One might assume, after reviewing the actions of Congress during the Civil War, that in its wake Congress would accept the idea of active and expensive administrative governance by a much expanded and much more intrusive federal government. Surely the problems of physical reconstruction of the national economy alone would require such devices. Added to this, the need to assist millions of newly freed slaves would demand far more than sponsorship and minimal supervision through courts. After all, by the end of the war Congress had declared that freedom for the slaves was to be an irreversible outcome of the war in a draft amendment to the Constitution, the Thirteenth Amendment, whose importance cannot be underestimated.

Congress did in fact take steps to assist the freedmen and women, but these efforts were framed at the outset by a lingering commitment to the republican ideal of limited government. What was more, they were confined within a pervasive attitude toward their intended beneficiaries which in some cases was overtly denigrating and dismissive. When viewed within our context, however, the Freedmen’s Bureau debates illustrate second state thinking. For the first time Congress explored the need to add overt, comprehensive, and extensive su-
pervision to its administrative agenda. Discussion of how this supervision was to function—its housing within the existing frame of government, its operation on the ground, the means by which it would be staffed and how and to whom it would report—then laid the groundwork for additional Reconstruction legislation.\(^5\)

Once again, law, legal culture, and the question of legal enforcement were foremost in the debates over the Freedmen’s Bureau and subsequent Reconstruction legislation such as the Civil Rights acts of 1866, 1870, 1871, and 1875 and the Fourteenth and Fifteenth amendments. Lawyers naturally took a lead, bringing to them their concerns over the enforceability of law, protection of judges and other court officers acting within the scope of their duties, and the relation between federal courts and state courts. What is important for this essay was the way in which the lawyers’ approach to the Reconstruction measures continued the second state notions expressed in the earlier debates on sponsorship. Not recognizing the role that the second state ideas had played in framing the Morrill Act and the Department of Agriculture, one might mistakenly assume that the lawyers’ part in inherently legal issues of Reconstruction simply grew out of the subject matter of the latter, rather than including an ongoing and vital interest in the shaping of American government—specifically, “a government of law.”

The agitation for a freedmen’s bureau originated outside of Congress, in 1863, when the War Department created the three-member American Freedmen’s Inquiry Commission.\(^6\) Its report and its recommendations reflected the tension between Radicals’ ideas regarding equality and their conception of a limited government. Like-minded members of Congress recognized that it would take a considerable effort to sponsor and supervise a free labor system in the South, but, at the same time, they shared concerns about authoritarian, centralized, and bureaucratic government.

The compromise was a proposal for a temporary agency that would have only limited functions. The model was not the War Department or the federal judiciary but the Civil War Sanitary Commission.\(^7\) Although they were called “Radicals,” even the most ardent advocates for African Americans in the Congress did not envision a fundamental rethinking of the national government.\(^8\) Congressional leaders only gradually broadened their goals to a full reconstruction effort in the South.\(^9\)

From the beginning of the war the U.S. Army had to deal with the so-called
contraband populations of runaway slaves who increasingly flooded Union positions. Federal troops handled their charges in a piecemeal fashion according to the commanding officer’s predilections. While some treated African Americans as little more than children, others recognized their perilous condition and sought to help. A smaller group treated them as fully capable human beings with rights. African Americans within Federal lines had a considerable role in changing attitudes of reluctant army officials away from condescending caretaking.\(^\text{10}\)

Flooded with requests for instructions, Congress belatedly took up the issue in 1864. From the reception of the report of the Freedmen’s Commission, the would-be Freedmen’s Bureau became caught up in a jurisdictional dispute between Representative Thomas D. Eliot of Massachusetts, who favored a War Department bureau, and Senator Charles Sumner, also of Massachusetts, who favored the Treasury Department.\(^\text{11}\) There were also familiar obstacles: fiscal conservatism, an ineluctable reluctance to create additional agencies, and the ideology of limited government. The debate on the original Freedmen’s Bureau bill reveals in telling detail how far the planners were willing to take the implication of the second state approach.

A Bureau for the Freedmen

On February 10, 1864, Eliot introduced his committee’s plan to deal with the persons he and others now labeled “freedmen.”\(^\text{12}\) Over the objections of Democrats Holman and Cox, whose resistance to the Department of Agriculture and the Morrill Act had never faltered, Eliot related the nature of the problem and how House Bill 51 would deal with it. Eliot had been a lawyer since 1831, when he was admitted to practice in New Bedford, Massachusetts. In between he had practiced a stint in the Massachusetts legislature and one term in the U.S. House as a Whig. Like many other so-called conscience Whigs, he was opposed to slavery and joined the Free-Soil Party in 1855, then the Republican Party. He returned to the House in 1859 and became chair of the newly created Committee on Freedmen in 1863 under President Lincoln’s Emancipation Proclamation.

The need for this new bureau, Eliot argued, stemmed from the freedmen’s impoverished condition. Exigency demanded action. Freedmen had not yet “learned to be free.” Hence, the federal government had to teach them basic entrepreneurial skills. Eliot believed that, with the proper schooling, the freedman was capable of achieving the status of a citizen in the republic. The years of en-
slavement had not permanently damaged him, only denied him the perquisites to handle life outside of his master’s control. Furthermore, Eliot stated that very little was required to give freedmen these skills. A temporary government agency “in the charge of able and administrative men” would suffice. In addition, he asserted that the freedmen would quickly pay the rents for the farms the bureau would give them from confiscated lands. Thus, the government would not have to appropriate a single dollar that would not be paid back with interest in the form of hardworking, law-abiding new citizens.  

It was the Republican ideal, New England style: give a man a farm and teach him to read and write, and the rest would take care of itself. But government had a vital role to play, and sponsorship and supervision were inseparable. The United States had incurred a moral obligation to help those whom slavery had debased and Union arms had freed. Eliot’s intertwining of religious faith and political theory was a staple of antebellum public speech, but for him it was genuine. Eliot was also aware of European efforts to aid those who had been slaves after emancipation. Although this was not quite the same as the school reformers borrowing of European pedagogical initiative in the Morrill Act debates, it nevertheless demonstrated that the same process of using European models that applied to education and agriculture was appropriate to the lifting up of the freedmen.  

Eliot knew, however, that any provision for aid to the freedmen must not exceed the narrow bound of sponsorship and supervision Congress had already drawn. The Freedmen’s Bureau was to be the freedmen’s “parent or guardian or friend,” but only temporarily. Its “superintendents” would aid them in their training period then disappear. Eliot minimized the effort involved, its expenditure, and its impact on the large course of American government. Despite the fact that this bureau would be in charge of settling up to four million former slaves on several million acres across the conquered South with a personnel and budget allocation smaller than that of the land office, the Bureau of Freedmen’s Affairs would not constitute a fundamental reworking of the United States federal government.  

Even with these acknowledgments of Congress’s fiscal conservatism, distrust of executive agencies, and reluctance to do anything that might backfire, his argument stirred concern on the other side of the aisle. Brutus Junius Clay, a Unionist Democrat from Kentucky; Holman; Robert Mallory, another Unionist Democrat from Kentucky; and Anthony L. Knapp (D-Ill.) objected. Three of the men—Holman, Mallory, and Knapp—were lawyers. The inner debate
over the second state retained its sectional component. All four critics were from a border state or were raised in and represented a district just across the river from one. Holman’s Aurora, Indiana, sat across the Ohio River from Kentucky. Knapp’s Jerseyville, Illinois, looked out across the Mississippi River to St. Louis, just a few bends south. Their concerns did not center on the scope of this proposed agency but on the legislation’s impact on Unionist landholders in the border states and the South. Despite Eliot’s repeated assurances that only lands held by conspirators in rebelling states were affected, the Democrats made plain their objection to the confiscation of Rebels’ property.  

The connection between the practice of law and the objectors’ reasoning was clear. Most lawyering in the heartland involved land disputes—titles, mortgages, contracts for sale, boundaries, and the like. Kentucky land disputes in the early republic, for example, had been particularly contentious. Confiscation for wealth redistribution purposes ran athwart all of the values that the owners of property associated with land. Lawyers for the landowners heatedly opposed legislative efforts to take land under the eminent domain doctrine.  

Had this not been enough, all these men suspected the Republicans’ plan for postwar reforms, for, if the freedman landowner became a voter (even if the right to vote was not mentioned in the bill), he would vote Republican. Republican plans for reconstructing the South through a freedmen’s bureau suggested that the Republicans were trying to ensure Republican dominance of state and national government for the foreseeable future. Mallory, Knapp, and Clay, with Holman prodding in the background, made their party’s tactic clear: refocus the Congress’s attention on the loyal southern whites and away from the debased former slaves. One way to do this was to talk about the right to property, though there were other, equally effective strands in the argument they wove. The most important among them was that emancipation had been acceptable as a war measure to cripple the rebellion. It should not become an engine to fabricate a new kind of state.

In the negative report on the measure prepared by a minority of the committee, Democratic representatives Knapp and Martin Kalbfleisch, from Brooklyn, New York, raised more objections to the new agency. First, they alleged that Congress did not have the express power to undertake such an activity (the same argument that opponents of the Morrill Act had made, unsuccessfully). Second, the agency would have too much control over their charges, a situation ripe for abuse. This argument was astute for the two objections went to the heart of the proposal. With muffled oars the majority was rowing toward more sponsorship
and supervision. But, applied to the freedmen, the measure seemed to contra-
dict the formative ideology of the Republican Party. The Democrats tried to
drive a wedge into this opening. The Republican mantra of free soil, free labor,
free men, bespoke a rugged individualism, a faith in the capacity of ordinary
men. An uncharitable reading of the bureau implied that either the freedmen
were not really men, that they were children and needed special help—a view
that most Republicans did not accept—or the core values of the Republican
Party were a sham.

The two Democrats also warned that every official entrusted with a degree
of autonomy would aggrandize and/or abuse his position. This was always a dan-
ger in supervision—who could supervise the supervisors? Finally, Congress did
not have to act because the judiciary constituted the proper forum for the adju-
dication of any traitor’s guilt, claims to their property, and any and all disputes
concerning the freedmen. The last touch was the nicest—for it played to the
lawyers’ professional pride. If you want to protect the freedmen’s rights, do not
add administrative agencies to government; merely go into the courts and bring
suits.

Eliot responded to these questions—questions that concerned the very na-
ture of federal administration in the second state—with what would be called
today a liberal credo. First, the president and Congress’s war powers gave ex-
PLICIT sanction to remedial enterprises. Second, the proposed bureau would give
authority to a very limited number of people, whose selection would weed out
anyone of bad character. Third, Christian charity demanded a swift response to
the destitution of the South. He made the very vagueness of the bill’s adminis-
trative apparatus a virtue. In point of fact, he maintained, “a detailed system of
government embodied in the organic law would be unwise and prejudicial to all
the interests concerned.”

Implicit in this rejection of a more defined agency was a concession that no
one in Congress knew exactly what this agency would do, how it would perform
its tasks, and how to staff it. At the very least its superintendents would function
as educators, real estate agents, attorneys for both the government and the freed-
men, social workers, relief aid disbursers, adjudicators of competing claims, and
keepers of the peace in what was most likely to be a hostile environment. In an
age before professionalization a temporary emergency could justify the creation
of a temporary officialdom with plenipotentiary powers.

Consideration of the measure continued on February 17, 1864. Cox, the
Ohio Democrat and de facto minority leader, spewed forth a mixture of virulent
racism, antiauthoritarian rhetoric, and pseudoscientific pontificating. In a long, convoluted, at times rambling diatribe, he blasted this vast “confiscation system. . . . This eleemosynary system for the blacks, and for making the Government of the United States a grand plantation speculator and overseer, and the Treasury a fund for the helpless negro,” which would ultimately lead to unfettered interracial breeding. This, in turn, would lead to the death of the black race because physiology tells us that “the mulatto does not live; he does not recreate his kind; he is a monster.”

Cox made the connection between race and expansion of the state clear: “When the party in power, by edict and bayonet, by sham election and juggling proclamation, drag down slavery, they drag down in the spirit of ruthless iconoclasm the very genius of our civil polity, local self-government.” Race relations has to be the sole responsibility of local authorities. Why? Because a national majority enacting its will on a locality is tyranny. Why? Because localities must always trump national will to maintain true democracy.

Cox’s take on Jeffersonian principles was not exactly news in the House. He did not overtly support slavery (he absented himself when the vote on the Thirteenth Amendment took place) or the Confederacy (he supported the war and opposed the peace Democrats). His bigotry was mainstream. He had gone to Brown University, graduated with honors, and returned to Ohio in 1846 to study law and practice for two years in Cincinnati before he took over a Democratic newspaper as a prelude to a political career. On his honeymoon he traveled to England, France, Germany, Switzerland, Rome, Naples, Venice, Sicily, Greece, Turkey, and Smyrna, after which he wrote a best-selling travelogue titled A Buckeye Abroad. Like many other Americans who visited Europe, his travels reinforced his love of American institutions while confirming his opinions about the superiority of European peoples over non-Europeans. As much as Cox’s attitudes toward race might figure in his assault on the bill, they were in one sense mere window dressing. Cox had a genuine attachment to states’ rights ideas of governance and a genuine dislike for innovative administrative instruments.

Representative Kalbfleisch spoke on the measure on February 19 and repeated Cox’s aversion to expanding the state without explicitly mentioning race. In addition to the standard assertions of states’ rights, Kalbfleisch added two more arguments to the minority leader’s scattershot foray. He maintained that the project would require a massive expenditure employing a vast number of officials for which the bill made no provision. The bureau’s very task, he said, made it “an exercise of power more despotic than the imperial Government of Russia
within any portion of its territory.” He referred here to the autocracy of the Russian Empire, with its single head of state with virtually unlimited powers. (This is a caricature of Russia rather than a conception based on extended study. Russian politics at this time included Tsar Alexander II’s liberation of the serfs, education and legal reforms, and the strengthening of local elected governments.) Russia manqué, however, served well as a stand-in for the very opposite of what Americans held dear.

Kalbfleisch’s second point about the inevitable result of this agency’s creation centered on the open-endedness in the bureau’s mission. “If Congress possesses the power to provide in this manner for these emancipated slaves, where, let me ask, is the power to end?” While he acknowledged the benevolent mission, he pointed out that a bureau aimed at helping one group could easily oppress another. Bureaus cannot be trusted with power. Kalbfleisch could claim firsthand knowledge, having received his education in his native Netherlands and emigrated to the United States at the age of twenty-two in 1826. Swarms of bureaucrats, their power unchecked—the nightmare of the first state mind-set.

While Kalbfleisch worried aloud about legions of bureaucrats, Representative James Brooks, a Democrat from New York City, returned to the racial issue. Supporters of the measure favored the black man over the white. They had the New England virus. “I know her inexorable, unappeasable, demoniac energy,” the Maine born and educated refugee intoned. Why did the New Englanders do this? He linked black racial inequality and Republican greed: “The whole scheme is one of money-making; the whole scheme is one for the use of the black race by northern masters.” Brooks saw blacks as the witless tools of Republican financial power in the North generally and in New England particularly. Abolition and aggrandizement of the government went hand in hand. The ultimate victim would be the liberty of the people—by definition white males. He warned his country, “Do not abandon this beautiful theory of States, and convert this Government into a consolidation and centralization, solely for the money-making purposes of this bill.”

Brooks, though he studied law, made his living as the owner and editor of the New York Daily Express. He spoke as he wrote (or rather wrote speeches as he wrote partisan editorials), in spurts of partisan vitriol. By allying with the masses of freedmen, the Republicans would set loose chaos. Brooks’s references to the excesses of the French Revolution as the source for this plan hinted at the dangers of placing the fate of the republic in the hands of the inheritors of the reforming fanaticism of Robespierre and Marat. Charles Dickens’s Tale of Two Cities.
Cities was a best-seller, and Brooks could rely on it “conjuring up the imagery of intolerance, fanaticism, madness, the mob let loose, disorder, the rabble in control, terrorism, violence, mass executions in the name of ‘the people’ the destruction of all checks and balances within the government.” But there was another theme in such references that ran deeper than best-sellers. The United States was better precisely because it was unlike other nations. It rejected central authority; it suspected unitary leadership; it eschewed networks of entrenched bureaucrats. The United States was exceptional.

On February 23 Eliot responded to the Democrats’ first day’s concerns about the overexpansive scope of the bureau’s duties by amending his bill to cover only freedmen and lands confiscated from Rebels. William D. Kelley, a Republican from Philadelphia, took Eliot’s cue. His lengthy peroration elaborated the Republican position on new agencies, although not necessarily to his side’s advantage. Six foot three, with a “lean frame, deep-set eyes, and florid complexion,” Kelley identified with the radical Republicans. He was a man above corruption, dying as poor as he was born. He was also seen as a fanatic, never varying in his course. And on the floor “his cry is that of the plaintive, pathetic, yet powerful in-lungs perambulator.” His oratory, according to another correspondent, was from the school of “thunderous flatulence.”

Kelley ardently endorsed Thaddeus Stevens’s view that the South was an alien nation and should be treated as such. Federal supremacy was incontrovertible, while congressional power to do all that the radicals required of it rested with the Guarantee Clause of republican government. The policy of the nation, he posited, must be consistent with “the great eternal laws of justice, right, and truth” and must adapt when need be to ever shifting circumstances. His concept of changing institutions based on immutable principles was an alternative American credo to the Democrats’ outright rejection of new agencies. Furthermore, Kelley asserted that modifying institutions to suit the times brings “the order of society into harmony with nature’s laws, and thus secure the prosperity and peace of the people.” Kelley implied that prosperity and security lay not with a stagnant approach to governing, but with continuous changes to the apparatus to reflect new needs—all within fixed and uniquely American principles, to be sure. Long before pragmatism became well established as a formal philosophy, Americans of a progressive bent recognized the need for an experimental, evolving state.

While he wore his sentiments on his sleeve, his motives were not so obvious. He was a former deputy prosecuting attorney for the city and county of Philadel-
phia and judge of the court of common pleas, but there is nothing explicitly legalistic in his plea. More to the point was his own experience. He had been born and bred in Philadelphia but traveled to Boston for his education. There his “foster-mother” had provided libraries, lyceums, and scholars for his development as a person and citizen. His experience left him with the opposite impression of the Bay State than Brooks or Cox, both of whom openly derided the state’s preeminence in the war effort. More to the point still, in Kelley’s view government served as a benefactor, a provider of schools, means of transport, and policeman of the public order. Kelley saw the positive creative potential in active government sponsorship and supervision.

This did not mean Kelley took a wholly egalitarian approach to the proposed bureau. He analogized the position of the freedmen to those of “orphan children”: “They need such guidance and assistance at the hands of the Government as a faithful guardian would bestow.” He diminished their independence, agency, and capacity further when he asserted, “all that they need is guidance, fair play in the battle of life, and fair wages for fair day’s work.” He fell into the trap decades of bigotry and Brooks’s cleverness had set for him. He could not advocate aid for them without lamenting their condition, and, when he did so, he had to admit to their inadequacies as citizens.

Although Kelley tried to place all of the blame for the freedmen’s ignorance, lack of formal marriages, and general poverty on slavery, he put blacks into a special category that reinforced their difference from other poor denizens of the South. The project of servicing their needs required supervision precisely because it could so easily go wrong. What was more, Kelley presumed a period of tutelage in which the federal government would treat the freedmen in a way similar to its treatment of the Native American tribes—as wards of the state. Without a broader appeal to both whites and blacks, an appeal based on opportunity for all, Kelley’s self-described “revolution” in political life would apply to a sharply circumscribed space and time. He was unwilling to make the jump to a full-blown national state that could reallocate land, provide schools, and guarantee the civil rights of all Americans. He portrayed the bureau as a one-time investment that would pay off in a population of taxpayers and consumers of northern products both agricultural and manufactured.

On March 1 Knapp turned to two points essential to the supervisory state: how this agency would be staffed and its scale and scope. He pointed out, correctly, the patronage system would govern recruitment to the Freedmen’s Bureau. He noted, exaggerating the case that “the head of any constitutionally gov-
erned country upon earth to-day has not a tithe of the patronage which is this day vested in the Executive of the United States.” For so long dominant over the executive branch, Democrats recognized the danger when the opposing party had control over appointments. Knapp thus denounced the partisan plan behind the Republicans’ creation of new bureaus. The Republican president would appoint his people to the new positions, and they would use their offices to recruit votes and money for the Republican Party. The larger national state under Republican presidents could dominate the country for the foreseeable future. New bureaus were, to his partisan mind, reduced to weapons in the battle for votes.

Knapp’s second major point in reference to supervision leaped ahead to a more abstract notion: the kind of society—its feel—which would result from the existence of such a bureau. “The measure, in my judgment, proposes such extensive and important changes in the whole social economy of so large a portion of the laboring population of a part of the United States” that it warranted special scrutiny. One should note his use of the term social economy. Knapp’s propositions recognized the interrelationship between government agencies and the general structure of human relations. Today the social economy is a term of art meaning those employers in neither the private nor the public sphere—community organizations, voluntary associations, and the like. It is a term of approbation in a growth area of modern employment. In some sense the Freedmen’s Bureau anticipated the modern definition. That is not what Knapp meant: his characterization of the result of this agency’s presence was entirely negative. “The gentleman in effect asks that the Government shall become the great patron, the great landlord, the great lord of all of these people; that they are to become the vassals of the Government,” he posited. This “feudal system” was contrary to the very essence of a democratic society.

Inadvertently, Knapp had conceded the abolitionists’ point. The role the government was to assume with respect to the freedmen would be the same one that the previous owners of slaves had held. The federal government became a surrogate parent. Slaves could hire out their services; now the bureau would ensure that they performed their duties under contracts to their employers. Did not governments in slave states, barring manumissions, limiting what slaveholders could do with their slaves, present the exact same problems of overreaching and tyrannous discretion that the new agency might exercise? Ultimately, Knapp and his fellow Democrats could not escape this contradiction in their logic. His points about the threat posed by additions to the state and patronage, however,
would linger. Would-be supporters of new agencies did not have an answer to the staffing question yet.

They did have a strong motivation to act, however, for the danger to the freedmen was grave, the time was short, and the problem had to be solved. Hi-ram Price (R-Iowa) understood both the potential and the limitations under which the Republican planners operated at this time. He brushed aside constitutional objection on the grounds that this was a situation without precedent. Waxing eloquent, he stated, “This wicked rebellion, forced upon us against our will, and in violation of all law, both human and divine, has upheaved and unsettled the very foundations of society, and thrown its component parts into chaotic wildness, and forced upon us the necessity of reorganization.”

For Price the agency was temporary, limited, and nonthreatening because its charges were ready for full participation in the life of the country. “The negro has learned to live with and copy the virtues as well as the vices of the white man,” he opined. “He is careful, kind, and affectionate in his disposition.” Furthermore, just like whites in the North, “he seeks a fixed habitation, he accumulates property, he grows rich, he builds churches and school-houses, and he feeds, clothes, and educates his children as the white man does.” He is unlike the Indian, who “is of a roving and unsettled nature, not domestic in his habits.” But how exactly to sponsor and supervise this end? Free labor ideas did not, as the war proved, actuate themselves.

Price closed his remarks with a hopeful prediction. “The industrial energies of the nation will be set in motion, and good will be achieved.” Government does not create; it sponsors and supervises. It does not direct; it indicates the direction. Supervision is exercised only lightly and briefly. Only “a proper exercise of vigilance on our part will work from the important events now transpiring around us the great problem of man’s political salvation.”

By a majority of sixty-one to forty-six the House seconded the question and moved toward a vote. With the outcome predetermined, Eliot allotted the remainder of his time to George H. Pendleton (D-Ohio) to present the Democrats’ last word on the project. The bulk of Pendleton’s argument concerned the unconstitutionality of the enterprise, but he found time to state that the freedmen “long for the repose and quiet of their old homes and the care of their masters; that freedom has not been to them the promised boon; that even thus soon it has proven itself to be a life of torture, ending only in certain and speedy death.” The “enormous powers” given to the agents of the bureau would corrupt not only the personnel but would soon aggrandize into a department that
“A Government of Law”

“will last as long as the Government itself.” Pendleton had attended the University of Heidelberg in Germany before studying and entering the practice of law in 1847, but his exposure to the centralized German states did not lead him to an affection for national government’s growth.

William H. Wadsworth of Kentucky took up the cudgels of the opposition when he asserted that the bill “aims at swallowing up people and States.” Federal government supervision constituted an impermissible task in and of itself. He gave full vent to his suspicions, stating, “These bureaucrats, these negro-catchers, meddling with the inhabitants of States, would find their road a hard one to travel.” His use of the term bureaucrats marks one of the first times this pejorative entered into congressional discussions of the state. From here on, it was a staple of those who would not concede any of the second state contentions.

Aided by a narrow majority, Eliot got the bill to a vote intact. It survived the House by two votes, sixty-nine to sixty-seven. Morrill and Lovejoy joined Eliot, Kelley, and Price, among others. A cadre of second state advocates had formed a party within a party. With an official name change from the Bureau of Emancipation to the Bureau of Freedmen’s Affairs, House Bill 51 moved to the Senate.

Sponsorship Requires Supervision

On June 8, 1864, Charles Sumner, chairman of the select committee on slavery and freedmen, presented his committee’s substitute for House Bill 51. It closely resembled Eliot’s bureau, with two critical exceptions. First, Sumner and his committee placed the bureau within the Treasury Department instead of the War Department. Sumner explained this change as appropriate because “it appears that there is now an organization under the Secretary of the Treasury, and also a system, both of reasonable completeness, to carry out these purposes.” In effect the switch was an easy answer to the lingering problem of staffing. The Treasury agents had promulgated regulations for the tending of abandoned lands. Being most familiar with the situation in the conquered areas, they were entrusted with its care.

The second change to the measure countered the objections that Democrats and Unionists had raised in the House over the discretion of assistant commissioners. Sumner reported that he and his colleagues had added safeguards to prevent any abuse. “Here is a safeguard against servitude or enforced apprenticeship [of freedmen] which seem to your committee of especial value,” he asserted.
The alteration showed that the committee was influenced by abolitionist thought. Unfortunately, this admission that the staff needed legislative restrictions opened the floodgates to additional changes to the bill.

Sumner’s impressive height, melodious voice, and extensive preparation for his important speeches made him the leading light of Senate debates. But his focus on principles more than the mechanics of any specific legislation, combined with his maverick, arrogant personal demeanor limited his effectiveness. He was a lawyer who had never experienced great success in the courtroom, and one could see why. As debates wore on past his scripted remarks, he often found himself tongue-tied and prone to defective responses.56

Sumner urged swift Senate action on this measure as a “charity and a duty.” The freedmen were “adrift in the world, they naturally look to the prevailing power.” He reassured nervous colleagues that the new bureau would exist only for the “transition period.” While the expansive and significantly original mission of the agency might disconcert its opponents, its limited duration and benevolent purposes mitigated its potential for mischief. Sumner confidently concluded: “I am not aware that there is to be any debate about it. Indeed I was not prepared to expect any extended debate on this question.”57 Whether disingenuous or not, Sumner had badly missed the mark. His colleagues had no intention of acting quickly.

William A. Richardson (D-Ill.) marked the divide between the Republican radicals and the Democratic Party, a gulf opened in the House debate. He asserted, “This whole Government is being run to-day on the question of making all interest yield to that of the negro.” The program to provide equal treatment and protect the liberties of every American regardless of race was inextricably linked in his logic to the building of the national state. “The thought forces itself upon my mind often that all this effort to keep the negro before the public is for the purpose of attracting attention from the effort to overthrow liberty and establish despotism in this country.”58 He compared the Republican effort to the regimes of Oliver Cromwell and Napoleon I.

Coming down from the rhetorical heights, his specific complaint was with the bill’s procedure for confiscating Rebel lands. Richardson maintained that “the object and intention is to have military tribunals to take the place of the courts. You intend to overthrow the judiciary and make a despotism.” While it is not true that only a lawyer, and he was such, would see the overthrow of the judiciary as the prelude to tyranny, Richardson had made a telling point. The bureau was an alternative to the regular courts. In fact, it could effectually take the
place of courts when freedmen brought complaints against whites. He believed in freedom—“freedom for the white race.”

The regular courts of law had and would continue to protect that freedom (as they had in his native Kentucky and his adopted home of Illinois). Who knew what the Radicals’ bureau would do?

This contingent of the Congress could never reconcile itself to any project that might redistribute the property of whites to blacks, even southern whites’ property, though a national majority might favor some measure of it. Although Richardson admitted that his cohort had little chance of preventing passage of the bill, he could take some solace in the fact that November elections might restore his party, in the person of George B. McClellan to the presidency. If they delayed sufficiently, they could end the danger with a veto in 1865, as they had done in 1859 with Buchanan’s veto of the land grant college bill.

On June 14, 1864, the senators resumed their exchange. Grimes, who had ultimately supported the Morrill Act and the Department of Agriculture, operated in the same manner on the Freedmen’s Bureau. He got Sumner to agree to limit the number of assistant commissioners to four per state and reduce their salaries to fifteen hundred dollars a year. These friendly amendments indicate the tight reign that moderate Republican congressmen felt appropriate for any piece of the administrative apparatus. But it was not the last of the compromises they made.

In another go-around the lawyers monopolized the floor. Thomas A. Hendricks (D-Ind.) expressed his disagreement with the placement of the new bureau. The Department of Interior had received the land office, the care of public lands, and should be the repository of an agency that dealt primarily with land. Zachary Taylor’s attorney general, Reverdy Johnson (D-Md.), who defended slavery but not secession, wanted to know why a wartime agency had landed in a civil department instead of the War Department. The proper “control” should rest with a wartime officer. Sumner countered that the confiscated lands rested with Treasury, hence so should the agents managing them. Grimes interposed that the functions to be carried out more closely approximated those tasks under the attorney general. The bureau, he argued, should be entrusted to that office’s care.

One could say that this reads like quibbling and could assign personal and partisan motives to it. Salmon Chase, far more radical than Lincoln, was secretary of the Treasury. Giving him the power to appoint the commissioners might aid the Radical cause (and Chase’s own hopes for the presidency). Giving the bureau to the War Department put the appointments in the hands of Lincoln and
might have thus pleased men such as Grimes, who was a backer of Lincoln. But
the key point is not who got what but, rather, the inability of the Senate to de-
cide this single small point. The large issue of supervision nearly broke apart on
the shoals of the appointment power.

Who, then, should run the Freedmen’s Bureau? The United States govern-
ment did not recruit its employees from professionally educated graduates of
government universities, as France or the German principalities did. Often-
times the only qualification for office was a connection to the party in power.
Any enculturation in the task took place as a result of on the job experience in
what one scholar has labeled the “clerical state.” But these officials would not
operate out of a Washington, D.C., office. They would be field agents with only
their own sense of duty to aid them. The discussion of the bureau’s placement
thus became a surrogate for an inquiry into the desirability of a professionally
trained bureaucracy. Supporters of the bill could not entertain the new bureau’s
ture problem of finding trained, expert personnel because that would defeat their
balancing act of creating a supervisory agency on the one hand and upholding
the still potent antibureaucracy ethos on the other.

That ethos ate away at the project. Willard Saulsbury Sr., a Delaware lawyer,
claimed that the grant of power was “arbitrary, without any limitation, without
any rules or regulations to govern these masters and drivers in the exercise of
their most extraordinary authority.” He preferred a limited, strictly defined, and
traditionally executed instrument. Furthermore, Saulsbury characterized these
would-be trustees as “a swarm of irresponsible officers at extravagant salaries.”
West Virginia’s Unionist senator, Waitman T. Willey, repeated this description
of “these irresponsible Commissioners,” “this overseer general and these deputy
drivers” with their “extravagant salaries.”

More compromises followed. On June 27 Sumner acquiesced to Grimes and
others’ concerns about the vagueness of some of the language. The confiscated
land could only belong to “disloyal persons”; the agents could only advise their
charges, not compel them in any way; and the salary of the commissioner went
from four thousand to three thousand dollars, the last amendment over Sum-
ner’s objection. Sumner felt a higher salary was necessary to “secure in this of-
fice a first-class man, a person who by character, by education, and by sympathy
would be the best fitted possible for the responsible duties we are about to im-
pose on him.”

The language echoed Horace Greeley’s “good men,” and not by accident.
Character mattered more than expertise. The bill’s supporters did not discuss
the lack of any qualifications specified for the personnel in the legislation itself. Personal probity, moral rectitude, and general ability constituted the sole requisites for office (though in fact party loyalty and, in particular, loyalty to the president played a substantial role in the selections). Sponsorship and supervision did not displace the older reliance on probity and character. The second state incorporated these values from older republicanism.

Undeterred and unmollified, opponents of the bill fixed on the enforcement powers of the new agency. Missouri’s Unionist Benjamin G. Brown, a lawyer, newspaper publisher, and regimental commander in the Union army, initiated the assault with his comment that “there is no necessity for giving these Treasury agents any more power.” Charles R. Buckalew, a Democratic lawyer who had served in the diplomatic corps, offered to amend the bill to subject the confiscations to preemptive court rulings. Again, the alternative to bureaucratic supervision was recourse to the regular courts. Hendricks followed with a proposition to allocate the responsibility of determining “loyalty” away from the bureau to the courts. “These assistant commissioners,” he reasoned, “have no machinery or opportunity of determining” said loyalty. It was the old trick. Deny to the commissioners the wherewithal to make factual determinations then decry their inability to do so. “Whether land ought to be confiscated is a question that ought to be tried by the courts, and not in this irresponsible mode.” Lazarus W. Powell (D-Ky.) supported this notion, asserting: “They [the agents] are not the proper tribunal to try the question of loyalty. That matter must be submitted to the courts.”

Sumner answered that the Bureau was an administrative alternative to courts in a South whose courts he would not trust. He protested that “there must be discretion lodged somewhere,” admitting, “The discretion is as well guarded as it can be, and it is a discretion which it seems to me is essential to carry out the purpose of the bill.” It is not quite right to say that the opponents of the bureau were opposed to the core creed of the second state so much as they preferred the familiar apparatus of local courts. The lawyers did not fear administration so long as it was imposed by lawyers, in courts.

Thus, behind the new group of amendments lay the presumption that the bureau had to be more legal in its operation. All of these lawyers conceived of legal process in the following manner: a prosecution would follow upon a bad act and indication of the requisite intent; the proceeding would then move to a court, where there would be a contest over the facts; a determination would follow with the opportunity for an appeal. Administrative actions without this
process were arbitrary at best, tyrannical at worst. American democracy required not only elections but court-based determinations. Sumner’s trust in the discretion of his “first rate” men did not violate these strictures, but neither did he satisfy them. Because he could not articulate an administrative alternative to the lawyer-in-court-centered approach, Sumner’s system inevitably fell under suspicion.

Surely, these thrusts and counters had been practiced before—why repeat them? Both sides could have predicted the outcome, so why rehearse the pros and cons? Part of the reason lay in the audience outside the capitol. Members were ensuring that their constituents knew where their representatives stood. But another reason was less cynical. Congressmen were truly groping toward an understanding of what each new proposal meant—how it fit, or could be made to fit, into older sets of ideas about the state. And the lawyers, turning debates over policy into more familiar channels of property and crime, led the way. On June 27 the subject of land confiscation then took a more serious turn, when Lyman Trumbull sought to repeal a provision in the Confiscation Act of 1862 which limited the seizure of land to the life of the disloyal owner. The exchanges on this proposal took up a substantial part of the discussions that followed. The lawyers, like Trumbull, seemed eager to apply their expertise directly to a familiar kind of question, moving tangential issues to center stage. Did the no “bill of attainder” clause of the Constitution limit punishment to the life of the offender? Pennsylvania Republican Edgar Cowan insisted that “no lawyer in this country” could disagree with his reading of the fundamental law. He underestimated the congressional bar. Harlan wanted to criminalize fiscal malfeasance with a penalty of up to ten thousand dollars in fines and/or up to ten years imprisonment. James R. Doolittle (R-Wis.) proposed to make the assistant commissioners subject to military tribunals wherever the federal court system was not operating. Hendricks objected to the enlistment in the army of what he called the likely “public plunderers” of the bureau.

Why did the senators need a corruption clause in an organic enactment when there were general federal laws against embezzlement? Once again, lawyers sweated the details. Doolittle could draw upon many years of familiarity with the underside of human nature, first as a county district attorney in New York State and later as a judge of the first judicial circuit of Wisconsin. Following the repeal of the Missouri Compromise, he switched from his original affiliation with the Democratic Party. These safeguards, he thought, constituted a check on bureaucrats while allowing sufficient independent authority to carry out the task.
Hendricks and Garrett Davis opposed any militarization of civilian officials on the grounds that it violated legal precedents. Civilian officials of the federal government had civil rights under the Constitution. Davis, a lawyer since 1823, resorted to courtroom reasoning when confronting matters of state. The majority bowed to the necessity of providing some court supervision of the commissioners and accepted Doolittle’s language.  

A series of amendments followed this minor contretemps. The senators seemed eager to edit every phrase in the bill according to their own interests and ideologies. Everything from the lands to be leased, the length of the leases, the exact meaning of the words giving authority over the freedmen, the encouragement of immigration to the North, and the nature of the mission received consideration. It might seem like micromanagement, but in fact the senators were asserting that they could confer supervisory authority on an agency if and only if that agency was constrained by the enabling legislation. The more closely they tailored the act, the less room there would be for discretion and independent judgment on the part of the commissioners. In so doing, the senators were acting less like legislators and more like bureaucrats themselves, turning the Senate into an administrative agency issuing its own rules. Legislation is general and prospective. Precise delineations of rules within agencies were usually the work of their administrators and agents. In the second state framework these functions had to close in on one another because the senators were unwilling to abandon older republican ideals.

Grimes came the closest to voicing a genuine concern over the whole of the project when he questioned Sumner’s amendment placing the appointments of the personnel with the secretary of the Treasury rather than the president and, hence, obviating the need for the consent of the Senate. “I never will consent to place in the hands of any Government officer the overwhelming power that is being placed in the hands of this public officer by the proposition of the Senator from Massachusetts,” Grimes declared. He went on to describe his criteria for officeholders: “I want to know the character of these men. . . . I want to know whether they are humane men, whether they are Christian men, whether they are honest men and will do their duty to the men, women, and children who are committed to their charge.” Both he and Sumner, despite their conflict here, agreed on the critical importance of the Senate ensuring the caliber of the staff of government agencies.

Hendricks tried to turn back the tide one last time: “Here is to be a government within a Government . . . within the government and independent of the
States, and almost independent of the ordinary machinery of the Federal Government, there shall be a government established for the control of the inhabitants of a particular class.” By ordinary machinery he meant the courts. The oath that the bill relied on to prevent malfeasance “will be found practically to accomplish nothing.” A clever trap indeed: advocates of the bureau could not create an independent regulatory institution dedicated to the efficient exercise of its function—that would violate the common faith in democratic government on both sides of the aisle. Therefore, the would-be advocate of additions to the national government had to staff them according to the patronage system. But this would inevitably lead, sometimes with justice, to charges of corruption. The “spoils system” had certainly survived Andrew Jackson’s time. The Republicans had adapted well to their political climate.

Zachariah Chandler (R-Mich.), an avid abolitionist and former dry goods merchant, ignored this clever trap. For him necessity demanded the new agency, period. “A negro, Mr. President is better than a traitor,” Chandler told the Senate. “I would let a loyal negro vote. I would let him testify; I would let him fight; I would let him do any other good thing, and I would exclude a secession traitor.” The war itself had pushed this conclusion on the Republicans. Adding supervision to national state functions constituted a pragmatic effort to meet the exigencies of the day: to deprive the rebellion of labor for its war effort, emancipate the slaves; to punish the slaveocracy for the blood and treasure spilled, confiscate their lands; to cement the victory, give land to veterans and freedmen; to prevent future rebellions, secure a national polity with a currency, railroads, and a northern system of free labor in the South; to limit the influence of the white South in the House due to the addition of formerly “other persons” who had been counted as three-fifths, give those males the vote. The Senate voted twenty-one to nine in favor of the retitled Bureau of Freedmen. The bill returned, amended, to the House.

A Fateful Compromise

On December 20, 1864, after Lincoln’s reelection and the Republicans’ retention of their majorities in both chambers, the lame-duck House considered the Senate’s version of the bureau. Democratic hopes were dashed; the sponsorship and supervision of the slaves’ transition to citizenship was much more likely. In a conference committee of both houses, without substantive debate, Eliot received the consent of a sizable majority of his fellow Republicans to think
On February 2, 1865, he reported that the conference committee had proposed a “Department of Freedmen and Abandoned Lands.” Eliot and Sumner had resolved their disagreement over the placement of the agency by giving it its own home and, in the process, thought they had validated the second state’s most ambitious project.

Because the commissioner would report directly to the president, the job possessed a degree of prestige that “would give to the department a more desirable character than any bureau could have.” The commissioner himself, Eliot predicted, was more likely to fulfill the requisites for the job, namely “great ability, and of experience and character.” Nothing new in that: character was sufficient to ensure republican administration. The other sections of the act, he maintained, resembled that of the recently created Department of Agriculture. Therefore, on its face the proposed department represented something new in government structure. But in this first explicit reference to the Department of Agriculture as a model for further government expansion lay the groundwork for further sponsorship and supervision. The legislation made the personnel of the bureau part of the military, subjecting them to the military courts in a region in which the federal judiciary no longer functioned. Eliot expected no additional expense because the leases of confiscated land would ultimately pay for the operating budget. Herein the second state spoke in the essentially conservative precepts of its predecessor: a low-cost, limited organization staffed by people of good character who would carry out a sharply circumscribed, supervisory task with ambitious goals. The measure survived a motion to table it, eighty-three to sixty-seven, with thirty-two not voting.

Yet Eliot could not hide the novelty entirely. On February 9 he admitted, “We are stepping upon untried ground.” He urged the House “to do something”: “There are difficulties and I cannot undertake to say that this bill is perfect; but I think it will be found to be sufficient for the purposes it seeks to accomplish.”

All proposals from Congress suffered from the defect of too many chiefs. A singular, complex, and flawless vision exceeded the reach of human effort, much less the murky, negotiated, and contested congressional process.

Despite Eliot’s protestations that the activity was bounded by its very nature, the department’s function still engendered a spirited resistance from radical Republicans such as James F. Wilson from Iowa and Robert C. Schenck from Ohio. Both were lawyers, not surprisingly. Wilson disliked provisions that “give the control of these persons into the hands of any officer of the Government.” He recommended a section that would “let them have the responsibility upon them-
selves of disposing of their own services in such a way as they may deem proper, receiving compensation therefor.” The freedmen should be treated as any other American. They should be able to sue in court for what was legally theirs.

Schenck’s objections, and his insight, went further. An independent department suggested a large, permanent effort, when all in Congress desired the opposite. “Now, it would seem proper that there should not be a great system built up, under a new Department, of indefinite duration, to be added to the various other Departments of the Government,” he argued, because “this new Department would have relation only to this subject of freedmen, provision for whom is, from the very nature of things, a temporary and fleeting necessity.” The general aid provisions affected needy whites as well as blacks. At the same time, the Congress should be wary of creating a state of dependency. “There is always danger that we may keep them [the freedmen] too long in a state of pupilage.”

Even Republicans wanted the government to tread lightly. They feared the encroaching leviathan not because, like the Democrats, they anticipated an unstoppable police state but because an authoritative, pervasive service provider threatened the self-reliance ideals of a free labor nation. “The Government therefore, I say, has been compelled, from the very necessities of the case, to sanction this relief, and yet it is irregular and without law, but has been done under the prompting of the higher law and the necessities of humanity,” he explained, regarding the army’s current operations. “Now, I propose to legalize the system,” he said. The legalization came from assigning the task, through legislation, to a bureau under a bill that he, as chairman of the Committee on Military Affairs, planned to introduce.

Eliot made a last-ditch effort to advance the idea of a department before the impending vote. He emphasized its temporary existence. “It will last but for a season,” he predicted. The freestanding department setup would eliminate the inevitable conflict between Treasury and War if it were lodged within either. The compromises necessary to secure support had produced a very attenuated though expansive mission. With Holman’s call for the yeas and nays, the conference report passed sixty-four to sixty-two, with fifty-six not voting. Despite his reservations, Wilson voted with Eliot, while Schenck defected to the opposition.

On February 13 Sumner introduced the same conference report to the Senate. He justified it with the same arguments Eliot presented to the House. An agency that possessed both the lands and the supervisors independent of either Treasury or War would serve best. Their “new trust, so grave and onerous,” re-
lied on the qualities of the personnel. “The man for this humane service should be humane by nature, and should sympathize especially with that race which has so long been neglected and outraged. They must be versed, if I may so express myself, in the humanities of the question.” The committee had changed the name from a “bureau” to a “department” and given the agency independent standing, but its policy of doing much with little remained the same.

The following day Garrett Davis began the opposition’s critique of the compromise. He regretted especially the place of military tribunals in it, labeling them “absorbing and domineering.” There was a clear referent at hand. When the Kentucky legislature invited the Union army, it found that military tribunals came with the soldiers. While he did not go further and accuse the Republicans of attempting to rule by bayonet, the implication waited in the wings. The contest between those who wanted to protect liberties through stronger government policing and those who wanted to protect liberties through limits on government suffused every exchange in the Senate.

On February 21 Sumner replied to the critics. He lamented shameful delay tactics. Apprehensions were misfounded. After all, the department was in service to, not in command of, the freedmen. “The power of the Government must be to them a shield.” The legislation proposed a limited mission with ample safeguards. “Are we not all under the general superintendence of the police, to which we may appeal for protection in case of need?” he argued. Anxiety about abuse of power might arise, “but the Presiding Officer can do nothing except according to law, and the Commissioner is bound by the same inevitable limitations.” Public officials did not act beyond their expressed duties. They sought only to do their duty. Sumner and his allies did not intend some vast conspiracy. “Look at other clauses, and they will all be found equally innocent.” Trust in our integrity, Sumner seemed to say. He sought to no avail to reassure those who were nervous about the venture into a new realm, the second state.

For the next few days Sumner sat impotently while senators continued to register their disapproval of “a” department. Perhaps the most worrisome opinion came from the Republican senator from Maine, Lot M. Morrill (no relation to Justin S. Morrill), who gave the conference report a lukewarm endorsement. He described the difference between the Senate’s bill and the conference effort: “One perhaps is a little more extended in its details, one perhaps is a little more permanent in its organization.” What was more “there is no difference between the law as it now stands and the law as it will be if the bill now proposed by this committee be passed,” he added. One cannot tell from the whole of this Yan-
kee lawyer’s remarks which bill is which. We can guess that he considered the departmental form to be the more permanent-looking one. The hold of a label on the senators’ imaginations seems strong. While the organization itself possessed no more employees or budget or putative mission than it had as a bureau, the independent status conferred a standing, at least in the minds of its proponents and detractors, which would impact its effectiveness, a boon to some, a threat to others.

Sumner’s ultimate attempt to sway the moderate fence-sitters did not raise any new propositions or insights. His remarks were impassioned but not particularly persuasive. When Reverdy Johnson notified the Senate of the availability of a more innocuous alternative, Schenck’s House bill for a War Department bureau, he sealed the would-be department’s fate. The final tally of twenty-four opposed to fourteen in favor, with twelve not voting, led to the formation of another conference committee to resolve the differences between the two houses. Moderate Republicans Lyman Trumbull, Grimes, Hale, and Howe joined Democrats and Unionists against the department. Sumner was not on the new conference committee, ensuring the moderates would have their way even on seeming superficialities.92

A Bureau at Last

The second conference committee report reached the Senate on February 28. It dumped the department concept in favor of a bureau in the War Department. Because the commissioner, clerks, and assistant commissioners would be part of the military, those sections of the bill dealing with enforcement and discipline became superfluous. Once again, the bureau had no budget other than the salaries of the officials coming from the expected revenue from the leases on confiscated lands.93

On March 3 two senators, Powell from Kentucky and Jacob M. Howard (R-Mich.), voiced substantive objections. They rehashed the familiar distaste for military government and a new system of peonage. Powell asked the rhetorical questions that by then had the ring of cliché: “Do you wish a bureau for every purpose? Do you intend that every interest of the people of the country shall be managed by bureaus in your War Office and your other Departments? . . . This is a step far in that direction.” But no one could refute Sumner’s initial point that government was the only recourse—at least no one who truly wanted to help
the freedmen. The Senate by votes of sixteen to twelve, sixteen to twelve, and twenty to ten refused to adjourn. The next day, without a tally, the Senate agreed to the conference report. With a vote of eighty-nine to thirty-five, with fifty-eight not voting, the House sustained the chair’s acceptance of the substitute that the conference committee offered. Subsequently, seventy-seven voted to accept the bill, fifty two to reject, and fifty-three did not vote. The Bureau of Freedmen, Refugees, and Abandoned Lands went to President Lincoln for his signature.

After Lincoln’s assassination and his successor, Andrew Johnson, demonstrated his hostility to the new bureau, Senator Lyman Trumbull’s efforts to extend the life of and reform the Freedmen’s Bureau demonstrate that some minimal commitment to supervision was inherent in Radical Reconstruction’s temporary expansion of the national state. The debate on the extension and, then, merely the renewal of the Freedmen’s Bureau added little to the arguments already proffered in the enactment discussion.

Nothing in the brief and troubled history of the bureau tutored its sponsors in the need to give it more independence or to train its personnel better. Without these elements supervision did not achieve its objective and perhaps, though this is the verdict of hindsight, could not. An attempt to make the bureau’s supervisory role more effective foundered. Eliot in the House and Lyman Trumbull (R-Ill.) in the Senate proposed to extend the powers of the agency. They sought to add assistant commissioners, a budget separate from the War Department, and reconciliation of the bureau’s mandate with the advent of the Thirteenth Amendment—in effect to make supervision more effective. Democratic opponents continued to offer the usual reasons for objecting: states’ rights, no constitutional power to act, and the bureau’s inevitable descent into corruption and patronage.

Cowan hinted at a common ground that Democrats were willing to share with Republican proponents of the second state when he said, “This is a Government of law; and if there is anything in the world which contradistinguishes it from all other Governments upon the earth, it is that it is a Government by law and a government of law.” This meant that “whoever undertakes to assert a power or exercise an authority under it, is bound to put his finger upon the law which authorizes it.” Although Cowan believed that only his party’s position rested on these propositions, in fact Trumbull and the Republicans also acted upon them. No less than the Democrats, the Republicans resisted authoritarian
institutions and grounded their proposals in the realm of the law. The problem was to find a form of administrative apparatus which was rooted in the rule of law rather than political patronage.

After the Senate and House approved the revision of the bureau with solid majorities, President Johnson vetoed it.98 On February 20, 1866, Trumbull’s Senate failed to override by only two votes.99 Beginning May 23, the Congress considered extending the life of the embattled bureau once again. This time Eliot and Trumbull produced an even more limited version of the bureau’s function. Again, the discussion did not raise any new ideas nor address the Freedmen’s Bureau’s central hollowness.100 The House approved it, and, on June 26, so did the Senate.101 When President Johnson vetoed this version, both the House and Senate voted to override.102 As the debates demonstrate, even within the most radical Congress following the Republicans’ massive victory of 1866, many members did not fully trust executive agencies with substantial powers, independent personnel, and a centralized orientation.103 Those who did had to pull in their horns to appease those who did not. Limited to a caretaker role, the Freedmen’s Bureau carried out its few functions until its expiration on June 30, 1872.104

There were lawyers on both sides of the Freedmen’s Bureau controversy. They dominated the debate in an even more forceful manner than they had the Morrill Act and Department of Agriculture debates. Some supported and some opposed the bureau. Above all, they agreed on the need for legal forms and formulas in the creation and operation of the bureau. They did not doom it—circumstance did that—but the limitation of their vision of law’s power to supervise what it sponsored in an ongoing fashion, and their commitment to an older, court-based idea of the function of law, laid the seeds for the bureau’s stunted growth. At the same time, Sumner’s trustees, Grimes and Doolittle’s concerns about court jurisdiction, and Richard Schenck’s attempt to “legalize,” derived from their professional backgrounds, gave them the comfort they needed to endorse a new bureaucracy with sweeping functions.

The debates on the Freedmen’s Bureau hinted and events would prove, therefore, that Congress could provide supervisory mechanisms if it wished to. They had completed their experiment in second state thinking. Now they would have to apply that thinking on a more permanent basis with the full participation of a partially reconstructed South.