

## “A Vast Labor Bureau”: The Freedmen’s Bureau and the Administration of Countervailing Black Labor Power

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*For a few short years starting in 1865, the Freedmen’s Bureau exercised regulatory power over labor markets in a fashion unprecedented in ambition, scope, and reach in U.S. history up to that point—and, arguably, since. The Bureau used its broad authority to construct, regulate, and coordinate labor in the post-slavery South according to a racial-egalitarian vision of “free labor.” Yet this vast federal agency’s innovative, multifaceted strategies for equalizing power relations between capital and labor rarely appear in scholarship or policy proposals on progressive labor-market governance today.*

*This Note begins to rectify that oversight. Primary and secondary historical sources on the Freedmen’s Bureau’s labor-market regulatory functions reveal a highly interventionist agency that transgressed many of the boundaries that limit today’s strategies for labor-market regulation. By breaking down boundaries between (a) the public and the private, (b) the political and the economic, and (c) the economic and the racial, the Bureau’s day-to-day operations, though imperfect, help chart the path toward more racially egalitarian and substantively democratic labor-market governance. Specifically, the Bureau’s labor-market activities raise critiques and opportunities for both theory and practice in labor, antitrust, and administrative law.*

*The Freedmen’s Bureau’s approach holds particular value today, as the United States once again faces a dangerous combination of racial wealth inequality, violent mass incarceration, political polarization, and a judiciary highly skeptical of administrative action, progressive economic policies, and racial redress. Indeed, in the face of a Supreme Court that increasingly demands historical precedent for government action, continued neglect of the Freedmen’s Bureau’s role as an economic regulator is costly. Reformers should embrace the best aspects of the precedent set by the Freedmen’s Bureau to build countervailing administrative power for today’s multiracial working class.*

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# The Freedmen's Bureau and the Administration of Countervailing Black Labor Power

## Introduction

So contracts were written, — 50,000 in a single state, — laborers advised, wages guaranteed, and employers supplied. In truth, the organization became a vast labor bureau; not perfect, indeed, — notably defective here and there, — but on the whole, considering the situation, successful beyond the dreams of thoughtful men. . . . The passing of a great human institution before its work is done, like the untimely passing of a single soul, but leaves a legacy of striving for other men. . . . Today, when new and vaster problems are destined to strain every fibre of the national mind and soul, would it not be well to count this legacy honestly and carefully?

— W.E.B. Du Bois<sup>1</sup>

Labor markets, like all markets, are embedded in social relations.<sup>2</sup> These social relations include hierarchies of political, economic, and racial power.<sup>3</sup> Power imbalances in the social, political, and economic spheres reinforce one another, and law mediates those feedback loops.<sup>4</sup> Capitalism purports to divide the “political” and the “economic,”<sup>5</sup> yet even capitalist markets cannot escape governance, coordination, and coercion, sanctioned and structured by legal institutions both visible and submerged.<sup>6</sup> Racial justice requires economic justice, and vice-versa.<sup>7</sup> These ideas have, in various forms, undergirded

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1. W.E.B. Du Bois, *The Freedmen's Bureau*, THE ATLANTIC (Mar. 1901), <https://www.theatlantic.com/magazine/archive/1901/03/the-freedmens-bureau/308772/> [<https://perma.cc/Z8YU-6255>].

2. See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944) (expositing a theory of the social embeddedness of markets).

3. See, e.g., CEDRIC J. ROBINSON, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* 1-28 (1983); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714 (1993) (discussing the “entangled relationship between race and property”); Nancy Fraser, *Behind Marx's Hidden Abode: For an Expanded Conception of Capitalism*, 86 NEW LEFT REV. 55 (2014) (discussing relationships among capitalism, social reproduction, ecology, and politics).

4. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) (charting how law creates and structures economic coercion in markets, thus creating and reflecting social inequalities); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1883 (2020) (outlining relationships among law, power, equality, and democracy and explaining that “law is perennially involved in creating and enforcing the terms of economic ordering”).

5. Ellen Meiksins Wood, *The Separation of the Economic and the Political in Capitalism*, 127 NEW LEFT REV. 66, 67 (1981).

6. Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, in THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 72, 72 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022) (providing a “general ‘market governance’ framework for understanding how markets are governed in the context of legal rules that allow and disallow certain forms of coordination”); Hale, *supra* note 4, at 470 (“Some sort of coercive restriction of individuals . . . is absolutely unavoidable, and cannot be made to conform to any Spencerian formula.”); Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 380 (2020) (“[P]rivate decisions to engage in economic coordination are always subject to public approval, which antitrust law grants either explicitly or tacitly.”).

7. See, e.g., Harris, *supra* note 3, at 1778 (“[T]he existing state of inequitable distribution is the product of institutionalized white supremacy and economic exploitation.”); Noah D. Zatz, *Get to Work or Go to Jail: State Violence and the Racialized Production of Precarious Work*, 45 L. & SOC. INQUIRY 304, 305 (2020) (describing the “thorough racialization of both criminal institutions and economic inequality”).

progressive legal movements from Realism and Critical Legal Studies to Critical Race Theory and Law and Political Economy. For the freedmen and freedwomen seeking to exercise their new right to sell their labor in the post-Civil War South, these ideas described their lived reality.

In the brief period of Radical Reconstruction, an activist federal government sought to uproot the racial and economic hierarchy of the “Slave Power” and replace it with “abolition democracy.”<sup>8</sup> “Free labor” was to supersede slavery as the organizing economic paradigm. In 1865, Congress created the Bureau of Refugees, Freedmen, and Abandoned Lands as the administrative agency tasked with reshaping the Southern economy and society in the mold of the Republicans’ free labor ideal.<sup>9</sup> As W.E.B. Du Bois would later describe it, what became known as the Freedmen’s Bureau was “the most extraordinary and far-reaching institution of social uplift that America has ever attempted.”<sup>10</sup> The Bureau, he wrote, instituted “a dictatorship by which the landowner and the capitalist were to be openly and deliberately curbed and which directed its efforts in the interest of a black and white labor class.”<sup>11</sup> Arguably, never before or since has the U.S. government played such an active, visible, and explicit role in shaping and governing the relationship between worker and employer in the interest of the worker and in service of racial equality.

As today’s legal scholars and reformers work to craft a more democratic, racially just political economy—in the face of interlocking crises of ongoing racial inequality, a persistent racial wealth gap, a declining labor share of income, and rising corporate monopoly power<sup>12</sup>—the Freedmen’s Bureau’s example looms large. To be sure, these contemporary crises cannot be equated to the unique evils of slavery and post-emancipation racial oppression. Still, they share important economic, social, and political parallels.<sup>13</sup> Indeed, many recent works by progressive legal scholars have looked to Reconstruction Era history—including that of the Freedmen’s Bureau—in search of precedent and inspiration

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8. W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA: TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860-1880, at 186 (1935).

9. An Act to Establish a Bureau for the Relief of Freedmen and Refugees of 1865, Pub. L. No. 38-90, 13 Stat. 507.

10. Du Bois, *supra* note 1.

11. *Id.*

12. See, e.g., Britton-Purdy et al., *supra* note 4, at 1786-89; Angela P. Harris & James J. Varellas III, *Introduction: Law and Political Economy in a Time of Accelerating Crisis*, 1 J. L. & POL. ECON. 1, 2-6 (2020).

13. See *infra* notes 163-169 and accompanying text.

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for new legal interpretations and reforms.<sup>14</sup> As Wilfred Codrington III recently wrote, “The United States Needs a Third Reconstruction.”<sup>15</sup>

Yet, for all of the copious legal literature on Reconstruction and the Freedmen's Bureau, relatively scant legal-theoretical attention has been paid to the Bureau's role as a labor-market institution.<sup>16</sup> In particular, the Freedmen's Bureau goes almost undiscussed in today's legal literature on market governance, labor coordination, and antimonopoly administration.<sup>17</sup> Instead, these works largely look to the Progressive and New Deal eras as models for inequality-reducing economic governance.<sup>18</sup> At the same time, decades of historical work have uncovered in rich detail the decentralized, multi-faceted, participatory, profound—and profoundly imperfect—work of the Freedmen's Bureau in constructing and governing the Southern labor market.<sup>19</sup> This Note

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14. See, e.g., JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 109-31 (2022) (positing Radical Reconstruction as the pinnacle of the “democracy-of-opportunity” tradition in constitutional political economy—and the Freedmen's Bureau as one of Congress's main tools in implementing that vision); BLAKE EMERSON, *THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY* 73 (2019) (discussing the Freedmen's Bureau as an exemplar of the administrative state's potential to promote substantive democracy, public participation, and “the interests of subjugated social groups” as against “the existing constellation of power in society”); WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* 57, 264 (2022) (discussing the Freedmen's Bureau's and Reconstruction's attempts to “fundamentally alter[] prevailing American configurations of the intimate relationship between public power, private right, and the equal protection of the laws” and arguing that the Freedmen's Bureau represented an early forerunner of the “modern legislative, regulatory, and administrative state” that emerged between Reconstruction and the New Deal). Other recent books in constitutional law have focused on this period's meaning for the Fourteenth Amendment in particular. See, e.g., RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE 14<sup>TH</sup> AMENDMENT: ITS LETTER AND SPIRIT* (2021); ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* (2020).

15. Wilfred Codrington III, *The United States Needs a Third Reconstruction*, *THE ATLANTIC* (July 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/united-states-needs-third-reconstruction/614293/> [<https://perma.cc/3S43-VQH2>]. In this account, the civil-rights movements of the 1950s and 1960s were the second Reconstruction.

16. Notable exceptions include 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 (2019); Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U. PA. L. REV.* 437 (1989); and John M. Bickers, *The Power to Do What Manifestly Must Be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 *ROGER WILLIAMS U. L. REV.* 70 (2006). However, these articles mostly focus on implications for constitutional law, as opposed to the other areas of law discussed in this Note.

17. The recent books discussed in *supra* note 14 connect these dots to some extent. Emerson's book centers the Freedmen's Bureau as an example of participatory administration but includes relatively limited discussion of its labor-market governance role. Fishkin and Forbath discuss the Freedmen's Bureau's important labor role, but they focus primarily on the Freedmen's Bureau's constitutional meaning and the congressional politics surrounding it, rather than on its on-the-ground implementation. Novak, too, focuses mostly on the Bureau's congressional politics and swift downfall.

18. See *infra* note 213 and accompanying text.

19. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877* (2014) [*hereinafter* UNFINISHED REVOLUTION]; *THE FREEDMEN'S BUREAU AND RECONSTRUCTION: RECONSIDERATIONS* (Paul A. Cimbala & Randall M. Miller eds., 1999) [*hereinafter* Cimbala & Miller, RECONSIDERATIONS]; 1 *LAND AND LABOR, 1865* (Steven Hahn, Steven F. Miller, Susan E. O'Donovan, John C. Rodrigue & Leslie S. Rowland eds., 2008) [*hereinafter* LAND AND LABOR, 1865]; 2 *LAND AND LABOR, 1866-1867* (René Hayden, Anthony E. Kaye, Kate Masur, Steven F. Miller, Susan E. O'Donovan, Leslie S. Rowland & Stephen A. West eds., 2013) [*hereinafter* LAND AND LABOR, 1866-1867].

delves into these historical sources to raise critiques of, and possibilities for, current thinking about labor-market governance and democratic administration in the shadow of monopoly power and racial oppression.

This Note contends that the Freedmen's Bureau, in establishing a "free labor" society in the South, combined a varied set of administrative and market governance approaches that aimed to equalize the socially and racially embedded bargaining power of Black workers. The Bureau, lacking significant redistributive authority, funding, and political support, nonetheless constructed countervailing power both within its own administration and within market relations. In so doing, it challenged the boundaries between the public and private, the economic and political, and the racial and economic in ways that can inform both the theory and practice of progressive labor, antitrust, and administrative law reform today.<sup>20</sup>

Part I describes the Freedmen's Bureau's roots in the free labor ideology of the 1850s and 1860s. Part II analyzes primary documents from the Bureau's on-the-ground operations to chart how this sweeping administrative agency attempted to make the promise of "free labor" real, where it succeeded, and where it fell short. Part III advances proposals for incorporating the Bureau's best features into contemporary administrative and market governance strategies that seek to combat racial and economic inequalities. The conclusion further addresses why the Bureau model, despite its significant limitations, merits greater prominence in progressive regulatory thinking today.

### **I. Freedmen's Bureau Background: A "Free Labor" Institution**

Historians, and their primary sources, appear unanimous that the main purpose of the Freedmen's Bureau was "to lay the foundation for a free labor society."<sup>21</sup> As Radical Republican Senator Carl Schurz put it, encapsulating the Reconstruction Congress's intent, "a free labor society must be established and built up on the ruins of the slave labor society."<sup>22</sup> The term "free labor"—employed by Republicans to signify slavery's opposite—pervaded not just high political discourse but also the everyday writings and orders of Bureau functionaries. Union Army Chaplain James Hawley wrote to the newly appointed Freedmen's Bureau assistant commissioner for Mississippi, "the labor of this State must be reorganized upon a free-labor basis."<sup>23</sup> An 1865 order from the Freedmen's Bureau commander for the District of Western South Carolina implored reluctant planters to "[e]ncourage the system of free labor."<sup>24</sup> Indeed, the disagreements and contradictions that emerged in the Freedmen's Bureau's

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20. Cf. Fraser, *supra* note 3, at 68-70 (discussing the concept of "boundary struggles," in which social movements and reform efforts contest the institutional structures and laws of capitalism as a means of promoting greater equality and reducing economic and social harms).

21. UNFINISHED REVOLUTION, *supra* note 19, at 227.

22. *Id.* at 348.

23. LAND AND LABOR, 1865, *supra* note 19, at 127.

24. *Id.* at 140.

enactment and implementation closely tracked Republicans', Bureau agents', and Black laborers' ideological and political disputes over the content of the term "free labor."<sup>25</sup> Thus, understanding the Freedmen's Bureau's role as a labor institution, and its implications for today, requires first grasping the meaning(s) of "free labor" in the 1860s.

Like any political slogan,<sup>26</sup> the term "free labor" may have obscured as much as it signified. Yet the central components of the free labor ideology that undergirded mainstream Republican politics in the lead-up to the Civil War were relatively clear. A free labor society meant more than just the absence of chattel slavery. It also included (a) widespread land ownership; (b) the promise of upward mobility, with wage-labor as a temporary stop on the way to economic independence (i.e., self-employment or business ownership) rather than a permanent status; and (c) equal civil rights, including equal rights to contract and own property.<sup>27</sup> Together, those three principles translated into a concrete economic program in the antebellum North: a poor worker in the East could obtain cheap land in the West from the government through homesteading laws, thereby becoming an upwardly mobile property owner who could contract on equal terms and run his own farm or business.<sup>28</sup> As Eric Foner recounts, the "safety valve" of abundant (colonized) Western land meant that, "[f]or Republicans, 'free labor' meant labor with economic choices, with the opportunity to quit the wage-earning class. A man who remained all his life dependent on wages for his livelihood appeared almost as unfree as the southern slave."<sup>29</sup> Describing this economic vision, Abraham Lincoln asserted in an 1859 speech that "there is no such thing as a freeman being fatally fixed for life, on

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25. See UNFINISHED REVOLUTION, *supra* note 19, at 243-46 ("The effort to create a free labor South would expose tensions and ambiguities within free labor thought . . . . United as to the glories of free labor, Bureau officials, like Northerners generally, differed among themselves about the ultimate social implications of the free labor ideology."); LAND AND LABOR, 1865, *supra* note 19, at 319 ("[One Bureau agent] and his counterparts elsewhere evaluated [labor] contracts with reference to [Bureau General Howard's] instructions, *their own understandings of free labor*, and local circumstances." (emphasis added)); *id.* at 510 ("[B]oth the freedpeople and their erstwhile owners became more accustomed to framing their interests and aspirations in the idiom of free labor.").

26. In 1856, John C. Frémont, the new Republican Party's first-ever candidate for President, used the slogan, "Free Speech, Free Press, Free Men, Free Labor, Free Territory, and Fremont." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 388 (2005). Senator Richard Yates stated, in his 1860 run for governor of Illinois, that "[t]he great idea and basis of the Republican party, as I understand it, is free labor." Hon. Richard Yates, Remarks at the Republican Ratification Meeting (1860), in ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11 (1995).

27. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 11-17 (1995) [*hereinafter* FREE SOIL]; FISHKIN & FORBATH, *supra* note 14, at 91-94 (describing the Republican free labor ideology and stating, "[e]qual rights alone were not sufficient to constitute a free political economy; there had to be genuine opportunities and 'no such thing' as fixed classes of laborers and capitalists").

28. FREE SOIL, *supra* note 27, at 27 ("The basic Republican answer to the problem of urban poverty was neither charity, public workers, nor strikes, but westward migration of the poor, aided by a homestead act.").

29. *Id.* at 16.

the condition of a hired laborer.”<sup>30</sup> Instead, under the free labor system, every man could attain property and become his own boss.<sup>31</sup>

The Freedmen’s Bureau translated free labor ideology into policy.<sup>32</sup> The Freedmen’s Bureau Act of 1865 created a new agency within the War Department to oversee and regulate “all subjects relating to refugees and freedmen from rebel states.”<sup>33</sup> These subjects included the relations of both property and labor. In terms of property, the Act authorized the Bureau to “set apart, for the use of loyal refugees and freedmen,” up to 40 acres of abandoned or acquired land in Southern states for three years at a rate of rent set based on the appraised value of the land.<sup>34</sup> Within or at the end of that three year period, the freedmen were to have the right to purchase the land from the United States at the appraised value.<sup>35</sup> The Act also called for the distribution of “provisions, clothing, and fuel” for “the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children.”<sup>36</sup> This measure, along with a similar measure in the Second Freedmen’s Bureau Act of 1866,<sup>37</sup> was intended to “guarantee[] destitute citizens the resources they needed to make the transition from slavery to full citizenship.”<sup>38</sup> In terms of labor relations, the Second Freedmen’s Bureau Act authorized, in the rebel states, “military jurisdiction over all cases and questions concerning the free enjoyment of” key constitutional “immunities and rights,” including “the right to make and

30. *Id.*

31. *Id.* (“Free labor argues that, as the Author of man makes every individual with one head and one pair of hands, it was probably intended that heads and hands should cooperate as friends; and that that particular head, should direct and control that particular pair of hands.”). In this way, Republican “free labor” political economy was proto-Realist: more equitable property ownership would ameliorate the private coercion of wage labor and enable the worker to achieve “individual freedom.” See Hale, *supra* note 4, at 470; see also BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIR: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 43 (2001) (“[I]f property is the basis of a harmonious and rational development of personality, it requires the condemnation of a social system in which property of the kind and amount required for such development of personality is not generally accessible to all citizens.” (internal quotations omitted)). This is not to suggest that Republican free-labor ideology and Realist legal thought perfectly aligned (to the extent either could even be said to have embraced a single coherent economic theory). Still, the Progressive-Realist program had important historical and ideological connections to the Radical Republican labor vision. See, e.g., ALEX GOUREVITCH, *FROM SLAVERY TO THE COOPERATIVE COMMONWEALTH: LABOR AND REPUBLICAN LIBERTY IN THE NINETEENTH CENTURY* (2014) (charting the historical development of labor republicanism and its connections to both Republican free-labor ideology and later Populist labor movements); FISHKIN & FORBATH, *supra* note 14, at 150-56 (arguing that the post-Civil War labor movement “wrote the first drafts of what later developed into Progressive and New Deal principles of constitutional political economy”).

32. UNFINISHED REVOLUTION, *supra* note 19, at 243 (calling the Bureau the “midwife” of a new free labor market in the South).

33. An Act to Establish a Bureau for the Relief of Freedmen and Refugees of 1865, Pub. L. No. 38-90, § 1, 13 Stat. 507, 507.

34. *Id.* § 4, 13 Stat. at 508-09.

35. *Id.*

36. *Id.* § 2, 13 Stat. at 508.

37. See Freedmen’s Bureau Act of 1866, Pub. L. No. 39-200, § 5, 14 Stat. 173, 174. The 1866 Act extended the 1865 Act for two more years and added further provisions, including a dedicated appropriation for the Bureau and the authority to create schools for freedmen across the South.

38. Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1386 (2016).



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enforce contracts” and the “full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal . . . without respect to race or color, or previous condition of slavery.”<sup>39</sup>

As that last clause demonstrates, racial equality was integral to the Freedmen's Bureau's free labor agenda. Indeed, alongside the Civil Rights Act of 1866 and later civil rights laws, the Freedmen's Bureau was a core component of Congress's legislative implementation of the Thirteenth and Fourteenth Amendments' dictates of abolition and racial equality.<sup>40</sup> Section 2 of the 1866 Act made that explicit, describing the Bureau's purpose as “making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of the States, and *by constitutional amendment*, available to [all loyal refugees and freedmen] . . . .”<sup>41</sup> Civil rights and economic opportunity were thus deeply intertwined in the free labor vision.

Yet, even as Congress sought to establish a free labor society in the South, the meaning of free labor in the North became increasingly unsettled. As Foner notes, the Republican free labor ideology described above was largely a “product[] of the age of independent craftsmen and yeoman, and up to the Civil War, the northern economy could still be described in these terms.”<sup>42</sup> Prior to the War, “large factories and great corporations were the exception, not the rule” in the North, and “the typical enterprise employed only a few workmen and only a small amount of capital.”<sup>43</sup> As the North increasingly industrialized, production became more capital-intensive, which raised the barriers to entry for the small merchant or yeoman farmer.<sup>44</sup> Wage labor became more common, and capital became more concentrated.<sup>45</sup> Increasingly, Republicans were forced to confront the question of whether wage labor without broad-based property or business ownership was consistent with the free labor vision of economic opportunity and

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39. Freedmen's Bureau Act of 1866, Pub. L. No. 39-200, § 14, 14 Stat. 173, 176-77.

40. See UNFINISHED REVOLUTION, *supra* note 19, at 363 (describing Congress's view that the Freedmen's Bureau and Civil Rights bills were “a prelude to readmitting the South to Congressional representation”); FISHKIN & FORBATH, *supra* note 14, at 119-20 (quoting one Republican member of Congress, in debate about the second Freedmen's Bureau Act, as saying, “[t]he second section of [the Thirteenth Amendment] . . . creates the duty for just such legislation as this bill contains, to give [the freed people] shelter, and food, to lift them from slavery . . .”).

41. Freedmen's Bureau Act of 1866, Pub. L. No. 39-200, § 2, 14 Stat. 173, 174 (emphasis added).

42. FREE SOIL, *supra* note 27, at 31.

43. *Id.*

44. *Id.*; see also JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 243-60 (2021) (describing the transition to an industrial economy increasingly dominated by large corporations and trusts in the two decades after the Civil War).

45. FREE SOIL, *supra* note 27, at 31-33. Data suggests that wage labor was already the norm by 1860, even before industrialization took off. Foner cites an estimate that “almost 60 per cent of the American labor force was employed in some way, not economically independent, in 1860.” *Id.* at 32. Yet most laborers were concentrated in cities, where the Republican Party was less dominant. In the more rural Republican strongholds, the vision of the free-labor proprietor was still plausible at the time. See *id.*

upward mobility.<sup>46</sup> Their varied answers to that question formed the basis for a later splintering of free labor politics into two camps—laissez-faire and labor-republican—those who saw the labor contract as an emblem of freedom versus those who saw it as a new form of slavery.<sup>47</sup>

An early version of that ideological rift appeared in the 1865-66 debates over the Freedmen's Bureau. On one side were the Radical Republicans, who advocated that the Freedmen's Bureau be authorized to confiscate every large slave plantation in the rebel states, break them up into forty-acre parcels, and grant a parcel to each ex-slave as the foundation for their yeoman-like economic independence.<sup>48</sup> With this plan, the Radicals aimed to transform "[t]he whole fabric of southern society,"<sup>49</sup> replacing the "oligarchy" of slavery with "the idealized image of small-scale, democratic capitalism."<sup>50</sup> The freedpeople themselves overwhelmingly supported that approach.<sup>51</sup> The more moderate Republicans, however, opposed the Radicals' proposals for land confiscation and redistribution, fearing that they would reduce the freedpeople's incentives to work, deter investment and economic development in the South, and "disorganize and revolutionize" Southern society.<sup>52</sup> In Du Bois's assessment, Northern capitalist interests "instinctively" resisted Southern land redistribution because "the Northern white working man himself had not achieved such economic emancipation."<sup>53</sup> The precedent of mass redistribution would threaten the North's burgeoning project of industrialization and transition to wage labor.

In the end, the version of the Second Freedmen's Bureau Act that Congress passed—over reactionary President Johnson's veto—enabled freedpeople to rent and then purchase land, but it did not authorize mass land confiscation and did not, in fact, provide forty acres for every freedman.<sup>54</sup> Thus, the Freedmen's

46. GOUREVITCH, *supra* note 31, at 17 ("[T]he free labor ideal was beset by a further ambiguity. Was wage-labor a form of free labor? The wage-laborer had been a liminal presence in early modern republicanism, but the rise of industrial capitalism pressed on this question with new intensity, even before the slavery issue was settled.").

47. *Id.* at 52-54; FISHKIN & FORBATH, *supra* note 14, at 113-14; William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 773-75 (1985).

48. FISHKIN & FORBATH, *supra* note 14, at 124-25; DU BOIS, *supra* note 8, at 198 (quoting Senator Thaddeus Stevens).

49. DU BOIS, *supra* note 8, at 197 (quoting Senator Thaddeus Stevens).

50. FISHKIN & FORBATH, *supra* note 14, at 114. In the words of Radical Republican Senator Ben Wade of Kansas, "[p]roperty is not equally divided, and a more equal distribution of capital must be wrought out." UNFINISHED REVOLUTION, *supra* note 19, at 444-45.

51. UNFINISHED REVOLUTION, *supra* note 19, at 435; FISHKIN & FORBATH, *supra* note 14, at 126 (quoting an ex-slave Baptist preacher as saying, "[t]he freedom, as I understand it, promised by the proclamation, is taking us from under the yoke of bondage and placing us where we could reap the fruit of our own labor, and take care of ourselves").

52. UNFINISHED REVOLUTION, *supra* note 19, at 444.

53. DU BOIS, *supra* note 8, at 206; *see also* UNFINISHED REVOLUTION, *supra* note 19, at 444 (describing moderate and conservative Republicans, including the Republican-aligned *New York Times*, as concerned by "the prospect that the precedent set by confiscation 'would not be confined to the South.' The North, [the *Times*] warned, had its own 'extremists' eager to destroy 'the inviolability of property rights.'").

54. *See* UNFINISHED REVOLUTION, *supra* note 19, at 362-63 ("Republicans were quite willing to offer freedmen the same opportunity to acquire land . . . , but not to interfere with planters' property rights.").

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Bureau lacked the authority to recreate the small-scale free labor economy of the antebellum North. The Bureau was also underfunded and understaffed from the start. And white planters and the nascent Ku Klux Klan worked to undermine the Bureau and the freedpeople at every turn.<sup>55</sup> “Under these circumstances,” Du Bois wrote, “the astonishing thing is that the Bureau was able to accomplish any definite and worth-while results . . . .”<sup>56</sup>

“[Y]et,” Du Bois continued, “it did . . . .”<sup>57</sup> Amid what Foner called the “ambiguities and inadequacies of the free labor ideology itself,”<sup>58</sup> the Freedmen's Bureau nonetheless used its significant powers to replace slavery with something closer to the ideal of equality and freedom for Black workers. It could not create a society of landowning freedpeople by fiat, but it could tip the scales of the bargaining relationship between white owner and Black worker through a variety of administrative strategies. For exactly that reason, the day-to-day work of the Freedmen's Bureau reveals critical lessons for present-day economic and racial-equity policy—where, as in 1866, capital is highly concentrated,<sup>59</sup> labor is subject to intense coercion and control,<sup>60</sup> and mass redistribution and reparations remain political third rails.<sup>61</sup>

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55. DU BOIS, *supra* note 8, at 223-25.

56. *Id.* at 224.

57. *Id.*

58. UNFINISHED REVOLUTION, *supra* note 19, at 228.

59. See, e.g., Aditya Aladangady & Akila Forde, *FEDS Notes: Wealth Inequality and the Racial Wealth Gap*, BD. GOVERNORS FED. RSRV. (Oct. 22, 2021), <https://www.federalreserve.gov/econres/notes/feds-notes/wealth-inequality-and-the-racial-wealth-gap-20211022.htm> [<https://perma.cc/4XYS-8S8D>] (charting increasing wealth inequality and a growing racial wealth gap); see also *infra* notes 163-164.

60. See, e.g., José A. Azar, Ioana Marinescu, Marshall I. Steinbaum & Bledi Taska, *Concentration in US Labor Markets: Evidence from Online Vacancy Data* (Nat'l Bureau of Econ. Rsrch., Working Paper No. 24395, 2018) (finding that increased employer concentration has reduced workers' options and driven down wages); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 LAW & CONTEMP. PROBLEMS 45, 45-46 (2019) (arguing that the “decline and erosion of antitrust law and its enforcement” has “contributed to the increasing imbalance of power between employers and workers”); Lawrence Mishel, Lynn Rhinehart & Lane Windham, *Explaining the Erosion of Private-Sector Unions: How Corporate Practices and Legal Changes Have Undercut the Ability of Workers to Organize and Bargain*, ECON. POL'Y INST. 1 (Nov. 18, 2020), <https://www.epi.org/unequalpower/publications/private-sector-unions-corporate-legal-erosion/> [<https://perma.cc/2QHS-6EXG>] (discussing the decline of unions in the United States and “[t]he erosion of workers' bargaining power”).

61. See, e.g., Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/XBC2-FJHP>] (discussing the need for, and political resistance to, reparations for Black Americans). The Senate's refusal in 2021 to pass the Build Back Better Act's tax increases for the wealthy and redistributive programs that would disproportionately benefit Americans of color is only the latest example of political resistance to meaningful racial wealth redistribution. See Build Back Better Act, H.R. 5376, 117th Cong. (2021); Danilo Trisi, Alicia Mazzara, Sarah Lueck, Kathleen Romig, George Fenton, Javier Balmaceda, Shelby Gonzales & Nick Gwyn, *House Build Back Better Legislation Advances Racial Equity*, CTR. ON BUDGET & POL'Y PRIORITIES (Sept. 27, 2021), <https://www.cbpp.org/research/poverty-and-inequality/house-build-back-better-legislation-advances-racial-equity> [<https://perma.cc/2H2R-RYRE>]. The slimmed-down legislation that Congress ultimately enacted, the Inflation Reduction Act, excluded most of the redistributive programs included in the House's Build Back Better bill. See Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

## II. Administering Free Labor

For the first few years of its existence, its most active,<sup>62</sup> the Freedmen's Bureau deployed a set of regulatory, adjudicatory, and other market-governance strategies in a decentralized and, at times, deeply democratic and racially progressive fashion. These included both traditional proto-administrative tasks like contract approval and dispute adjudication, as well as market-coordination functions that mirror the core functions of labor law and antitrust. Despite its inconsistencies and limited capacity, and the paternalistic views of many of its administrators, the Bureau's reach extended deep into putatively "private" economic relations within and between the planter and freedperson classes to create a free labor market.

Even by today's standards, the Freedmen's Bureau's authorities as an administrative agency were vast. In Du Bois's summation,

[The Freedmen's Bureau] made laws, executed them and interpreted them; it laid and collected taxes, defined and punished crimes, maintained and used military force, and dictated such measures as it thought necessary and proper for the accomplishment of its varied ends. Naturally, all these powers were not exercised continuously nor to their fullest extent; and yet, as [Bureau Commissioner] General Howard has said, "scarcely any subject that has to be legislated upon in civil society failed, at one time or another, to demand the action of this singular Bureau."<sup>63</sup>

Interpreting his broad statutory grant of authority over "the control of all subjects relating to refugees and freedmen from rebel states,"<sup>64</sup> General Howard described his "almost unlimited authority" as follows: "Legislative, judicial, and executive powers were combined in my commission, reaching all the interest of four millions of people, scattered over a vast territory, living in the midst of another people claiming to be superior, and known to be not altogether friendly."<sup>65</sup>

From a certain perspective, this powerful federal agency—Du Bois's "dictatorship" of labor over capital<sup>66</sup>—was profoundly undemocratic. After all, the Bureau was imposed via military rule by a Congress that had not yet readmitted members from the rebel states, rendering its administration without

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62. See UNFINISHED REVOLUTION, *supra* note 19, at 257 ("The Bureau's role in supervising labor relations reached its peak in 1866 and 1867; thereafter, federal authorities intervened less and less frequently to oversee contracts or settle plantation disputes."). The Bureau was formally repealed by Congress in 1872 in response to Southern political pressure. See *id.*

63. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 27 (1903).

64. An Act to Establish a Bureau for the Relief of Freedmen and Refugees of 1865, Pub. L. No. 38-90, § 1, 13 Stat. 507, 507.

65. DU BOIS, *supra* note 8, at 224 (quoting General Oliver O. Howard).

66. See *supra* note 11.

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representation.<sup>67</sup> From another perspective, though, the Bureau advanced a deeper form of substantive democracy. As Blake Emerson argues, channeling Du Bois, the Freedmen's Bureau at its best represented "a suspension of ordinary political accountability and judicial process in order to achieve the egalitarian social conditions under which a future democracy could flourish."<sup>68</sup> To realize this substantive democratic vision, Emerson contends, "public participation would need to be structured in a way that would counter the existing constellation of power in society."<sup>69</sup>

With respect to the labor market, the Freedmen's Bureau countered the existing constellation of power through two major sets of strategies. The Sections below detail how these strategies served such a purpose, both alone and in combination.

### *A. Regulatory and Adjudicatory Approaches*

First, the Freedmen's Bureau employed regulatory and adjudicatory approaches that are common to many administrative agencies today. It is worth noting that Bureau policy and practice were largely set on a state-by-state basis, subject only to relatively general orders and recommendations from General Howard.<sup>70</sup> Thus, the Bureau's implementation differed significantly from state to state, and from district to district within each state.<sup>71</sup> Still, many jurisdictions used similar strategies.

Perhaps the Bureau's most expansive regulatory strategy was its practice, in many jurisdictions, of reviewing and either approving, annulling, or revising labor contracts between planters and freedpeople. The Freedmen's Bureau strongly encouraged freedpeople to enter into year-long labor contracts and even threatened to arrest freedpeople who refused to sign a contract or breached one by quitting early.<sup>72</sup> For the Bureau, this was a second-best strategy: lacking the authority to distribute land to every freedman so that he could farm for himself, the Bureau had to get freedpeople and plantation owners to negotiate labor relationships. Year-long contracts were the Bureau's preferred way of governing

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67. EMERSON, *supra* note 14, at 71 ("As Du Bois acknowledges, the Bureau was created by an act of Congress without the participation of representatives of the southern states, which remained occupied by federal armed forces. The Bureau thus operated as an arm of military government, attempting—with only occasional success—to protect the rights and interests of the freedmen against the wishes of white Southerners.").

68. *Id.* at 72.

69. *Id.* at 73.

70. UNFINISHED REVOLUTION, *supra* note 19, at 256; *see also id.* at 227 ("At first glance, the Bureau's activities appear as a welter of contradictions, reflecting differences among individual agents in interpreting general policies laid down in Washington, and themselves evolving. Given the chaotic conditions in the postwar South, agents spent most of their time coping with day-to-day crises, and did so under adverse circumstances and with resources unequal to the task.").

71. UNFINISHED REVOLUTION, *supra* note 19, at 256-57; LAND & LABOR, 1865, *supra* note 19, at 313 ("As the Freedmen's Bureau began to take shape, it too provided only the broadest guidelines concerning the labor arrangements that would replace slavery.").

72. LAND AND LABOR, 1865, *supra* note 19, at 497, 502.

those negotiations.<sup>73</sup> Many freedpeople resisted the idea of entering into binding contracts with their former masters—contracts they often could not read or understand, and which functionally prevented them from leaving that master’s employ for a year or more.<sup>74</sup> Against this reality, Bureau agents worked, with varying degrees of tenacity and efficacy, to prevent the contracts from replicating the conditions of slavery.<sup>75</sup>

The contract review criteria differed “from state to state, and from agent to agent.”<sup>76</sup> But some criteria were more uniform. For instance, pursuant to orders from General Howard, all contracts had to require employers to provide food, shelter, clothing, and medical care to the workers and their dependents, or else provide sufficient compensation to allow workers to buy those necessities on their own.<sup>77</sup> This would prevent the freedpeople from being coerced to sign contracts that, in the words of the Bureau’s assistant commissioner for Mississippi, “secure to the Freedmen less than they received when slaves.”<sup>78</sup> Indeed, when that assistant commissioner, Colonel Thomas, reviewed a contract in August 1865 that failed to provide sufficient pay to feed or clothe the freedpeople who nonetheless signed it, he asked the Bureau headquarters in D.C. to confirm that he should not approve the contract.<sup>79</sup> In response, an adjunct general of the Army declared, “This matter is entirely within the competency of Col. Thomas, and if the contracts made with the freedmen are unjust and they dissatisfied they should be annulled.”<sup>80</sup> Notice that the officials were unbothered by the fact that the freedpeople had already signed the contract and thus theoretically consented to it. If the contract was “unjust” and the freedpeople

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73. UNFINISHED REVOLUTION, *supra* note 19, at 255. In fact, the notion of season-long or year-long contracts differed from the standard in the North at the time, where employment was typically at will or involved short-term commitments of a few weeks or months. “But concern for stability in unsettled postwar circumstances vitiated misgivings about departures from Northern practice.” LAND AND LABOR, 1865, *supra* note 19, at 314.

74. See LAND AND LABOR, 1865, *supra* note 19, at 323 (“Illiterate and inexperienced in the ways of the law, former slaves feared that they might be tricked into ‘sign[ing] away their freedom’ or otherwise assenting to their own oppression.”); *id.* (quoting a freedman in Louisiana as saying “I can’t read it and I am afraid that it will bind me to slavery again.”). Notably, despite wanting to bind the freedmen to work for an entire season, the planters did not necessarily support the idea of having to sign *written* contracts that would bind the planter, too. Indeed, “the prospect of bargaining with people whose labor they had previously commanded by right was almost inconceivable” to many planters. *Id.* at 320.

75. For instance, in two May 1865 circulars to Bureau agents, General Howard declared that the “old system of overseers” would be “prohibited” in labor contracts because it “tend[ed] to compulsory unpaid labor and acts of cruelty and oppression.” LAND AND LABOR, 1865, *supra* note 19, at 314 (quoting WAR DEP’T, BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, CIRCULAR NO. 2 (May 19, 1865) and WAR DEP’T, BUREAU OF REFUGEES, FREEDMEN, AND ABANDONED LANDS, CIRCULAR NO. 5 (May 30, 1865)).

76. UNFINISHED REVOLUTION, *supra* note 19, at 256.

77. LAND AND LABOR, 1865, *supra* note 19, at 318 (citing WAR DEP’T, BUREAU OF REFUGEES, FREEDMEN AND ABANDONED LANDS, CIRCULAR NO. 11 (July 12, 1865)).

78. Letter from Col. Sam Thomas, Assistant Comm’r of the Freedmen’s Bureau for the State of Miss., to the War Dep’t (Aug. 4, 1865), in LAND AND LABOR, 1865, *supra* note 19, at 374.

79. See *id.*

80. Letter from Adj. Gen. L. Thomas to Major Gen. O.O. Howard, War Dep’t (Aug. 22, 1865), in LAND AND LABOR, 1865, *supra* note 19, at 374.

“dissatisfied,” it could be annulled at the discretion of the local official. This was no laissez-faire, Lochnerian labor market.

In fact, some jurisdictions went so far as to set minimum wages for the labor contracts they reviewed. Notably, General Howard himself refused to set South-wide minimum wages, preferring that compensation be permitted to “vary[] according to the multifarious circumstances of the contracting parties.”<sup>81</sup> General Howard made clear, however, that his preference was based as much on administrability concerns as any allegiance to market price-setting per se, and he permitted local jurisdictions to set wages more explicitly.<sup>82</sup> The Georgia arm of the Bureau set what appears to have been among the most comprehensive state-wide minimum wage policies. In 1865, a labor surplus, anti-Black violence, and the refusal of planters with pricing power to pay reasonable wages combined to reduce freedpeople’s pay below what the Georgia Bureau chief considered to be consistent with the aspirations of free-labor economic independence.<sup>83</sup> In response, Bureau Chief Davis Tillson published a circular that “instructed his agents to secure contracts paying twelve to thirteen dollars per month for a prime male hand and eight to ten dollars per month for a prime female hand in upper and middle Georgia.”<sup>84</sup> It also required “fifteen dollars and ten dollars per month for first-rate men and women respectively” in the state’s more fertile southwest and along the coast.<sup>85</sup> These rates were significantly higher than the average pay in previous years.<sup>86</sup> When planters protested, Tillson countered with statistics showing that planters even in less fertile lands could afford those wages and still earn a profit.<sup>87</sup> He also responded in the language of fairness, telling one local agent who objected on behalf of purportedly struggling planters in his district, “If your people are poor, the freed people are still poorer having nothing but their labor for sale.”<sup>88</sup> Elsewhere, Bureau offices set specific monthly wage rates based on job classification, with “skilled trades” such as engineers and mechanics earning a certain surplus relative to agricultural or domestic work.<sup>89</sup>

In addition to these *ex ante* regulations, Bureau agents also engaged in significant *ex post* adjudication to resolve individual contract disputes. As mentioned above, the Second Freedmen’s Bureau Act granted jurisdiction to the Bureau, in place of both state and federal courts in the rebel states, over “all cases

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81. MARTIN RUEF, BETWEEN SLAVERY AND CAPITALISM: THE LEGACY OF EMANCIPATION IN THE AMERICAN SOUTH 22 (2014) (quoting General Howard).

82. *Id.* (“[General Howard] deemed it impracticable to offer federal rules of compensation that would cover ‘the infinite gradation from the able-bodied man to the little child,’ instead leaving such negotiations to local agents.”).

83. Paul A. Cimbala, *The “Talisman Power”: Davis Tillson, the Freedmen’s Bureau, and Free Labor in Reconstruction Georgia, 1865-1866*, 28 CIVIL WAR HIST. 153, 159-60 (1982).

84. *Id.* (citing FREEDMEN’S BUREAU OF GA., CIRCULAR NO. 5 (Dec. 22, 1865)).

85. *Id.*

86. *Id.* at 162.

87. *Id.*

88. *Id.* at 162-63 (quoting Letter from D. Tilson to G.W. Selvidge (Jan. 26, 1866)).

89. RUEF, *supra* note 81, at 37.

and questions concerning” the freedpeople’s constitutional “immunities and rights,” including rights “to make and enforce contracts,” to sell property, and “the full and equal benefit of all laws and proceedings concerning personal liberty” and “personal security.”<sup>90</sup> Accordingly, many labor contract disputes adjudicated by the Bureau took the form of court-like proceedings. In one seemingly typical dispute, a freedman sued his employer in Freedmen’s Bureau court, arguing that the employer was requiring him to work for longer than their contract intended.<sup>91</sup> When the local Bureau agent ruled for the employer, the freedman appealed his case to an acting assistant commissioner for a region in South Carolina, who reversed, calling the employer’s demands “unjust.”<sup>92</sup> In his ruling, the acting assistant commissioner indicated that the decision was precedential, like an appellate court’s or an agency commission’s.<sup>93</sup> Bureau proceedings were generally seen as favorable to the freedpeople, certainly relative to what the civil courts would have offered at the time.<sup>94</sup> Even when Southern civil courts regained (or reasserted) jurisdiction over contract disputes, the Bureau would take back proceedings from the civil courts and adjudicate them internally if, in the words of a Florida Freedmen’s Bureau assistant commissioner, “unjust proceedings [were] conducted in any manner towards the freed-people.”<sup>95</sup>

The Bureau also mediated contract disputes through more informal approaches. In one instance, a planter in Tennessee wrote to the Tennessee Freedmen’s Bureau assistant commissioner seeking advice on how to handle a disagreement between himself and a husband-and-wife couple who had been his slaves and whom he hired under contract after emancipation.<sup>96</sup> In response, the assistant commissioner advised the planter as to what he owed and did not owe the couple and urged him to “amicably adjust[]” any “little differences that may arise” between him and the freedpeople.<sup>97</sup> Although not every planter-freedmen dispute would work out so “amicably,” the fact that planters proactively contacted the Bureau for what we might now refer to as informal agency guidance demonstrated the extent of the Bureau’s perceived power over labor relations. Indeed, the planter explained that he wrote to the Bureau officer

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90. Freedmen’s Bureau Act of 1866, Pub. L. No. 39-200, § 14, 14 Stat. 173, 176-77.

91. S.C. Freedmen’s Bureau, Ruling by Br. Brig. Gen. Ben P. Runkle (Sept. 13, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 443-44.

92. *Id.*

93. *Id.* (“This is one of hundreds of cases of like facts, and is therefore submitted to test the question and settle the dispute.”).

94. See, e.g., John C. Rodrigue, *The Freedmen’s Bureau and Wage Labor in the Louisiana Sugar Region*, in *RECONSIDERATIONS*, *supra* note 19, at 206 (“Although Bureau agents took care not to give the appearance of indulging freedmen or favoring them in disputes, planters often accused them of doing just that.”).

95. *LAND AND LABOR, 1866-1867*, *supra* note 19, at 512 (quoting Letter from Col. T. W. Osborn to Henry J. Stewart (Feb. 1866)).

96. See Letter from Geo. T. Allman to Gen. Clinton B. Fisk, Tennessee Freedmen’s Bureau (Sept. 4, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 440-41.

97. Letter from Gen. John R. Lewis to Geo. T. Allman (Sept. 12, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 441 (stating that he “trust[s] that both you and the freedmen will both bear & forbear so that all things may work harmoniously and to your mutual advantage”).



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because, “[u]nder the new order of things, many new questions naturally present themselves, and tis to you we look for light.”<sup>98</sup> “Besides,” the planter continued, “the Negroes have more faith in anything coming from you (being the highest authority).”<sup>99</sup>

As another informal form of dispute resolution, Bureau agents would visit plantations in their districts and “examine the conditions of the Freedmen,” as one agent put it.<sup>100</sup> In a letter to the Mississippi assistant commissioner’s office recounting his recent visits, that agent reported undertaking the following activities, among others: mediating a dispute between a set of freedpeople and their employer; approving certain labor contracts; “rearrang[ing]” other contracts in response to complaints; transferring some workers to a different plantation due to disputes; and encouraging both freedpeople and planters to comply with approved contract terms.<sup>101</sup> All of this was done in real time, without formalized agency proceedings. A Bureau agent in Maryland wrote that these kinds of “occasional visits” magnified the perceived power of the Bureau and gave it greater “moral effect,” even though many of the agents’ actions were “only advisory.”<sup>102</sup>

Informality and flexibility were intentional, critical features of the Bureau’s approach to the exercise of its jurisdiction over planter-freedperson labor disputes. General Howard, among other authors of the Bureau legislation and early leaders of the agency, sought to enable the Bureau courts to resolve disputes speedily and fairly. They saw standard courtroom procedures as unnecessarily onerous and feared that too much procedure would be unfair to the freedpeople and delay their ability to get paid money they were owed or be freed of unfair labor contracts.<sup>103</sup> To be sure, the flexibility and relative lack of procedure that characterized the Bureau courts also reflected a dearth of resources and staff. But, in large part, the informal methods discussed above were intentionally designed to facilitate equal justice for the freedpeople. And indeed, freedpeople won the majority of cases that they brought to Bureau courts.<sup>104</sup>

Critically, the Bureau also adjudicated cases of alleged racist violence by planters, an issue that was inextricably bound up with labor relations. In one illustrative case, a freedwoman in Alabama, Fanny Tipton, sued her employer’s

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98. Letter from Geo. T. Allman to Gen. Clinton B. Fisk, Tenn. Freedmen’s Bureau (Sept. 4, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 440-41.

99. *Id.*

100. Letter from Lt. Geo. W. Corliss to Lt. Stuart Eldrige, Miss. Freedmen’s Bureau (Apr. 9, 1966), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 407-12.

101. *Id.*

102. Letter from 2d Lt. Ja. M. Johnston to Cap’t Jacob. F. Chur, Md. Freedmen’s Bureau (July 19, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 433-34 (emphasis in original).

103. AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 300-01.

104. Sara Rapport, *The Freedmen’s Bureau as a Legal Agent for Black Men and Women in Georgia: 1865-1868*, 73 *GA. HIST. Q.* 26, 34 (1989).

son in a Freedmen's Bureau proceeding for assault and battery on the job.<sup>105</sup> She alleged that the son, Richard Sanford, asked her to clean a rabbit in the kitchen. She testified that, because she was "a Field hand" and not a cook, she refused his request. The next morning, he whipped her 30 times with a lash.<sup>106</sup> In his testimony, Sanford did not deny the charges but said that he was justified because Tipton "has refused several times to obey orders."<sup>107</sup> The Bureau superintendent hearing the case ruled for Tipton, fined Sanford \$15, "and gave him a severe reprimand."<sup>108</sup> Freedpeople frequently complained to the Bureau about threatened or actual violence on the job. That is because, in part, Bureau courts were typically the freedpeople's only place to get redress for racist violence in the labor relationship, given the limits of federal civil rights law at the time and the lack of rights for Black litigants in Southern state courts.<sup>109</sup> And as a result of the Bureau's enforcement, "whipping and beating—the mainstays of labor discipline under slavery—fell into increasing disuse."<sup>110</sup>

Indeed, redressing racial wrongs sat at the core of the Bureau's labor-regulatory mission. Under the Freedmen's Bureau Act, the Bureau's jurisdiction to resolve freedperson-planter disputes, including labor disputes, was limited to cases in which the freedman's rights would not be respected in state courts.<sup>111</sup> The Bureau was thus part of the "enforcement machinery" of the Civil Rights Act of 1866, which prohibited racial discrimination against Black people in numerous domains.<sup>112</sup> Consistent with that understanding, Bureau leadership and officers often carried out their labor regulatory authority with a keen eye for signs of racist treatment or discrimination. One South Carolina Bureau official, for example, wrote in a report from his investigation into conditions on a plantation in Charleston that "the rights of the colored people were not respected [on the plantation] and that gross injustice was the rule and not the exception."<sup>113</sup> The official observed that the planter, like many in his "class," "cannot conceive that a black man has rights to be respected," and he recommended either that the

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105. Docket of Trials, Fanny Tipton v. Richard Sanford, Huntsville Ala. Superintendent, Ala. Freedmen's Bureau, RG 105 (Mar. 24, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 401-02.

106. *Id.*

107. *Id.*

108. *Id.*

109. For an excellent discussion of how freedpeople sought, and won, redress for racialized violence through labor contract adjudication, given the limits of federal and state civil rights, see Brittany Farr, *Breach by Violence: The Forgotten History of Sharecropper Litigation in the Post-Slavery South*, 39 *UCLA L. REV.* 674 (2022).

110. *LAND AND LABOR, 1866-1867*, *supra* note 19, at 376.

111. See *KESSLER*, *supra* note 103, at 280 (discussing disagreement over the exact extent of the Bureau's jurisdiction and General Howard's expansive interpretation of the Bureau's authority to hear interracial disputes).

112. Bernice B. Donald & Pablo B. Davis, "To This Tribunal the Freedman Has Turned": *The Freedmen's Bureau's Judicial Powers and the Origins of the Fourteenth Amendment*, 79 *LA. L. REV.* 1, 42 (2019); see also Freedmen's Bureau Act of 1866, Pub. L. No. 39-200, § 14, 14 Stat. 173, 176 (creating jurisdiction for the Bureau courts over "all cases and questions concerning the free enjoyment of" various enumerated "immunities and rights," including "the right to make and enforce contracts," "without respect to race or color").

113. Report from Maj. Edward F. O'Brien to Maj. A. Mcl. Crawford (Oct. 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 157-59.

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planter be required to “put someone in charge of that plantation who has common sense enough to do right” or that the Bureau station a military guard nearby to protect the freedpeople.<sup>114</sup> This and similar stories suggest not only that the Bureau took its responsibility to enforce civil rights seriously. They show, too, that the Bureau ultimately could not separate issues of economic domination from issues of racial domination and had to intervene in both as part of its labor governance strategy.<sup>115</sup>

Although many of the Bureau's approaches—from proto-rulemakings and formal adjudications to informal guidance and worksite inspections—are now common regulatory tools, the Freedmen's Bureau exercised them all at once over an incredibly wide set of economic, racial, and other social issues. As Foner summed it up, “In turn diplomat, marriage counselor, educator, supervisor of labor contracts, sheriff, judge, and jury, the local Bureau agent was expected to win the confidence of blacks and whites alike in a situation where race and labor relations had been poisoned by mutual distrust and conflicting interests.”<sup>116</sup>

### *B. Overseeing Market Coordination and Competition*

The Freedmen's Bureau also worked to equalize the bargaining power between planters and freedpeople by policing both horizontal and vertical forms of labor-market coordination and competition.

First, Bureau agents monitored and oversaw efforts by freedpeople to organize and collectively bargain for higher wages. Across the South, freedmen and women exchanged information about their employers' wages and working conditions through informal whisper networks and more organized channels like worker meetings.<sup>117</sup> At many of those meetings, workers decided to withhold their labor until the local planters agreed to pay them more or give them greater autonomy on the job.<sup>118</sup> In Donaldsonville, Louisiana, the local bureau agent reported that freedpeople at their meetings were insisting that they “would not work unless they can get from \$20 to \$25 per month with rations included.”<sup>119</sup> In Georgetown, South Carolina, an agent wrote that freedpeople “positively refused to make any contracts unless they have the control of the crops themselves.”<sup>120</sup>

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114. *Id.* at 159.

115. *See, e.g.*, Letter from Lt. Edwin Lyon to Col. O. Brown, Va. Freedmen's Bureau (Apr. 30, 1866), *in* LAND AND LABOR, 1866-1867, *supra* note 19, at 416-17 (including an extensive discussion of the “Feeling between Whites and Freedmen” as part of the agent's labor-market report).

116. UNFINISHED REVOLUTION, *supra* note 19, at 226.

117. LAND AND LABOR, 1866-1867, *supra* note 19, at 363-64 (quoting one planter as saying, “The negroes have a kind of telegraph by which they know all about the treatment of the negroes on the plantations for a great distance around.”).

118. *Id.* at 364-65.

119. Rodrigue, *supra* note 94, at 193.

120. LAND AND LABOR, 1866-1867, *supra* note 19, at 364.

Bureau agents differed in their treatment of these labor organizing tactics. Some, like the South Carolina agent, praised this collective action, reporting that it was “wonderful how unanimous [the freedmen] are; communicating like magic, and now holding out, knowing . . . that the planters will be obliged to come to their terms.”<sup>121</sup> Others, like the Louisiana agent, acknowledged the freedpeople’s right to withhold their labor but were more ambivalent about that strategy’s wisdom.<sup>122</sup> Still others broke up freedpeople’s strikes and allowed them to be fired.<sup>123</sup> Overall, most agents appeared to allow, if not support, collective action on the part of freedpeople and often mediated their collective bargaining with planters. Typically, only when the laborers threatened to take up arms or form militias did the Bureau intervene on the side of the planters. For example, the Bureau assistant commissioner for South Carolina refused a group of planters’ request to put down a strike by freedmen, finding that the freedmen were peaceful and the planters’ concerns about the strike’s violent potential were “exaggerated.”<sup>124</sup> He wrote that their complaints:

[S]pring from the dread on the part of the planters of the freedpeople asserting their rights of manhood and claiming proper remuneration for their labor. A combined attempt upon the part of the planters has been made to coerce the freedpeople into contracts for the coming year for wages ranging from 6 to 8 Doll[ars] per Month[.] [T]o this freedpeople naturally demur and consequently have held meetings for mutual discussion and guidance and as long as such meetings are quiet and orderly and do not partake of a Military character, I believe there is no law to prohibit them or break them up.<sup>125</sup>

Instead, the assistant commissioner sent additional soldiers to guard the local bureau agent against violence from the planters. In so doing, he positioned the state power of the Bureau firmly on the side of the workers’, rather than the employers’, concerted action.

Indeed, while the Bureau maintained a generally supportive posture toward labor coordination among freedpeople, it took a hard line against horizontal wage-fixing by planters. In May 1865, landowners in Elon, Virginia, met to agree upon maximum wage rates and other terms that they would offer to freedpeople that season.<sup>126</sup> When a Bureau assistant commissioner learned about this meeting, he condemned it as an “iniquitous combination” and refused to approve any resulting contracts.<sup>127</sup> Freedpeople would also file complaints to the Bureau reporting similar wage-fixing arrangements and other coercive and

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121. *Id.*

122. Rodrigue, *supra* note 94, at 193 (quoting the agent as acknowledging “the right of the freedmen to get the best wages possible” but worrying that “holding about from work” would be “ruinous to themselves and will eventually bring them to penury and want”).

123. LAND AND LABOR, 1866-1867, *supra* note 19, at 365-66.

124. Letter from Brevet Maj. Gen. to Gov. James. L. Orr (Dec. 17, 1866), *in* LAND AND LABOR 1866-1867, *supra* note 19, at 459.

125. *Id.*

126. RUEF, *supra* note 81, at 43.

127. *Id.*

anticompetitive methods on the part of planters.<sup>128</sup> As a result, historians' assessment is that wage-fixing efforts by planters "generally fell flat. Federal authorities overruled them, freedpeople rejected the employers' proposals, and employers themselves frequently broke rank and hired at higher rates."<sup>129</sup>

Finally, the Bureau policed a third major type of market coordination, namely the vertical control that planters exercised over "independent" share-workers. Many freedpeople—a majority of the freedpeople working in agriculture in 1886-1887—worked not for cash wages but for a specified share of either the season's crop or the proceeds from its sale.<sup>130</sup> To the freedpeople, compensation on shares meant greater independence than wage labor, including, they thought, the ability to have a say in the operations of the farm and the freedom to pursue other work in addition to their primary work for the planter. It was not the full landownership that the Radicals advocated but seemed like something closer to it.<sup>131</sup> Yet planters still exercised significant control over share contractors.<sup>132</sup> For instance, they tried to coerce freedpeople who were contracted only for the current crop season to help prepare for the next season's crop, too, or to do non-crop related work.<sup>133</sup> Many planters also brought in overseers—often the same overseers who supervised the freedpeople when they were enslaved—to closely supervise the work of the share-worker freedpeople.<sup>134</sup>

Freedpeople resisted these practices, often collectively, and enlisted the Bureau to help them maintain a degree of independence in their work. A group of Mississippi freedpeople complained to the local Bureau agent that "they would not have a superintendent to direct them as they knew how to work as well as any white man."<sup>135</sup> A group of freedpeople in South Carolina collectively negotiated a contract with their planter stipulating that the crop was "to be cultivated by the freedmen as suits them best, the owner having no voice in the matter."<sup>136</sup> The Freedmen's Bureau often intervened to make sure that planters adhered to their share-cropping agreements and to clarify vague contract terms. For instance, a Bureau agent in Louisiana wrote to the Louisiana assistant commissioner about a dispute as to whether the freedpeople in that parish (who had signed a collective agreement) were entitled to a share of the net *proceeds* of the season's crop (as the freedpeople claimed) or the net *profits* (as the planter

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128. LAND AND LABOR, 1866-1867, *supra* note 19, at 365-66.

129. *Id.* at 365.

130. *Id.* at 368-69.

131. *Id.* at 369 ("Their stake in the crop, [the freedmen] contended, made them partners with the landowner, not mere employees.").

132. *Id.* ("Even if an employer conceded that a share contract established a sort of 'joint partnership,' the freedpeople were decidedly junior partners.").

133. *Id.* at 374.

134. *Id.* at 375.

135. *Id.*

136. *Id.* (quoting Contract between W. J. Ball and Daniel Irving et al., S.C. Freedmen's Bureau (Mar. 2, 1866)).

claimed).<sup>137</sup> The assistant commissioner wrote back that, although the contract was “indefinite,” the “nature of the contract” suggested that the freedpeople should be paid a share of the net proceeds, supporting the freedpeople’s view.<sup>138</sup> At the same time, the Bureau often held freedpeople to their side of the bargain, including ordering freedpeople back to work if they left before the end of their contract—as long as the contract met the Bureau’s policy standards for fairness.<sup>139</sup>

As the above examples illustrate, the Bureau’s work to enforce rules of market coordination and competition was intimately connected to its labor regulation and adjudication practices. Bureau agents not only set jurisdiction-wide rules, they then adjudicated individual disputes to ensure compliance with such rules. They also acted at the level of the competitive process, both protecting and proscribing forms of coordination and power-building such that the resulting “market” outcome would meet similar (if not better) standards without the need for direct intervention. Indeed, these two forms of market governance often complemented one another. For instance, a group of freedpeople in Virginia formed a “Freedmen’s Court” for their county that met to discuss their dissatisfaction with the way the local Bureau agent was handling local labor disputes. They challenged the agent’s approval of share-work contracts that they viewed as too restrictive of the freedpeople’s independence.<sup>140</sup> The Freedmen’s Court wrote to the Virginia Bureau assistant commissioner calling for the agent to be investigated and, if necessary, replaced.<sup>141</sup> Dispatched by the assistant commissioner to respond to this complaint, a Bureau investigator agreed that the local Bureau agent’s position was “too broad in favor of the white farmers.”<sup>142</sup> The investigator mediated a discussion between the freedpeople and planters and arrived at a more pro-freedpeople arrangement that nonetheless left both parties “satisf[ie]d.”<sup>143</sup> In this not-unusual example, the freedpeople’s labor organizing gave them the collective power not just to bargain with the planters, but to influence the operations of the Bureau itself and push it toward a more pro-freedpeople stance. The Bureau then provided further countervailing power for the freedpeople through its dispute resolution.

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137. Letter from Lt. Amos S. Collins to Capt. A. F. Hayden, S.C. Freedmen’s Bureau (Nov. 7, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 450-51.

138. Letter from Capt. A. F. Hayden to Lt. Amos S. Collins, S.C. Freedmen’s Bureau (Nov. 13, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 451.

139. See, e.g., La. Freedmen’s Bureau, Circular from Cap’t. J.H. Hastings (Jan. 24, 1867), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 474 (ordering ten freedmen, who were working on shares, back to the plantation to “fulfil their contract” after the Bureau agent found that the freedmen “understood the terms of the contract” and had negotiated “for several days before signing it”).

140. Letter from Lt. Col. Garrick Mallery to Bvt. Brig. Gel. O. Brown (May 16, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 422-24 (“Some of the Freedmen considered that if they could not at their own option, absent themselves from work, and leave the farm without the slightest notice to their employers, they were practically reduced to the former state of slavery.”).

141. Letter from William Edwards to Col. O. Browne, Va. Freedmen’s Bureau (Apr. 30, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 422.

142. Letter from Lt. Col. Garrick Mallery to Bvt. Brig. Gel. O. Brown (May 16, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 422-24.

143. *Id.*

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In the end, the combined power of the generally pro-freedpeople Bureau and the organized freedpeople themselves was not enough to overcome the political power of the planters. As the planters reestablished political and economic control in the late 1860s, they increasingly restricted the Bureau's operations—through both electoral politics and violent politics.<sup>144</sup> The result, for freedpeople's labor power, was predictable. As the aforementioned Bureau investigator opined, presciently, at the end of his 1866 report to the Virginia assistant commissioner:

The Freedmen were so far right in their complaints—that if the Bureau did not or could not interfere in the settlement of such cases their state might become worse than their former slavery. . . . I look with dread to a time when these poor people will be left without protection to the tender mercies of the former slave owning class.<sup>145</sup>

### C. Labor Governance Shortcomings

The above account presents the Freedmen's Bureau's most successful strategies for building countervailing labor power for and with newly freed Black Southerners. But the Bureau's notable successes should not be mistaken for perfection. On the contrary, the Bureau suffered from several shortcomings with which any effort to replicate the agency's labor-market strategies must contend. These shortcomings extend beyond the agency's most well-known limitations, such as its lack of sufficient funding or staffing and the ardent political opposition it faced from President Johnson and the Southern states.<sup>146</sup> They also reveal tensions in the Bureau's core strategies and driving ideology.

First, Bureau agents and leadership frequently expressed paternalistic views about the freedpeople. Bureau records are replete with officials' descriptions of the freedpeople as akin to "children." One Texas agent's letter to Bureau leadership was representative, arguing that the freedpeople "should be protected and guarded by the Bureau" because "[t]hey are as yet children and do not know the law or the penalties for its violation . . . ."<sup>147</sup> Bureau officials saw themselves not only as protectors of the freedpeople's civil rights and economic

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144. DU BOIS, *supra* note 8, at 670-84.

145. Letter from Lt. Col. Garrick Mallery to Bvt. Brig. Gen. O. Brown (May 16, 1866), in LAND AND LABOR, 1866-1867, *supra* note 19, at 422-24.

146. See *supra* notes 55 & 144 and accompanying text; see also Donald & Davis, *supra* note 112, at 11 (noting that the Freedmen's Bureau employed, at its peak, only about 550 local agents and 350 clerks to cover the entire South and that "[a]ssignments also far outnumbered the agents, with one agent typically assigned to one, two, or three counties and tens of thousands of freedpeople, often unaided and with a hostile White population surrounding the assignment").

147. Letter from Wm. H. Sinclair to Lt. J. T. Kirkman, Tex. Freedmen's Bureau (Feb. 26, 1867), in LAND AND LABOR, 1866-1867, *supra* note 19, at 477-78 ("There are it seems to many and strong reasons why these people [the freedmen] should be protected and guarded by the Bureau. . . . They are as yet children and do not know the law or the penalties for its violation.").

opportunities, but also as their educators.<sup>148</sup> This perspective led Bureau agents to, for instance, enforce Southern states' vagrancy laws against freedpeople as a means of "teach[ing] freedpeople market values and relations."<sup>149</sup> Yet this paternalistic attitude was not necessarily driven by racial bias (explicit or implicit) alone. In fact, Bureau officials also saw themselves as educators of the white planters, not just the Black freedpeople.<sup>150</sup> Even so, whether undergirded by racial prejudices, regional biases, or wise dispute resolution strategy, Bureau officials at times exhibited a level of paternalism and condescension toward those it purported to govern, particularly the freedpeople, in a way that conflicted with their more democratic and participatory ideals.

The Bureau also undermined its own potential through an excessive commitment to fixed-term labor contracts as the central vehicle for a "free labor" society, despite the contracts' clear limitations. Whereas Bureau officials saw fair, well-regulated seasonal or year-long labor contracts as expressions and protectors of the freedpeople's newly won civil and economic rights—putting the freedpeople on equal footing with planters in a mutually enforceable contractual relationship<sup>151</sup>—many freedpeople feared that binding work commitments to their former masters represented a new form of enslavement.<sup>152</sup>

The Bureau's insistence on enforceable work contracts appears to have been motivated by at least three interrelated ideological and strategic commitments. First, many Bureau officials prioritized reestablishing economic order and production in the South—after the war and a sudden and destabilizing emancipation—even at the expense of ensuring the best possible deal for the

148. See, e.g., KESSLER, *supra* note 103, at 267 ("[T]he primary mission of the governmental organization that would later come to be known as the Freedmen's Bureau was in essence pedagogical. Former slaves had to be taught to view themselves as men from whom, in their new character of freedmen, self-reliance and self-support are demanded.").

149. James D. Schmidt, "A Full-Fledged Government of Men": *Freedmen's Bureau Labor Policy in South Carolina, 1865-1868*, in RECONSIDERATIONS, *supra* note 19, at 242.

150. According to General Howard, freedmen-planter labor disputes originated in large part from both sides' ignorance of the virtues and requirements of "free labor": the freedpeople held "too exalted notions" of "justice and privileges," and the white planters lacked "practical knowledge of any other system than the one under which [t]he[y] ha[ve] been brought up." Report of the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands, H.R. EXEC. DOC. NO. 39-11, at 32-33 (1866) (quoted in KESSLER, *supra* note 103, at 280).

151. See, e.g., FISHKIN & FORBATH, *supra* note 14, at 119 (describing the Republicans' "free labor" vision as "one of Black free laborers making contracts, owning or leasing land, and meeting white employers, merchants, and landlords on a plane of legal equality").

152. See *supra* note 74. Many historians, too, have condemned the Bureau's insistence that freedpeople sign year-long work contracts, arguing that the contracts "fastened the former slaves into a refurbished plantation system in which they were only slightly less dependent, only slightly less restricted in their options than they had been before emancipation." Robert Harrison, *New Representations of a 'Misrepresented Bureau': Reflections on Recent Scholarship on the Freedmen's Bureau*, 8 AM. NINETEENTH CENTURY HIST. 205, 206-07 (2007). To be sure, some at the time argued that the contracts benefited the freedpeople by limiting planters' ability to fire them mid-season. However, historians doubt the value of that guarantee—even to the extent that the Bureau could enforce it, given limited resources—because labor supply was scarce in the immediate post-war period. The planters generally held on to labor for the full season or year if they could, and they had little incentive to prematurely fire the workers. Thus, the year-long commitment more often worked to the advantage of the planters than the freedpeople. *Id.* at 211.



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freedpeople.<sup>153</sup> Second, at least some agents were more sympathetic to the interests and desires of the planters than the freedpeople.<sup>154</sup> And third, many Bureau officers shared mainstream free-labor Republicans' belief in the potential of a regulated but fundamentally capitalist "free market" to sufficiently protect the freedpeople's interests.<sup>155</sup>

The above shortcomings were apparently enabled and magnified by the fact that the Bureau employed very few Black agents. Instead, the agency hired a combination of Northern white liberals and local white Southerners. Many of the Northern liberals subscribed to what one historian described as "racial constructs that imagined freedpeople as long-suffering supplicants for white goodwill."<sup>156</sup> Meanwhile, the white Southerners employed by the Bureau included former slave masters, whom the Bureau employed as a way to gain legitimacy among the communities of Southern whites who still held significant social and political power.<sup>157</sup> Many freedpeople rightly wondered why so many white people, including ex-masters, were in charge of what they thought was supposed to be "their bureau."<sup>158</sup> The absence of Black people in official Bureau positions limited the extent to which the agency would ever sufficiently contest the economic and racial power of the Southern planters. It also demonstrated an incomplete view of what participatory, representative, egalitarian administration requires.

### *D. Breadth and Impact*

The Freedmen's Bureau's deficiencies undermined its effectiveness as a force for countervailing Black labor power and must figure into any assessment of the Bureau or any attempt to recreate its features. Still, despite these limitations, the available evidence suggests that the Bureau's labor-market interventions were significant and far-reaching, and they provided meaningful economic benefits to the freedpeople.

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153. Michael W. Fitzgerald, *Emancipation and Military Pacification: The Freedmen's Bureau and Social Control in Alabama*, in RECONSIDERATIONS, *supra* note 19, at 49-50 ("Whatever the intentions of the Union troops, the overriding priority of restoring order shaped the transition to free labor. In practice, this necessity often worked against the freedmen."). However, many of these agents began to prioritize more stringent, pro-freedmen regulations on labor contracts from 1866 to 1887, after initial post-War order had been established. *Id.* at 60-61.

154. Randy Finely, *The Personnel of the Freedmen's Bureau in Arkansas*, in RECONSIDERATIONS, *supra* note 19, at 93.

155. See, e.g., UNFINISHED REVOLUTION, *supra* note 19, at 350-51 (describing even the Radical Republicans' belief that "market forces themselves would inevitably produce the demise of the plantation system, once high cotton prices and competition for their labor enabled blacks to earn good wages" and that mass land confiscation and redistribution would "ruin the freedmen by leading them to believe they could acquire land without working for it . . ." (internal quotations omitted)); LAND AND LABOR, 1866-1867, *supra* note 19, at 74 (describing Gen. Howard initially disapproving of a proposal to set a minimum wage in Georgia because it departed from "fundamental principles" of free labor).

156. Schmidt, *supra* note 149, at 226.

157. See Paul A. Cimbala, *Reconstruction's Allies: The Relationship of the Freedmen's Bureau and the Georgia Freedmen*, in RECONSIDERATIONS, *supra* note 19, at 320-22.

158. *Id.* at 320.

Overall, scholars estimate that Bureau agents reviewed “several hundred thousand” labor contracts.<sup>159</sup> And multiple studies have found statistically significant impacts of this contract review and regulation on the freedpeople’s wages. One recent economic analysis found that freedpeople living in counties with Freedmen’s Bureau field offices had incomes and ratings of socioeconomic status that were four to eight percent higher than those of freedpeople living in counties without a field office.<sup>160</sup> Another analysis of Freedmen’s Bureau-approved labor contracts in the Washington, D.C., and northwestern Virginia areas found that the Freedmen’s Bureau’s role in contract regulation had a statistically significant effect on the amount that Black laborers were paid. One of its major effects was to create greater variation in how Black laborers were compensated—laborers with higher occupational skill levels (including in crafts) gained greater compensation. This wage premium aligned with the requirements spelled out in Bureau wage guidelines.<sup>161</sup> This demonstrates that the Bureau’s regulations on paper had a measurable impact on the ground. Other studies examining other states or regions, too, have found positive economic impacts of the Bureau’s labor regulation for the freedpeople.<sup>162</sup>

Together, this and other evidence strongly suggests that the Bureau’s limitations did not outweigh its pro-freedpeople benefits. It suggests, in other words, that the Bureau’s pro-freedpeople labor-market governance strategies featured in Sections II.A and II.B above were more the rule than the exception.

### III. Implications for Market Governance and Democratic Administration

In its few active years, the Freedmen’s Bureau provided and enabled multiple forms of countervailing power for poor, property-less Black workers navigating a labor market that was rife with both private and public coercion. This model has significant value for legal theory and practice today.

Several factors render the Freedmen’s Bureau model particularly pertinent. First, U.S. workers face conditions of racial and economic subordination that mirror the conditions of the post-Civil War South, perhaps more so than at any other time since. For instance, after decades of a slowly narrowing Black-white racial wealth gap, that gap has begun to increase again since the 1980s. These past four decades mark the first sustained period of increase in the racial wealth gap since the Jim Crow era—when the progress brought about by emancipation and Reconstruction, including the Freedmen’s Bureau, came to a halt.<sup>163</sup> And as

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159. RUEF, *supra* note 81, at 15.

160. Jon C. Rogowski, Reconstruction and the State: The Political and Economic Consequences of the Freedmen’s Bureau (Apr. 20, 2018) (unpublished manuscript), [https://scholar.harvard.edu/files/rogowski/files/freedmens\\_bureau\\_0.pdf](https://scholar.harvard.edu/files/rogowski/files/freedmens_bureau_0.pdf) [<https://perma.cc/5AN4-E4XJ>].

161. Martin Ruef, *Constructing Labor Markets: The Valuation of Black Labor in the U.S. South, 1831 to 1867*, 77 AM. SOCIO. REV. 970, 991-92 (2012).

162. Harrison, *supra* note 152, at 212.

163. See Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020* (June 10, 2022), <https://www.minneapolisfed.org/>

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a result of the persistent racial wealth gap and recent increase, Black Americans' share of total wealth in the United States has "barely budged" between 1863 and today.<sup>164</sup> At the same time, monopolization and market concentration have increased corporations' economic and political power at the expense of workers, echoing the private economic might of the planter monopolies and the industrial trusts in the years and decades after the Civil War.<sup>165</sup> Racialized mass incarceration further impedes the economic opportunities and power of the working class, particularly Black and Latino workers.<sup>166</sup> Contemporary mass incarceration has been compared to the forms of racist state punishment and labor discipline used in the Jim Crow period—the very forms of racist punishment from which the Freedmen's Bureau briefly shielded Southern Black workers.<sup>167</sup> Now, as in the 1860s, new legal approaches are needed to rebalance vast disparities in economic power between labor and capital.

Current political and legal realities also echo challenges that the Freedmen's Bureau faced and attempted to overcome. According to at least one study, political polarization (which is associated with legislative gridlock) has reached its highest level since the Civil War.<sup>168</sup> Broad delegations of authority to administrative agencies can enable effective governmental action, including economic regulation, to persist despite legislative polarization and paralysis. This was true for the Freedmen's Bureau, which exercised broad authority pursuant to sweeping statutory delegations, and many have cited polarization and gridlock as justifications for similarly broad administrative authority today. And yet now, as in the period after the Civil War, the Supreme Court has taken a highly skeptical stance toward pro-labor and pro-racial equality government interventions in the economy.<sup>169</sup> The Freedmen's Bureau briefly overcame those

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research/institute-working-papers/wealth-of-two-nations-the-us-racial-wealth-gap-18602020 [https://perma.cc/Z7U4-9EB4].

164. MEHRSA BARADARAN, *THE COLOR OF MONEY* 9 (2017). As Baradaran and others argue, wealth (as opposed to income or some other economic metric) is perhaps the best indicator of accumulated economic advantage or disadvantage across generations. Wealth also determines, in large part, a worker's need for any given job and thus their outside options and bargaining power in any labor relationship. *See, e.g.,* Hale, *supra* note 4, at 472. The Freedmen's Bureau's central challenge was to equalize the immense power differentials between freedpeople and planters that resulted from the freedpeople's lack of ownership over wealth and reliance on labor income.

165. On current market concentration and its impacts on labor power, see *supra* note 60. On similar trends in the years after the Civil War, see JONATHAN LEVY, *AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES* 243–60 (2021).

166. *See, e.g.,* BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* 83–130 (2007).

167. *See, e.g.,* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR-BLINDNESS* (2010) (comparing contemporary mass incarceration to Jim Crow); *see also* Dorothy E. Roberts, *The Supreme Court 2018 Term—Foreword: Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019) (discussing relationships between the movement to abolish slavery and current movements to abolish prisons).

168. *See, e.g.,* Laura Paisley, *Political Polarization at Its Worst Since the Civil War*, *USC NEWS* (Nov. 8, 2016), <https://news.usc.edu/110124/political-polarization-at-its-worst-since-the-civil-war-2/> [https://perma.cc/R9LE-5RRN].

169. Many in the Reconstruction Congress worried that the Supreme Court would invalidate at least part of the Freedmen's Bureau legislation—particularly its grant of Bureau jurisdiction over labor

obstacles, establishing a precedent for expansive, pro-labor, egalitarian agency action in times of inequality and polarization to which today's reformers should turn.

Indeed, the Bureau's precedent is valuable today not just because it responded, with meaningful success, to similar economic, legal, and political conditions. The Bureau's story also provides a legal defense for pro-labor, pro-racial equality agency action under the current Supreme Court's analytical framework by demonstrating that such action is "deeply rooted in this Nation's history and tradition."<sup>170</sup> The modern Court has begun demanding historical precedent for government action in both constitutional cases and cases challenging administrative action under the "major questions doctrine."<sup>171</sup> The Freedmen's Bureau can provide such precedent as a defense to the legal challenges that pro-labor, anti-monopoly, pro-equality regulatory actions invariably face today.<sup>172</sup> For this reason, too, today's reformers should build atop the foundation that the Bureau laid.

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and other legal disputes between freedpeople and planters and its processes for adjudicating those disputes. The Court's decision in *Ex Parte Milligan*, 71 U.S. 2 (1866), which invalidated the jurisdiction of military tribunals in the peacetime North, was seen as a signal that the Court would overrule the Bureau courts, too. See KESSLER, *supra* note 103, at 317-21. Congress avoided that threat by stripping the Court's appellate jurisdiction over such cases. See *Ex Parte McCardle*, 74 U.S. 506 (1869) (upholding Congress's repeal of appellate jurisdiction in a habeas case arising from a military tribunal authorized under the Military Reconstruction Acts, which were closely related to the Freedmen's Bureau Act). Yet, the Court undermined the Radical Republicans' redistributive policies in other ways, including in its decision in *United States v. Klein*, 89 U.S. 128 (1871), protecting the President's use of the pardon power to limit Southern land confiscation and redistribution. See Helen Hershkoff & Fred O. Smith, Jr., *Reconstructing Klein*, 90 U. CHI. L. REV. (forthcoming 2023). The Court also pared back other civil-rights legislation and the reach of the Reconstruction Amendments in the years thereafter. See, e.g., *The Slaughterhouse Cases*, 83 U.S. 36 (1872); *The Civil Rights Cases*, 109 U.S. 3 (1883). And the Court began invalidating other government regulation of labor markets in that period. See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). Today's Supreme Court has also restricted government's ability to promote racial and economic equality, in part through similarly strained readings of the Reconstruction Amendments. See, e.g., *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding the Voting Rights Act unconstitutional based on a constrained reading of Congress's enforcement powers under the Fourteenth and Fifteenth Amendments); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that a school desegregation policy violated the Fourteenth Amendment). It has also developed other legal innovations like an anti-regulatory reading of the First Amendment, see, e.g., *Janus v. AFSCME*, 138 S. Ct. 2448 (2018); *Sorrell v. IMS Health*, 564 U.S. 552 (2011), and the Fifth Amendment's Takings Clause, see, e.g., *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021), alongside constitutional canons of construction like the major questions doctrine, see, e.g., *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

170. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1994)).

171. See, e.g., *id.*; *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022); *West Virginia*, 142 S. Ct. at 2608 (looking to the "history and the breadth of the authority that [the agency] has asserted" in determining whether the major questions doctrine's clear-statement rule should apply (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000))); *Alabama Ass'n of Realtors v. Dep't of Health and Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (overturning the federal eviction moratorium because of, in part, its "unprecedented" nature).

172. For example, scholars and jurists have pointed to the Freedmen's Bureau as part of an originalist defense of race-conscious policies under the Fourteenth Amendment. See, e.g., Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 396-98 (1978) (Marshall, J., separate opinion). To be sure, the Bureau precedent would not necessarily provide a relevant precedent in cases challenging agency action under the major questions doctrine; the historical question under that doctrine pertains to historical

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In short, the present moment, more than perhaps any other since Reconstruction, demands a revival of Freedmen's Bureau-like market governance. Through the methods charted in the previous Part, the Bureau's market governance approach challenged divides between the public and private, the economic and political, and the racial and economic. This Part points toward ways in which the Bureau's pushing at the boundaries of those categories can inform current U.S. law reform efforts to counter private, undemocratic power.

### A. *Public vs. Private*

Dominant paradigms in both federal labor law and antitrust law enforce, or at least presume, certain public-private divides with which the Freedmen's Bureau's market governance approach dispensed. With respect to labor law, scholars like Kate Andrias have critiqued the current regime's relegation of collective bargaining to "private ordering," in which "labor negotiations are a private affair [between employers and employees] and the state plays a neutral and minimal role."<sup>173</sup> Instead, she and others advocate for forms of sectoral bargaining, in which tripartite employer-employee-government negotiations over wages and working conditions take place "in the public arena on a sectoral and regional basis."<sup>174</sup> Freedmen's Bureau agents' often-active role in freedpeople-planter collective bargaining demonstrates the value of government having a seat at the bargaining table to weigh in on the side of workers and the public interest, particularly where racial and economic power dynamics heavily favor the employers. Indeed, under the Freedmen's Bureau, "private" collective bargaining and "public" regulation substantially merged. The same agents who were protecting the workers' rights to organize and negotiating their annual contracts were also policing individual contract violations, wage theft, racial discrimination, and other illegal acts on the part of planters. In this way, the Bureau also transgressed a particular public-private divide in work law today—the employment law vs. labor law divide—in which employment law protects

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uses of the specific enabling statute or the historical purview of the challenged agency. On the other hand, the Freedmen's Bureau's expansive use of broad but general statutory language calls into question the historical validity of the major questions doctrine itself. No one in the 1860s appeared to think the Bureau needed a clearer statement of legislative authorization as it regulated on some of the most "major" economic and political questions facing the post-war nation. Further, the Bureau precedent calls into question the nondelegation doctrine, which is the putative constitutional source of the major questions doctrine. See *West Virginia*, 597 U.S. at 2619 (Gorsuch, J., concurring) (explaining that the major questions doctrine is a "corollary" to the nondelegation doctrine). The Freedmen's Bureau's history appears to show that, at an important constitutional moment in which the Nation adopted amendments reconfiguring the relationships among the branches and enhancing the power of Congress, the Reconstruction Framers had an expansive view of Congress's authority to delegate to the executive. The Freedmen's Bureau would thus seem to provide an originalist rebuttal to both the major questions and nondelegation doctrines. Further scholarship should explore the Bureau's implications for these two doctrines.

173. Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 9 (2016).

174. *Id.* at 8.

“individual rights” through public regulation while labor law protects “collective action” through private ordering.<sup>175</sup>

Reformers seeking to break down those divides, to equitably promote both individual and collective worker protections, would do well to look to the flexible, responsive, multifaceted strategies of Bureau agents as an early historical precedent. Modern proposals for sectoral bargaining would be one promising way to replicate the Bureau’s more flexible, public, holistic labor governance process. A few states have already passed laws enabling some form of sectoral bargaining, and the Biden-Harris campaign committed to “explor[ing] the expansion of sectoral bargaining” in 2020.<sup>176</sup> However, at the time of writing, neither congressional Democrats nor the Biden Administration have officially introduced a nationwide sectoral bargaining proposal, which would require new legislation to enact.

Antitrust law imposes similar public-private boundaries in its governance of economic coordination. Mainstream antitrust doctrine sharply distinguishes between public regulation and private market competition. For instance, industries that are “pervasively” regulated by federal regulatory statutes are often exempt from the antitrust laws,<sup>177</sup> as are certain state regulatory schemes.<sup>178</sup> As Herbert Hovenkamp summarizes these doctrines, “[A]ntitrust’s role is residual. It picks up only where regulation leaves off.”<sup>179</sup> Indeed, antitrust is often discussed as an alternative to regulation, substituting the outcomes of private competition for the outcomes of public decision-making.<sup>180</sup> Such a dichotomy between private competition and public regulation would likely have seemed foreign to the Freedmen’s Bureau agents, who both policed employer wage-fixing to promote competition among employers *and* more directly regulated the terms of employment contracts. For the Bureau, these two capacities played complementary roles: competition among planters reduced the likelihood of contracts being signed that provided unfairly low wages, which then reduced the need for *ex post* adjudication of contract disputes. And regulation of planters’

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175. Benjamin Sachs, *Employment Law as Labor Law*, 39 CARDOZO L. REV. 2685, 2702 (2008); see also Andrias, *supra* note 173, at 37-40 (discussing the employment-labor law divide and its relationships to the failure of labor law); Kate Andrias, *An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act*, 128 YALE L.J. 616, 622-27 (2019) (discussing the possibility of “a sectoral bargaining approach integrating labor and employment law” and how the FLSA’s industry committees exemplified such an approach).

176. Chris Marr, *California Fast Food Bill Inches US Toward Bargaining by Sector*, BLOOMBERG L. (Aug. 18, 2022), <https://news.bloomberglaw.com/daily-labor-report/california-fast-food-bill-inches-us-toward-bargaining-by-sector> [<https://perma.cc/DT9X-ADL2>]; *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, BIDEN-HARRIS DEMOCRATS, <https://joebiden.com/empowerworkers/> [<https://perma.cc/EFY9-RALH>].

177. See, e.g., *United States v. Nat’l Ass’n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975); *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264 (2007).

178. See *Parker v. Brown*, 317 U.S. 341 (1943).

179. Herbert Hovenkamp, *Antitrust and the Regulatory Enterprise*, 2004 COLUM. BUS. L. REV. 335, 342 (2004).

180. See, e.g., Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922 (2018); Stephen G. Breyer, *Antitrust, Deregulation, and the Newly Liberated Marketplace*, 75 CALIF. L. REV. 1005 (1987).

treatment of the freedpeople (including violent supervision practices) prevented planters from exerting anticompetitive control over workers' employment decisions. The Freedmen's Bureau model thereby lends support to the broader antimonopoly approach to market governance, in which antitrust is just one tool, alongside other tools like public utility regulation, to reduce private market power.<sup>181</sup> Echoes of the Bureau's regulatory approach can be heard, for instance, in the Federal Trade Commission's recently proposed rulemaking banning noncompete clauses in employment contracts.<sup>182</sup> Like the Bureau, the FTC is using its regulatory authority—alongside its traditional antitrust enforcement strategies—to address imbalances in bargaining power between workers and monopolistic employers.

Indeed, antimonopoly scholars associated with the “neo-Brandeisian” school have only just begun to explore the possibility of breaking down the public-private divide in antitrust that the Freedmen's Bureau story reveals. For instance, Sanjukta Paul's influential account of antitrust law as an “allocator of economic coordination rights” largely maintains antitrust law's traditional public-private distinction. Professor Paul observes that antitrust's “central function” is “to allocate economic coordination rights,” and thus that “private decisions to engage in economic coordination are always subject to public approval.”<sup>183</sup> In that framework (to simplify only a bit), the government's role is to decide who gets to coordinate and who has to compete, and private actors then coordinate or compete accordingly. While Paul mentions “public coordination of markets” in passing, it falls outside of her central coordination rights framework.<sup>184</sup> More recent work by Professor Paul and others discuss the possibility of forms of “public-private” market coordination, but that discussion remains mostly theoretical and has yet to translate into specific policy proposals.<sup>185</sup>

The Freedmen's Bureau may help us envision what such public-private market coordination could look like. In the case of the Bureau, the line between

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181. See Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018) (arguing that “[a]ntitrust law is just one tool in the antimonopoly toolbox,” alongside other regulatory tools); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1634 (2018) (arguing that public utility regulation, antitrust law, and corporate governance share “common genealogical roots” and “are in fact, complements”); William J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 BUS. HIST. REV. 665, 673-75 (2019) (discussing how the Progressives and institutional economists saw both antitrust law and public utility regulation as means of exerting “social control” over capitalism).

182. See *FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM'N (Jan. 5, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition> [<https://perma.cc/BUN3-PYBF>].

183. Paul, *supra* note 6, at 380.

184. See *id.* at 388 (mentioning but not defining “public coordination of markets,” which appears to refer to strategies like sectoral bargaining and public utility regulation).

185. Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 617 (2023); Tankus & Herrine, *supra* note 6, at 95.

“public decisions” and “private coordination” blurred. “Private” economic coordination—on the part of both the freedpeople and, at times, the planters—often occurred through, and with the direct involvement of, the “public” Bureau officials as mediators, adjudicators, and supporters. When the Virginia share-workers’ “Freedmen’s Court” petitioned the Bureau for a new local agent who would negotiate better contract terms than their current pro-planter agent, they were translating private economic coordination into public regulation and then bringing that public regulatory force back into their private negotiations. In a sense, the freedpeople coordinated both outside of the administrative bureaucracy (having been allocated a right to do so) *and* through it (in a form of participatory administration). Today’s efforts at “root and branch reconstruction in antitrust”<sup>186</sup> should include more discussion of how administrative agencies can enable desirable forms of economic coordination that traverse the public-private divide, as the Freedmen’s Bureau did.<sup>187</sup>

### *B. Economic vs. Political*

That last example points to a closely related boundary that the Freedmen’s Bureau challenged: the economic versus the political. At the highest level, the Freedmen’s Bureau exemplified the reality that economic outcomes are fundamentally political.<sup>188</sup> Contract terms, coordination rights, and planters’ daily treatment of their workers all depended on the Bureau’s market governance decisions, and those decisions depended on political forces. The previous Part discusses the example of the Bureau assistant commissioner in South Carolina who rejected planters’ requests to break up a strike by a group of freedpeople.<sup>189</sup> That discussion omitted the fact that the planters did not address their petition directly to the Bureau. Instead, the planters petitioned the governor of South Carolina, who then contacted the Bureau on their behalf.<sup>190</sup> While the governor

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186. Sanjukta Paul, *Root and Branch Reconstruction in Antitrust: A Symposium*, LPE BLOG (Apr. 4, 2022), <https://lpeproject.org/blog/root-and-branch-reconstruction-in-antitrust-a-symposium/> [https://perma.cc/3DYX-U6Q5].

187. Notably, public-private forms of coordination played a significant role in competition policy during the Progressive and early New Deal eras in the form of trade association agreements. Particularly in the 1920s and early 1930s, associations of businesses small and large (though often dominated by larger businesses) coordinated various terms of production (including prices and production schedules) through “trade association agreements” that were facilitated and reviewed by the Federal Trade Commission, Department of Commerce, and briefly the National Recovery Administration. See LAURA PHILLIPS SAWYER, *AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE ‘NEW COMPETITION,’ 1890-1940*, at 107-308 (2018); see also Daniel Backman, Note, *The Antimonopoly Presidency*, 133 YALE L.J. (forthcoming) (discussing the National Recovery Administration’s market coordination model and its lessons for current antimonopoly law and policy). Unlike the trade associations, the Freedmen’s Bureau tended to favor coordination among employees and independent contractors rather than large businesses (i.e., planters). To the extent that today’s antitrust reformers look to the Progressive era for models of public-private coordination, they should also look to the more pro-labor coordination mechanisms of the Freedmen’s Bureau.

188. See Wood, *supra* note 5, at 81 (“In all these senses, the ‘economic’ sphere rests firmly on the ‘political’, despite their ‘differentiation.’”).

189. See *supra* notes 124-125 and accompanying text.

190. Letter from W.I.B. Cooper et al. to Gov. J. L. Orr (Dec. 11, 1866), in *LAND AND LABOR, 1866-1867*, *supra* note 19, at 455-56.



had no formal power over the Bureau, an arm of the U.S. military, the planters appeared to believe a demonstration of their political influence could sway the Bureau to their side. Although the Bureau ultimately did not side with the planters, because it found the strike to be peaceful, the incident reflected a pattern of planters attempting to use their organized political power to influence the Bureau. At the same time, the freedpeople's economic prospects deeply relied on their own political power (as newly enfranchised voters) and that of the Republican Party in the North. The Bureau was thus a concrete manifestation of Ellen Wood's observation that "the relation between appropriators and producers rests to a great extent on the relative strength of classes, and this is largely determined by the internal organization and the political forces with which each enters into the class struggle."<sup>191</sup> The Bureau, and its surrounding politics, was a site of class struggle.

The Bureau's operations therefore suggest insights for how to design administrative institutions that account for, channel, and balance political influence and class struggle in doing economic regulation. In many ways, the Bureau exemplified what K. Sabeel Rahman calls "policymaking as power-building" by "institutionalizing the countervailing power of constituencies that are often the beneficiaries of egalitarian economic policies, yet lack the durable, long-term political influence."<sup>192</sup> By supporting freedpeople's labor organizing and incorporating those organizations into Bureau decision-making (albeit in ad hoc ways), the Bureau illustrated the ability of administrative agencies to "facilitate the construction of countervailing organizations among the nonwealthy" and then "grant policymaking power" to those organizations "through administrative processes."<sup>193</sup> Freedmen's Bureau history reinforces the importance of those kinds of reforms, particularly in times of interlocking economic and political inequality.<sup>194</sup>

Yet the Bureau's ability to provide countervailing economic power often depended not only on enabling organized freedpeople's participation, but on adopting a stance of (political) non-neutrality with respect to many freedpeople-planter disputes. Although the Bureau did not always operate in the interests of the freedpeople,<sup>195</sup> it appeared to achieve its most egalitarian outcomes when it

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191. Wood, *supra* note 5, at 79.

192. K. Sabeel Rahman, *Policymaking as Power-Building*, 27 S. CAL. INTERDISC. L.J. 315, 318 (2018).

193. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 552, 626 (2021).

194. See Kate Andrias, *Separations of Wealth: Inequality and the Erosion of Checks and Balances*, 18 J. CONST. L. 419, 421 (2015) (discussing how "[d]isparities in income and wealth" have accompanied "the concentration, or reconcentration, of political power among wealthy individuals, large business firms, and organized groups representing them, as well as by a precipitous decline of countervailing organization among middle- and low-income Americans").

195. See, e.g., DU BOIS, *supra* note 8, at 581-636 (discussing how the Bureau eventually became a tool of northern capitalists to industrialize the South, rather than solely working in the freedmen's interests); Rodrigue, *supra* note 94, at 204 (discussing that Bureau agents "also protected employers' interests when they deemed it necessary").

did. Indeed, Bureau agents saw themselves as “protectors” of the freedpeople in ways that were, at times, deeply paternalistic.<sup>196</sup> To be sure, the Bureau employed some traditional administrative processes that we associate with today’s vision of a neutral, rationalized administrative state, such as court-like proceedings.<sup>197</sup> Yet, in many parts of its labor-market governance, the Bureau operated in a relatively procedure-less, non-neutral manner. Thus, the Bureau’s story invites proponents of more participatory, democratic administration to ask not just what procedures and opportunities for contestation should be *added* to administrative operations, but also what existing procedures should be curtailed or abolished.<sup>198</sup> In addition, the Bureau experience points to the importance of administrative governance that is driven by an economically egalitarian ideology, including at the level of the on-the-ground agents. Often, freedpeople’s labor outcomes seemed to depend, for good and for ill, on a particular agent’s ideological view toward the plight of the freedpeople.<sup>199</sup> To the extent politics are inevitable, even desirable, in administration, the Bureau encourages reformers to ask what the role is and should be for the politics and ideology of on-the-ground administrators.<sup>200</sup>

### C. Racial vs. Economic

Finally, the Freedmen’s Bureau’s operation as an explicitly *race-conscious* economic regulator points toward considerations for building countervailing labor power and democratic administration in today’s iteration of U.S. racial capitalism.<sup>201</sup> As the above accounts demonstrate, the Bureau’s success at

196. See, e.g., LAND AND LABOR, 1866-1867, *supra* note 19, at 374 (“I look with dread to a time when these poor people will be left without protection to the tender mercies of the former slave owning class.”).

197. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 401-02 (2015) (arguing that “administrative law lacks any kind of ideological valance” and “is organized not by any kind of politicized master principle but by commitments to fidelity to governing statutes, procedural regularity, and nonarbitrary decisionmaking”).

198. See, e.g., K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1675 (2018) (reviewing JON D. MICHAELS, CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC (2017)) (“Despite its neutral trappings in legal doctrine and thought, the administrative state is not ultimately a neutral institutional structure.”); Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 345 (2019) (advocating for “a reform agenda that would undo counterproductive procedural rules” that are often understood to be neutral but in fact impede progressive results).

199. See, e.g., *supra* notes 140-142 and accompanying text (discussing freedpeople’s concerns about a pro-planter Bureau agent); LAND AND LABOR, 1865, *supra* note 19, at 319 (discussing how Bureau agents “evaluated [labor] contracts with reference to [Bureau General Howard’s] instructions, their own understandings of free labor, and local circumstances”).

200. To be sure, granting greater political or ideological discretion to administrative officials comes with risks, and it does not always lead to more progressive or egalitarian outcomes. One instructive example is immigration enforcement, where Democratic administrations have tried to constrain and structure the discretion of line enforcement officers in various ways in view of, among other things, the officers’ political and ideological views. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 174-208 (2015).

201. Cedric Robinson uses the term “racial capitalism” to refer to “[t]he development, organization, and expansion of capitalist society” in a way that “pursued essentially racist directions,” in

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creating a “free labor” society in the South required intervening in both economic and racial power imbalances. The two were inextricably linked. Bureau agents often saw themselves as combatting both racial oppression and economic oppression, and the Bureau’s enabling statutes were both redistributive and explicitly racially egalitarian.<sup>202</sup>

By contrast, many of today’s key market governance institutions and laws eschew considerations of race. Beyond the Roberts Court’s equal protection jurisprudence—which has rendered race-conscious redistributive policy increasingly suspect<sup>203</sup>—aspects of labor law, administrative law, and antitrust law also constrain the pursuit of racial justice in market governance. Labor law, by privileging “economic” topics (e.g., wages, hours, and benefits) as subjects of collective bargaining—and limiting such bargaining to each individual workplace—can hinder unions’ leeway to advocate for broader racial and social justice reforms at the bargaining table.<sup>204</sup> The separation of labor law from employment law (including antidiscrimination law) serves a similar function.<sup>205</sup> Yet under the Freedmen’s Bureau, freedpeople would often necessarily address issues of racist mistreatment alongside wages and hours in their contract negotiations, and the Bureau had authority over both types of concerns. The Bureau thus provides a precedent for forms of “common good” unionism, in which innovative workers’ movements use a variety of legal and political tools beyond traditional labor law to address the fuller set of issues that affect workers’ opportunities, including racial discrimination.<sup>206</sup> But instead of requiring workers to turn to multiple agencies and authorities to redress their fundamentally interconnected racial-economic concerns—as common-good unionists must do today—the Freedmen’s Bureau allowed both “racial” and “economic” issues to be (a) negotiated at the bargaining table, often on a regional/sectoral basis, and (b) adjudicated by a single, flexible, relatively pro-worker and racially egalitarian agency.

Administrative law draws its own lines between “racial” and “nonracial” regulatory concerns by, for example, channeling suits alleging racial or gender discrimination by government agencies into Title VI civil rights law (where burdens on plaintiffs are high) rather than allowing such suits under the APA’s

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which “racialism would inevitably permeate the social structures emergent from capitalism.” ROBINSON, *supra* note 3, at 2.

202. Graber, *supra* note 38.

203. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) (“[R]emedying past societal discrimination does not justify race-conscious government action.”); *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021) (striking down a provision of the American Rescue Plan Act of 2021 that prioritized women and “socially and economically disadvantaged” (i.e., nonwhite) business owners for COVID-related relief, citing *Parents Involved* as a key case).

204. See Kimberley M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers’ Identities Are Shaping Labor Law*, 126 *Yale L.J. F.* 503 (2017); Catherine L. Fisk, *The Once and Future Countervailing Power of Labor*, 130 *YALE L.J. F.* 685 (2021); Andrias, *supra* note 173, at 49.

205. See Andrias, *supra* note 173, at 38-39.

206. See Sánchez Ocasio & Gertner, *supra* note 204.

“hard look” review.<sup>207</sup> Stories like that of the Freedmen’s Court in Virginia, which petitioned the Bureau for a new administrator who was both less anti-labor and less pro-white, suggest that clean lines between racial and economic concerns in administration are often illusory. The Bureau experience thus supports the case, and provides important early precedent, for administrative procedures and review processes that explicitly take racial power imbalances and impacts into account.<sup>208</sup>

Meanwhile, antitrust law also attends very little to racial inequality.<sup>209</sup> Yet, for Freedmen’s Bureau agents policing planter wage-fixing and vertical restraints, racial power dynamics were a central consideration. The Freedmen’s Bureau experience lends support to proposals for race-conscious antitrust enforcement, and the Bureau’s implementation details provide useful examples, and some cautionary tales, in administering such an approach.<sup>210</sup>

## Conclusion

The Freedmen’s Bureau was a unique administrative agency in American history. It attempted to construct a “free” labor market from the ruins of a racist slave society. To do so, it worked to counteract the racially and economically coercive power of the planter class through novel forms of public coercion and administration. This experience reflected a core insight of the Realist and Progressive schools of legal and economic thought since: markets are unavoidably coordinated and governed. The key question was, and continues to be: What forms of coordination and governance do we want? At its best, the

207. Cristina Isabel Ceballos, David Freeman Engstrom & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370 (2021); see also Steph Tai, *Racism and Informal Agency Decisions, or, Is Racism Arbitrary and Capricious*, YALE J. ON REGUL.: NOTICE & COMMENT (Aug. 5, 2020), <https://www.yalejreg.com/nc/racism-and-informal-agency-adjudicatory-decisions-or-is-racism-arbitrary-and-capricious-by-steph-tai/> [<https://perma.cc/QDQ4-WXMY>].

208. In this way, the Freedmen’s Bureau represents an exception to the otherwise largely racist aspects of the early American administrative state. It adds an important counterexample to, for instance, Jonathan Weinberg’s account of racism in eighteenth and nineteenth century administrative agencies. In fact, Weinberg completely skips over the Freedmen’s Bureau in his account, jumping from the Fugitive Slave Act of 1850 to the Chinese Exclusion Act of 1882. See Jonathan Weinberg, *The Racial Roots of the Federal Administrative State*, YALE J. ON REGUL.: NOTICE & COMMENT (July 20, 2020), <https://www.yalejreg.com/nc/the-racial-roots-of-the-federal-administrative-state-by-jonathan-weinberg/> [<https://perma.cc/G55W-3TBS>]. This demonstrates, once again, the minimization or exclusion of the Freedmen’s Bureau’s story and learnings from administrative-law scholarship, including scholarship that seeks to promote greater racial equality through administration.

209. Sandeep Vaheesan, *How Antitrust Perpetuates Structural Racism*, THE APPEAL (Sept. 16, 2020), <https://theappeal.org/how-antitrust-perpetuates-structural-racism/> [<https://perma.cc/HDG4-DL3T>]; Hal Singer, *Antitrust Can Address Racial Inequities*, AM. PROSPECT (Feb. 10, 2021), <https://prospect.org/economy/antitrust-can-address-racial-inequities/> [<https://perma.cc/Y4TD-ASMP>].

210. For proposals on race-conscious antitrust enforcement, see, for example, Darrick Hamilton & Madeline Neighly, *The Racial Rules of Corporate Power: How Extractive Corporate Power Harms Black and Brown Communities and How Race-Conscious Solutions Can Create an Inclusive Economy*, ROOSEVELT INST. (Nov. 2019), [https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI\\_Racial-Rules-of-Corporate-Power\\_Issue-brief\\_201911-1.pdf](https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI_Racial-Rules-of-Corporate-Power_Issue-brief_201911-1.pdf) [<https://perma.cc/4BKZ-H3YQ>]; *Remarks by Commissioner Rebecca Kelly Slaughter at GCR Interactive: Women in Antitrust*, FED. TRADE COMM’N (Nov. 17, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1583714/slaughter\\_remarks\\_at\\_gcr\\_interactive\\_women\\_in\\_antitrust.pdf](https://www.ftc.gov/system/files/documents/public_statements/1583714/slaughter_remarks_at_gcr_interactive_women_in_antitrust.pdf) [<https://perma.cc/V4LY-75QY>].

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Freedmen's Bureau offered deeply pro-labor, anti-monopolist, racially egalitarian, substantively democratic answers to that question. As such, the Bureau's daily operations suggest paths for creating a more pro-labor, anti-monopolist, racially egalitarian, substantively democratic political economy and administrative state today.

This Note charts some of those paths. But it also leaves much uncharted. As the historical evidence demonstrates, the Bureau's work as an economic regulator was both sweeping and innovative. Its statutory authority—if not its actual financial or operational capacity—rivaled or surpassed the authority of Progressive and New Deal-era regulatory agencies that have come to represent the zenith of the federal administrative state.<sup>211</sup> And whereas Progressive and New Deal regulatory movements neglected racial equality, or worked against it,<sup>212</sup> the Freedmen's Bureau was explicitly racially egalitarian. Yet current progressive economic reform projects more often look to the Progressives and New Dealers, rather than the Reconstruction Republicans, for policy inspiration and legal precedent, including in labor, antitrust, and antimonopoly regulation.<sup>213</sup>

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211. Indeed, this Note's account of the Freedmen's Bureau as a significant early administrative agency aligns with and extends other historical works unearthing the early origins of the American administrative state, long before the New Deal. *See, e.g.*, JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (unearthing the breadth of administrative authority in the first 100 years of U.S. history); William Novak, *Putting the "Public" in Public Administration: The Rise of the Public Utility Idea, in ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY MASHAW* (Nicholas R. Parrillo ed., 2017) (discussing the long pre-New Deal history of public utility regulation). The Freedmen's Bureau's history further militates against the argument, common in conservative scholarship today, that the administrative state was a twentieth-century creation and is inconsistent with the constitutional separation of powers. *See, e.g.*, Ilan Wurman, *Nondelegation at the Founding*, 130 *YALE L.J.* 1490 (2021). The idea of an administrative agency with broad statutory authority and significant policy delegations to agency officials was certainly not foreign to the Framers of the Reconstruction amendments. On the contrary, it was central to these Framers' constitutional vision.

212. *See* IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: THE UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (discussing the racially exclusionary features of major New Deal policies); FISHKIN & FORBATH, *supra* note 14, at 185 (describing how Reconstruction and Populism's "commitment to multiracial democracy" was "shunted out of the mainstream of reform ideals by the increasingly virulent, taken-for-granted racism of mainstream white America" in the Progressive era).

213. *See, e.g.*, TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018) (looking to Louis Brandeis and his Progressive-era contemporaries and policies as models for today's antitrust reforms); Lina Khan, *The Separation of Platforms and Commerce*, 119 *COLUM. L. REV.* 973 (2019) (looking to Progressive and New Deal antitrust and regulatory approaches); Rahman, *supra* note 198, at 1621 (looking to "historical Progressive Era concepts of private power and public utility"); Andrias, *supra* note 175 (looking to the New Deal-era Federal Labor Standards Act, and the New Deal-era National Industrial Recovery Act before it, as models for labor sectoral bargaining). A notable exception to this is Sanjukta Paul's work on the common-law "moral economy" antecedents of antitrust law, which extend "more or less as far back [in history] as the common law itself." Sanjukta Paul, *Recovering the Moral Foundations of the Sherman Act*, 131 *YALE L.J.* 175, 185 (2021). However, Paul's account does not address the Freedmen's Bureau or Reconstruction. Another important corrective is Alex Gourevitch's work on labor republicanism and its origins in the Reconstruction era. *See* GOUREVITCH, *supra* note 31. But his discussion does not touch on the Freedmen's Bureau's administrative operations or legal components, focusing instead on the surrounding labor ideological disputes and how they informed the Populist and Progressive labor debates that followed. *Id.* at 4-5.

The historical record canvassed herein suggests the risks of such an oversight.<sup>214</sup> This Note invites further research into both the legal-theoretical and practical lessons of the Freedmen's Bureau for economic regulation today.

Critically, the Freedmen's Bureau model has value for today's reformers not because it was perfect—or even more effective, on the whole, than later Progressive and New Deal approaches. Rather, the Bureau model holds promise because the best features of its labor-market governance anticipated many of these later eras' regulatory approaches and insights, while at the same time resisting strictures and boundaries that those eras left in their wake and that persist today. The Bureau's best labor governance strategies offer historical precedent for relatively racially egalitarian, participatory labor-market governance and should not be thrown out with the bathwater of the Bureau's limitations.

In that vein, one final lesson from the history recounted above merits notice. For all its innovation and promise, the Freedmen's Bureau also displayed the limits of building countervailing power through administration in the context of immense racial wealth inequality. Without the authority to redistribute property to the freedpeople, the Bureau was hamstrung from the outset. Its efforts to rebalance the bargaining equation and build both economic and political power among the freedpeople were ultimately insufficient to thwart the planters' reconstitution of economic and political control—and the concurrent importation of industrial monopoly power from the North.<sup>215</sup> With most property left in the hands of large plantation owners and other monopolists, the original “free labor” vision of democratic capitalism and economic independence never had a chance to emerge. Ultimately, then, the Bureau's best market governance strategies should be seen as complements to, and not replacements for, wealth redistribution. To conclude with Du Bois's words, the “large legacy of the Freedmen's Bureau” is “the work it did not do because it could not.”<sup>216</sup> Current efforts to reform market governance and democratic administration must do that neglected redistributive work, too.

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214. It is worth noting that Progressive-era scholars, including some associated with Progressive reform movements, were sharply critical of the Freedmen's Bureau and the broader Reconstruction project in ways that contributed to Progressives' neglect of the Freedmen's Bureau's egalitarian, pro-labor components. Progressive-era historians associated with the Dunning School and Progressive School propagated a narrative of the Bureau and Reconstruction as a failure—a tool of corrupt Black politicians and Northern capitalists. See Eric Foner, *The Continuing Evolution of Reconstruction History*, 4 OAH MAGAZINE OF HIST. 11 (1989). Du Bois's 1935 book, *Black Reconstruction*, *supra* note 8, sought to correct this narrative but “failed to influence prevailing views among academic historians” until decades later. UNFINISHED REVOLUTION, *supra* note 19; see also DU BOIS, *supra* note 8, at 726 (“I cannot believe that any unbiased mind, with an ideal of truth and of scientific judgment, can read the plain, authentic facts of our history, during 1860-1880, and come to conclusions essentially different from mine; and yet I stand virtually alone in this interpretation.”). This Note echoes Du Bois's account of the pro-labor features of the Freedmen's Bureau and seeks to incorporate those features into theories on economic regulation and law reform that are otherwise more closely aligned with Progressive-era thought (to the neglect of Reconstruction-era lessons).

215. Du Bois, *supra* note 8, at 580-636 (discussing the “counter-revolution of property,” including both Southern planters and Northern industrialists).

216. Du Bois, *supra* note 11.