not be exactly the re-establishment of slavery in its old form, but as for the practical working of the system with regard to the welfare of the freedman, the difference would only be for the worse."[59] A freed person "is not only not permitted to be idle, but . . . he is compelled to be in the 'regular service' of a white man, and if he has no employer he is compelled to find one."[60] The employers understood that a freed person is "just as much bound to his employer . . . as he was when slavery existed in the old form."[61] "On the whole," Schurz wrote, "this piece of legislation is a striking embodiment of the idea that although the former owner has lost his individual right of property in the former slave, 'the blacks at large belong to the whites at large.'"[62]

In the seven years following the end of the War, the Freedmen's Bureau was the primary adjudicator of disputes involving freed people.[63] An essential role of the bureau was to implement the new system of free labor. To this end, bureau agents enforced a system of contract on newly freed black laborers with a heavy hand. In Jacksonville, Florida, for example, a bureau official ordered black workers who refused to contract to work on local plantations to be "shipped by rail to Tallahassee" and to work under contracts made for them by the bureau.[64] In Mississippi, freed people were

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56 SCHURZ, REPORT, S. REP. EX. DOC. NO. 2, *supra* note 28, at 45.

57 *Id.* at 16, 19.

58 *Id.* at 22.

59 *Id.* at 24.

60 *Id.*

61 *Id.*

62 *Id.*

63 Tani, *supra* note 35, at 1612.

64 *Id.* at 1613.

ordered by the bureau to sign labor contracts if they did not want to be subject to arrest as vagrants.[65] In Arkansas, one bureau commissioner "sometimes winked at agents' use of heavy-handed methods."[66]

Although the bureau disregarded the Black Codes and refused to prosecute black workers under those provisions, its own regulations on freed people displayed some striking parallels to the state laws it denounced as discriminatory and unenforceable.[67] As head of the bureau, General Oliver Otis Howard ordered his agents to not enforce provisions forbidding freed people from owning land in Mississippi's "Act to Confer Civil Right," but did not object to the anti-enticement statute or any contract provisions in the Act.[68] In August 1865, the Freedmen's Bureau issued General Order No. 12 on the subject of plantation labor.[69] The Order prescribed that any contracts with freed people for labor over a period of four months must be approved by a bureau agent.[70] The bureau, however, would not approve contracts for shorter employment that were set to expire on or before the first day of 1867.[71] The usual remedy for breach of contract would be for a breaching employee to forfeit all wages due.[72] But, the Order proclaimed, this process would be subject to one important qualification. If an employer claimed under oath that his employee had been absent from work without good cause for more than one day, or for a total of three days in a month, such employee would be prosecuted as a vagrant.[73] To justify this provision, the Order explained that every freed person must learn "the binding force of a contract, and that freedom does not mean living without labor."[74]

A letter sent by the bureau office in Little Rock, Arkansas reported one particular instance where bureau agents became enforcers of state vagrancy law.[75] The worker was a freedman named Daniel Webster.[76] He had signed a contract with a planter firm but had not gone to the plantation to start his

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65 NOVAK, *supra* note 41, at 9, 11.

66 Tani, *supra* note 35, at 1613.

67 NOVAK, *supra* note 41, at 4.

68 *Id.* at 11.

69 Wager Swayne, Gen. Ord. No. 12 Subject. Plantation Labor, Sept. 1, 1865, South Carolina Assistant Commissioner, Orders and Circulars, Orders and Circulars Issued and Received, 1865-67, Freedmen's Bureau, Smithsonian Institution Transcription Center.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION, 1861-1867, SERIES 3: VOL. 2, LAND AND LABOR, 1866-1867, at 200 (Rene Hayden et al. eds., 2013).

76 *Id.*

work.[77] "I have had this man before me three times and as often has he faithfully promised to [me] that he would fulfill his contract," the bureau agent complained.[78] Having explained to Webster "the importance of fulfilling his contract in good faith, but without effect," the agent sent Webster to his bureau supervisor for "imprisonment" or any other proper punishment.[79] The letter, while failing to provide any information on Webster's own reason for refusing to work on the plantation, stated that Webster did not make the contract before bureau agents, but before witnesses "who testif[ied] that he voluntarily signed."[80] "I believe him to be, not only a trifling character," the letter concluded, "but also a bad one."[81] The agent recommended that the bureau use Webster's case to set an example.[82] Webster was later convicted for breaching his contract with the planters; he was sentenced to a ten-dollar fine and was to be jailed until he paid his fine.[83]

Although bureau policy delegated the agents to make "fair and liberal" contracts for freed people, in practice, written contracts were often made with white planters at the expense of substantive protections for black laborers.[84] In Tennessee, for example, the bureau approved numerous labor contracts where black laborers agreed to feed and clothe themselves, pay their own medical bills, and forfeit all claims under the contract if they failed to comply with its provision or leave work before the expiration date.[85] Indeed, as summarized by one article, "the record reveals that however much

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77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 *Id.* at 200-01.

84 R. Saxton & Stuart M. Taylor, Gen. Ords. No. 11, Aug. 28, 1865, South Carolina Assistant Commissioner, Orders and Circulars, Orders and Circulars Issued and Received, 1865-67, Freedmen's Bureau, Smithsonian Institution Transcription Center.

85 *See, e.g., Articles of agreement between J M. Mask & Albert Chambers & such hands as he may employ all of the State & county aforesaid*, approved on Mar. 8, 1867, by John D. Ussery & JGW Fenwick, Tennessee Assistant Commissioner, Records Relating to Freedmen's Labor, Contracts, Hardeman-Madison Counties, 1865-1868, Part 3, Freedmen's Bureau, Smithsonian Institution Transcription Center; *Articles of agreement between John Coates & Dick Smith*, approved on Mar. 15, 1867, by John D. Ussery & JGW Fenwick, Tennessee Assistant Commissioner, Records Relating to Freedmen's Labor, Contracts, Hardeman-Madison Counties, 1865-1868, Part 3, Freedmen's Bureau, Smithsonian Institution Transcription Center; *Articles of agreement made and entered in to between John Cheairs of the first Part and Eaphraim Jones Arron Cheairs & family Charles Lake of the second Part*, approved on Apr. 11, 1867, by John Dussen & JGW Fenwick, Tennessee Assistant Commissioner, Records Relating to Freedmen's Labor, Contracts, Hardeman-Madison Counties, 1865-1868, Part 3, Freedmen's Bureau, Smithsonian Institution Transcription Center.

blacks attempted to control their labor, agents forced them to make and then abide by contracts with decidedly pro-planters terms."[86]

The bureau enforced vagrancy laws on freed people, but the motives behind such enforcement should not be confused with the plainly discriminatory purposes behind the Black Codes. For starters, although the top-down bureau policy was premised on the belief that the legal right to contract would lead to the realization of free labor, some ground-level bureau agents vocally disagreed with the heavy-handed approach and saw limits in forcing freed people into formal contractual arrangements.[87] Moreover, as illustrated by the bureau letter from Little Rock, the vagrancy charge against Webster was brought, not out of apparent racial hatred or animus, but out of frustration resulting from ineffective and inadequate communications.[88] Although the letter never described Webster's trial testimony in his own defense, it did specify that he was tried before a jury of his peers composed of six black men.[89] Also evident from the letter and the bureau's general order was the belief that labor is central to one's moral character and closely linked to one's entitlement to freedom and citizenship.[90] The bureau forced freed people to form contracts and disciplined them for violating the terms with the hope to "educate this work force emerging from slavery in the main

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86 Sara Rapport, *The Freedmen's Bureau as a Legal Agent for Black Men and Women in Georgia: 1865-1868*, 73 GA. HIST. Q. 26, 31 (1989).

87 *See To the Landlords and Laborers of the State of South Carolina*, Circular Letter, Dec. 26, 1866, South Carolina Assistant Commissioner, Orders and Circulars, Orders and Circulars Issued and Received, 1865-67, Freedmen's Bureau, Smithsonian Institution Transcription Center ("The system of fines and penalties . . . should be abolished as experience has shown that it is productive of more evil than good and is not adapted to free labor. Let it be understood that a fair days wages will be paid for a fair days work . . . . When it becomes necessary on account of bad conduct or breach of contract to dismiss a laborer he should be paid in full to date of dismissal"); R. K. Scott, Bvt. Major General and Assistant Commissioner, *To the Landlords and Laborers of the State of South Carolina*, Circular Letter, Dec. 26, 1866, South Carolina Assistant Commissioner, Orders and Circulars, Orders and Circulars Issued and Received, 1865-67, Freedmen's Bureau, Smithsonian Institution Transcription Center ("I would also advise that all fines and penalties be excluded from contracts, as the laborers will soon find by experience that the severest punishment that can be visited upon them, is to lose their place and be compelled to seek employment elsewhere. They are already coming to a realizing sense of the necessity of being industrious orderly and quiet in order to retain their places, and as soon as experience has taught them the duties and responsibilities of Citizenship, it is my conviction that they will become as quiet and industrious laborers as the white people. And in all cases when they have been treated with justice and kindness, they have proved themselves to be so").

88 *See supra* note 75, at 200.

89 *Id.* at 200-01.

90 *See supra* notes 74, 81 and accompanying text.

tenants of free labor thinking, among which contractualism was perhaps the most important."[91]

CONGRESSIONAL INTENT

Abhorred by the Southern legislatures' attempts to keep *de facto* slavery in place and out of the desire to provide more explicit guidance to the Freedmen's Bureau, the 39th Congress introduced the Civil Rights Act of 1866 to the Senate less than a month after the ratification of the Thirteenth Amendment.[92] The Judiciary Committee, chaired by Senator Lyman Trumbull, who was also the sponsor of the Act, learned from testimonies that, although state laws did not necessarily prohibit freed people from accessing the free labor market or purchasing land, "access was severely limited" in reality.[93] Some Southern white landowners, for example, would not sell property to black buyers.[94] In an attempt to furnish a federal remedy for these pressing problems, Section 1 of the original version of the 1866 Civil Rights Act provides that

> [T]he inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, . . . shall have the same 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 full and equal benefit of all laws and proceedings for the security of person and property [.][95]

A few key phrases were added to the final version of the Act passed by the Senate on April 9, 1866.[96] First, the drafters declared that all persons born in the United States, except for Native Americans, would be considered "citizens of the United States."[97] Second, the drafters emphasized that the same right shall be given to all "citizens," without regard to previous condition of servitude, "in every State and Territory in the United States."[98] Most importantly, the finalized Act contained a more explicit anti-discrimination clause, adding that black citizens shall enjoy "full and equal benefit of all laws . . . as is enjoyed by white citizens."[99] The final version of

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91 Rapport, *supra* note 86, at 32.

92 FONER, *supra* note 1, at 243.

93 Kohl, *supra* note 5, at 281.

94 *Id.*

95 S. 61, 39TH CONG. § 1 (1866).

96 S. 61, 39TH CONG. § 1 (1866) (enacted).

97 *Id.*

98 *Id.*

99 *Id.*

the Act, thus, had an additional meaning centered on national identity and equality, both consistent with the language of the Fourteenth Amendment, which was passed by the same Senate two months after the Act's enactment. Newly freed blacks would not only be inhabitants of the individual states and be subject to state regulations, but they would also become citizens of the United States and be subject to federal protections. Reading the finalized language in Section 1 together with Section 2, which made violation of the Act a misdemeanor, it is clear that Congress thought that liberty could not come without equality and that government intervention was necessary to guard both.[100]

The legislative history of the Act also illustrates how Congress intended to use the right to contract to facilitate the free labor system in the South. "It is idle to say that a citizen shall have the right to life, yet to deny him the right to labor," argued Ohio Republican William Lawrence during a floor debate; "It is a mockery to say that a citizen may have a right to live, and yet deny him the right to make a contract to secure the privilege and the rewards of labor."[101] The goal of this Civil Rights Act, explained then-Representative William Windom from Minnesota, "is to secure to a poor, weak class of laborers the right to make contracts for their labor, the power to enforce the payment of their wages, and the means of holding and enjoying the proceeds of their toil."[102] "Who can deny them this?" he continued, "To do so would be to repudiate utterly the pledges we made in the day of our sore trial, and would justly merit the scorn and contempt of mankind."[103]

Further, proponents of the Act refuted the simplistic view of equating a written labor contract with free labor. "[T]he barbarous vagrant law recently pass by the rebel State Legislature is rigidly enforced, and under its provisions the freed slaves are rapidly being reenslaved," Representative Lawrence quoted a testimony; "every freedman who does not contract for a year's labor is taken up as a vagrant. The officers of the Freedmen's Bureau are often not accessible, and the freedmen are kept back, by the distance, from complaining."[104] Martin R. Thayer, Representative from Pennsylvania, echoed Lawrence. If Southern legislatures could freely enact "laws which impair [freed people's] ability to make contracts for labor in such manner as virtually to deprive them of the power of making such contracts, and which

100 *Id.*

101 CONG. GLOBE, 39TH CONG., 1st Sess. 1833 (1866).

102 *Id.* at 1159.

103 *Id.*

104 *Id.* at 1833.

then declare them vagrants . . . because they have no employment," he argued, "the amendment abolishing slavery in the United States" would have no practical value.[105]

The proponents and drafters of the 1866 Civil Rights Act, many of whom were also the architects of the Thirteenth Amendment, envisioned the right to contract as a vehicle to achieve free labor in the former Confederate states. Significantly, the proponents supported and voted to pass the Act despite concerns from the dissenters in Congress over what they considered to be an illegitimate expansion of federal power.[106] The majority of Congress saw no problem in federal government intervention in private contracts when doing so would protect the weaker bargaining parties. Such intervention, under the logic of the 1866 Civil Rights Act, would not only promote free labor, but also enhance rather than diminish freedom of contract. But the kind of government intervention practiced by the Freedmen's Bureau fell far short of this intent.

CONCLUSION

This brief recount of the important shift from slavery to a system of free labor in the 19th-century United States has provided some preliminary insights into the ways in which the right to contract, free labor, and constitutional development outside the courts interacted during the two years after the Civil War. For historians, this essay traces one of the many episodes where federal enforcement of the Reconstruction Amendments and accompanying legislation failed in the face of local resistance. This essay focuses only on the legal development of the right to contract and free labor ideology. Future scholarship in History could shed more light on this development by making deeper connections to the violent and divisive social and political context during Reconstruction.

For private law scholars, this essay explores the immediate postwar development of the free labor system and the individual right to contract through a historical lens. This short episode in history may be illustrative of

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105 *Id.* at 1151.

106 The Civil Rights Act, argued Representative Anthony Thornton from Illinois, "is but a stepping-stone to a centralization of the Government and the overthrow of the local powers of the States . . . . There is nothing left but absolute, despotic, central power." *Id.* at 1157. Representative Charles Eldredge, a Democrat from Wisconsin, expressed a similar worry: "There is no doubt [the Act] is a measure designed to accumulate and centralize power in the Federal Government." *Id.* at 1154.

the limits of standard contract theories, where the ability to contract, in and of itself, is considered an expansion of choice and autonomy.[107]

Lastly, for public law scholars, this essay presents an early example of administrative constitutionalism, where the Freedmen's Bureau pioneered the interpretation of a constitutional provision.[108] On another constitutional note, this history of interaction between the right to contract and free labor ideology in the postwar South illustrates the distorted reading of the Reconstruction Amendments by the *Lochner* Court.[109] The Reconstruction Congress rejected the notion that liberty is government abstention and that redistribution is an unconstitutional infringement on individual freedom to contract.[110] The Thirteenth Amendment instead signaled a congressional endorsement of government intervention in private contracts for the purpose of protecting the weaker bargaining parties.

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107 *See generally* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (2d ed. 2015); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); Hanoch Dagan & Michael Heller, *Choice Theory: A Restatement*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORIES (Hanoch Dagan & Benjamin Zipursky eds., 2020).

108 *See* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801 (2010) (defining the term "administrative constitutionalism" as "regulatory agencies' interpretation and implementation of constitutional law").

109 *See Lochner v. New York*, 198 U.S. 45, 62 (1937) ("Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution").

110 *See Id.* at 57 ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action").