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## DIGNITY CONTRADICTIONS: RECONSTRUCTION AS RESTORATION

TAJA-NIA Y. HENDERSON\*

### I. INTRODUCTION

In 1867, in Rutherford County, Tennessee, W.H. Tilford initiated a legal action against Stephen Tilford (a former slave) to have Stephen declared legally insane.<sup>1</sup> Records from the case indicate that Stephen had been “charged with lunacy.”<sup>2</sup> Writing about the case, J.K. Nelson, an agent with the federal Bureau of Refugees, Freedmen, and Abandoned Lands, commonly known as the Freedmen’s Bureau, noted that Stephen Tilford was neither “an idiot or lunatic or a man of unsound mind.”<sup>3</sup> To the contrary, Stephen Tilford was (and had been all his life) a deaf-mute: W.H. Tilford had, in effect, held out Stephen’s inability to speak (his physical disability) as proof of his alleged feeble-mindedness. Tilford’s strategy was successful. A Rutherford County jury found that Stephen was insane, and the court ordered him remanded into Tilford’s custody for the purpose of working on Tilford’s farm.<sup>4</sup>

Surviving Freedmen’s Bureau records indicate that, prior to emancipation, Stephen had been enslaved as the property of Tilford’s family; that the man had a reputation as “one of the best farm hands in Rutherford County”; and that, after emancipation, Stephen had stayed on with the family—”laboring hard” without pay—until late 1866, when he quit the farm to live with his own extended family.<sup>5</sup> It was this decision—to quit the farm and deprive the Tilfords of his labor—that catalyzed the sequence of events

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1. Reports of Outrages, Riots and Murders, Jan. 15, 1866–Aug. 12, 1868, Records of the Assistant Commissioner for the State of Tennessee, Bureau of Refugees, Freedmen, & Abandoned Lands, 1865–1869, *microformed on* M999, Roll 34 (National Archives Microfilm Publications), <http://www.freedmensbureau.com/tennessee/outrages/tennoutrages2.htm> [<https://perma.cc/NM98-J2A8>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*



resulting in Stephen being subjected to a court-ordered confiscation of his labor (for a period of one year). He was, in effect, sentenced by the Rutherford County Court to be the Tilfords' slave—two years after the passage of the constitutional amendment abolishing slavery.<sup>6</sup>

When the Freedmen's Bureau inquired whether Stephen would like to return to the Tilfords to work for wages, the deaf-mute man used his index finger to draw a slicing sign across his neck.<sup>7</sup> Employing a universally-understood signal, Stephen communicated that he'd rather "cut his [own] throat" than return to the dominion of his former owners.<sup>8</sup> Stephen's sign for suicide motivated the local Bureau field agent to become involved in his case. In contemporaneous reports of the incident, the agent expressed disgust at the efforts of the Tilford family to steal Stephen's labor without paying him a wage,<sup>9</sup> and considered whether the federal government should seek to use military force to free Stephen from the custody of the Tilfords. In large part due to the efforts of the local Bureau agent, Stephen was eventually released into the custody of his own family and allowed to quit the Tilfords for good.<sup>10</sup>

The saga of Stephen Tilford reminds us that the labor and wage theft that was central to the institution of American chattel slavery did not cease with emancipation. In its place, emerged a system of purported "free labor" which bound freedpeople to the soil, restricted their movement, and kept them indebted, all at the risk of extreme violence (whether administered by the state or private parties). This Essay considers the utility of Bernadette Atuahene's theory of dignity takings and dignity restoration in the context of American chattel slavery, emancipation, and Reconstruction. Here, I take up the challenge posed by Atuahene at the end of Chapter 1 to "explore whether the concept of dignity takings helps us to better understand" property atrocities in the United States, namely, the systematic dispossession of black property rights in labor under slavery, Reconstruction and Jim Crow. Using slavery's dismantling—specifically, emancipation and Reconstruction (including the ratification of the Reconstruction Amendments)—as a qualitative case study, this Essay considers whether (and if so, how) Reconstruction functioned to restore dignity to formerly enslaved persons. I begin with the premise that American chattel slavery easily fits Atuahene's theorization of dignity takings. According to Atuahene, "[a] dignity taking

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

occurs when a state directly or indirectly destroys or confiscates property rights from owners or occupiers and the intentional or unintentional outcome is dehumanization or infantilization.”<sup>11</sup> Concomitantly, dignity restoration “is a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency.”<sup>12</sup> The question I ask, however, is whether dignity takings and dignity restoration are clarifying lenses through which to consider the persistent harms of slavery and racialized subjugation. Using government policy in the immediate wake of the Civil War (specifically, the work of the Freedmen’s Bureau) as an example, I argue that remedial initiatives in the wake of racially-motivated property atrocities may function simultaneously as both dignity restoration and dignity extraction. The resultant “dignity contradiction” suggests that property deprivation (in this case, the expropriation of labor) may not bring “conceptual clarity”<sup>13</sup> to efforts to craft compensatory regimes for the harms attendant to an entrenched slave regime. It may even be the case, as Dirk Hartog argued in his comment on coverture, that “the language of dignity and of dignity takings stands in the way of the project of finding redress for those distinctive and continuing wrongs.”<sup>14</sup>

As a federal agency backed by the military might of the federal government, the Freedmen’s Bureau stood in the gap for those freedpeople, like Stephen Tilford, who had been subjected to the “forced illiteracy”<sup>15</sup> of the slave regime. Throughout the South, agents of the Bureau oversaw the resettlement of abandoned lands, investigated (and, in some cases, adjudicated) the civil and criminal complaints of freedmen and women, assisted with the reunification of black families, disbursed military bounties and pensions, negotiated labor agreements, and (as laid bare in the case of Stephen Tilford) acted as advocates both in, and outside of, court for the labor and property rights and bodily integrity of formerly enslaved persons. Bureau agents acted as intermediaries tying the fate of the freedpeople to an arm of the federal government. This disruption of wide-scale labor theft

11. Bernadette Atuahene, *Dignity Takings and Dignity Restoration: Creating a New Theoretical Framework for Understanding Involuntary Property Loss and the Remedies Required*, 41 LAW & SOC. INQUIRY 796, 817 (2016) [hereinafter Atuahene, *Dignity Takings and Dignity Restoration*]; see also Bernadette Atuahene, *Takings as a Sociolegal Concept: An Interdisciplinary Examination of Involuntary Property Loss*, 12 ANN. REV. L. & SOC. SCI. 171, 178 (2016).

12. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 11, at 818.

13. *Id.*

14. Hendrik Hartog, *Coverture and Dignity: A Comment*, 41 LAW & SOC. INQUIRY 833, 833 (2016).

15. CHRISTOPHER HAGER, WORD BY WORD: EMANCIPATION AND THE ACT OF WRITING 33 (2013).



and anti-black violence had clear dignity restoration intents and effects. As one author notes, “[i]n many cases the Freedmen’s Bureau offered the former slaves the first real protection ever allowed them before the law.”<sup>16</sup>

Simultaneously, Bureau personnel often acted against the attempts of freedpeople to exercise autonomy over their bodies or their labor. Bureau agents sided with planters, declined to investigate complaints of anti-black violence, withheld material support from defiant or unruly freedpeople, and encouraged (or more accurately, *coerced*) freedpeople to recommit their labor to the cultivation of cotton. The chronic inadequacy of Bureau resources in some jurisdictions meant that “the needs and wants of the freedmen” in those states invariably went unaddressed or ignored.<sup>17</sup> By tying freedpeople to the land, the Bureau limited mobility, depressed wages, enriched planters, and helped cement a permanent underclass or “subclass” of black agricultural workers in the region.<sup>18</sup> By these acts, the Freedmen’s Bureau presented a dignity contradiction—acting in its official government capacity to simultaneously perform both dignity extraction and dignity restoration.<sup>19</sup>

Part I of this Essay argues that chattel slavery was a dignity taking warranting restoration. Part II presents a historical sketch of the major elements of Reconstruction-era federal policy from 1865–1873, with special emphasis on the Freedmen’s Bureau. Part III argues that the Bureau had clear dignity restoration and dignity extraction properties. As the state’s interest in remedying the wage theft endemic to chattel slavery yielded to a policy of transforming formerly enslaved persons into disciplined wage workers in order to protect regional economic interests, the possibilities for redress for this particularized harm necessarily became constrained. The resulting dignity contradiction suggests that the conceptual framework of dignitary property may not be ideally suited for examining the harms attendant to chattel slavery and its legacy.

16. JOHN DAVID SMITH, *BLACK VOICES FROM RECONSTRUCTION, 1865–1877*, at 63 (1997).

17. MARTIN ABBOTT, *THE FREEDMEN’S BUREAU IN SOUTH CAROLINA, 1865–1872*, at 20–21 (1967); *see also id.* at 20 (“[T]here were several counties of [South Carolina] in which, a full year after the Bureau had begun to operate, the freedmen has never seen or felt its presence.”).

18. *Id.* at 76 (“No matter how hard they worked, during Reconstruction most blacks remained landless, poor, undereducated, and subject to white control.”).

19. As noted by Atuahene, “acts or institutions can be simultaneously dignity degrading and dignity enhancing.” Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 11, at 817.

## II. CHATTEL SLAVERY AS A DIGNITY TAKING

Before considering how the dismantling of American chattel slavery fits within Atuahene's theory of dignity restoration, it is necessary to clarify how chattel slavery itself effected a "taking."

### *A. Labor as Property*

Although governmental seizures of land and other real property form the target for the archetypal exercise of eminent domain, the takings clause of the Fifth Amendment is not limited to interests in land. Government appropriation of personal property is similarly subject to the Amendment's limitations. The U.S. Supreme Court reaffirmed this principle in 2015's *Horne v. Department of Agriculture*, noting that the state "has a categorical duty to pay just compensation when it takes your car, just as when it takes your home."<sup>20</sup> This principal also holds true for labor, as state and federal courts have consistently acknowledged.<sup>21</sup> Labor is property.

The philosopher most associated with the proprietary theory of labor is John Locke. In the *Second Treatise of Government*, Locke argued the centrality of labor to property acquisition. Since, according to Locke, labor was "the unquestionable property of the labourer,"<sup>22</sup> then whatever the laborer produced, so too, was the laborer's "unquestionable property." By Locke's reasoning, labor (the "work of his hands") did not merely belong to the laborer, but also belonged to him exclusively.<sup>23</sup> Among society's various groups, disadvantaged landless persons (those for whom "there is not then enough and as good land left"<sup>24</sup>) have a special interest in labor as property.<sup>25</sup> In the absence of land or capital, labor offers a property of last

20. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2422 (2015).

21. See *infra* notes 26–28 and accompanying text.

22. JOHN LOCKE, TWO TREATISES OF GOVERNMENT, SECOND TREATISE OF GOVERNMENT § 27 (C.B. Macpherson ed., 1980) (1690), <http://www.gutenberg.org/files/7370/7370-h/7370-h.htm> [<https://perma.cc/7P22-KUXM>].

23. *Id.* ("[E]very man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his."). Thomas Jefferson believed that the right to one's labor was among the natural rights of man. See, e.g., Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in 2 THE LIFE AND WRITINGS OF THOMAS JEFFERSON 292 (Samuel Eagle Forman ed., 1900) (referring to the right to "labor the earth" as "fundamental.>").

24. C. B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM 212 (1962) (cited in Francis A. Citera, *Vested Seniority Rights: A Conceptual Approach*, 36 U. MIAMI L. REV. 751, 759–60 n.50 (1982)).

25. LOCKE, *supra* note 22, § 27; see JOHN LOCKE, THE FIRST TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT § 42 (C. & J. Rivington 1824) (1691) ("Charity gives every Man a title to so much out of another's Plenty, as will keep him from extreme want, where he has no means to subsist otherwise . . .").



resort for the poor.<sup>26</sup> This premise—that labor is property—is widely accepted as a normative foundational principle by legislatures,<sup>27</sup> courts,<sup>28</sup> and scholars.<sup>29</sup>

### B. Chattel Slavery as a Dignity Taking

This inclusion of labor into the universe of property broadens norms regarding labor expropriation. If, then, labor is property, then the labor of slaves was also property. The forced extraction (or theft) of the labor of slaves, therefore, functioned as a property loss. As an uncompensated property loss, this extraction violated the constitution's Takings Clause.<sup>30</sup> Since the state collaborated in its expropriation, this confiscation demands state redress.<sup>31</sup>

26. *In re Boyce*, 75 P. 1, 2 (Nev. 1904) (“[L]abor, the poor man’s patrimony, the creator of wealth, and upon which all must depend for sustenance, is the highest species of property . . .”); *State v. Peters*, 25 Ohio N.P. (N.S.) 69, 73 (1924) (“Labor is property, and it may be and often is the only commodity that the workman has to sell.”).

27. In 1927, for example, California’s Penal Code was amended to include the extraction of labor “by any false or fraudulent representation or pretense” in the state’s definition of the crime of theft. CAL. PENAL CODE §484(a) (West 2001).

28. The courts have also maintained that labor is both constitutive of, and creates, property. *See, e.g., S. Bus Lines v. Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emp. of Am.*, 205 Miss. 354, 379 (1949) (“We are of the firm conviction that under the law Liberty includes the right to make and enforce contracts, because the right to make and enforce contracts is included in the right to acquire property. Labor is property.”); *Bayonne Textile Corp. v. Am. Fed. of Silk Workers*, 114 N.J. Eq. 307, 316 (Ch. 1933), *modified*, 116 N.J. Eq. 146 (1934) (“Labor is property; capital is property; both must be equally safeguarded.”); *Branson v. Indus. Workers of the World*, 30 Nev. 270, 361 (1908) (“The right to labor is property.”); *Mathews v. People*, 202 Ill. 389, 401 (1903) (“Labor is property.”); *W. & Atl. R. Co. v. Bishop*, 50 Ga. 465, 470 (1873) (“Labor is property . . .”); *Butler v. Perry*, 240 U.S. 328, 333 (1916) (“[F]or some purposes labor must be considered as property”); *Slaughter-House Cases*, 83 U.S. 36, 58 (1872) (Bradley, J., dissenting) (“Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and as such merits protection.”); *United States v. Thompson*, 647 F.3d 180, 186–87 (5th Cir. 2011) (concluding that, for the purposes of a criminal prosecution for extortion under the Hobbs Act, a person’s labor was property capable of being extorted); *Ritchie v. People*, 155 Ill. 98, 104 (1895) (“Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner.”).

29. *See John Acevedo, Dignity Takings in the Criminal Law of Seventeenth-Century England and the Massachusetts Bay Colony*, 92 CHI-KENT L. REV. 743 (2017); *Citera, supra* note 24, at 766 (“Labor is property, and as such merits protection.”); *Laws Regulating Hours of Labor of Minors and Women*, 17 YALE L.J. 536, 537 (1908) (“Labor is property . . .”).

30. *See Kaimipono David Wenger, Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191, 219 (2004) (noting that the confiscation of enslaved labor “resulted in a physical taking, that is, removal of effective title to property”).

31. Scholars of reparations disagree on whether this is a moral or legal duty. *Compare* David Lyons, *Corrective Justice, Equal Opportunity, and the Legacy of Slavery and Jim Crow*, 84 B.U. L. REV. 1375, 1386 (2004) (“[T]he federal government is morally accountable for its support of a deeply entrenched racial hierarchy and its failure to repair the consequences of slavery and Jim Crow.”), and Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81 (2004), with Ayesha Bell Hardaway, *The Breach of the Common Law Trust Relation-*

This duty to redress is heightened when the original holders of the property are enslaved persons deemed to be inferior “sub persons.”<sup>32</sup> Sub persons are both dehumanized and infantilized by, and within, the polity;<sup>33</sup> in the Kantian philosophical tradition, such persons are less (or not at all) deserving of ethical treatment. In the context of American chattel slavery, the loss of dignity occasioned by enslavement was catastrophic. As a dignity denial, this extraction served to further instantiate the legal, economic, and social subordination of people of native and African descent in the U.S.<sup>34</sup>

Property confiscation and theft that targets sub persons entails more than mere loss of property; dignity itself is impaired. As Atuahene argues, the resultant dignity taking “involves involuntary property loss accompanied by dehumanization or infantilization.”<sup>35</sup> As defined by Atuahene in her 2016 article, dignity takings require four elements: (1) direct or indirect execution by the state; (2) destruction or confiscation of property; (3) from owners or occupiers; (4) where the intended or unintended result is dehumanization or infantilization.<sup>36</sup>

The property loss inhering in chattel slavery directly implicates the authority and power of the state. As a system of domination, slavery places the labor (and by extension, the body) of the enslaved within the power of the enslaver.<sup>37</sup> In the U.S. context, positive law provided the scaffolding for this domination, namely by excluding enslaved men and women from the category of property rights claimants.<sup>38</sup> The state’s complicity in this sys-

*ship Between the United States and African Americans: A Substantive Right to Reparations*, 39 N.Y.U. REV. L. & SOC. CHANGE 525 (2015).

32. BERNADETTE ATUAHENE, WE WANT WHAT’S OURS: LEARNING FROM SOUTH AFRICA’S LAND RESTITUTION PROGRAM 3 (2014).

33. *Id.* at 12 (“[T]he dispossessions in South Africa were part of a larger strategy that dehumanized and infantilized blacks—they were dignity takings.”).

34. See CHARLES W. MILLS, THE RACIAL CONTRACT 11 (1997) (defining the “racial contract” as the universe of agreements between and among those considered “white” to subordinate, exploit, and deny opportunities to nonwhites).

35. Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 11, at 800.

36. ATUAHENE, *supra* note 32, at 26–34.

37. See generally ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH (1982).

38. See, e.g., *Sanders v. Devereux*, 25 Tex. Supp. 1, 11 (1860) (“The right of private property belongs, in this country, exclusively to freemen. The slave is denied this right as completely as he is the right of personal liberty. His person and his time being entirely the property of his master, whatever he may accumulate by his own labor, or may otherwise acquire, becomes immediately the property of his master . . . .”); *In re Bodine’s Will*, 34 Ky. 476, 477 (1836) (“Slaves are considered as property; the privilege of asserting rights, by judicial proceedings, is not, in general, conceded to them . . . . And therefore, the general rule is, and upon reasons of state, must be, that a slave can neither sue nor be sued.”); *Poydras v. Mourain*, 9 La. 492, 505 (1836) (“So far as regards the slaves, the power of the master is indeed absolute. The slave cannot resist, or be heard if he complain of the abuse of this power.”); *Matilda v. Crenshaw*, 12 Tenn. 299, 303 (1833) (“That the slave cannot sue the master is a general rule.”).



tem was material and critical.<sup>39</sup> In the U.S., federal, state and local governments owned, leased, and sold slaves.<sup>40</sup> Similarly, public law enforcement personnel from federal marshals to local sheriffs hunted, returned, and “correct[ed]” suspected fugitive slaves.<sup>41</sup> Put simply, the “government intervened in the master-slave relationship” with regularity.<sup>42</sup> As Kaimipono David Wenger argues, “[t]he express language of the Fugitive Slave Clause—that slaves from each state were held ‘under the Laws thereof’—underscores that slavery was a creature of law and regulation, imposed over a baseline of freedom for all persons.”<sup>43</sup> This direct involvement of every level of American government in chattel slavery renders *public* the institution’s harms, including the confiscation (theft) of labor.<sup>44</sup>

Moreover, American chattel slavery hinged upon this state-sanctioned systematic dehumanization of enslaved persons. As Saidiya Hartman points out, the violence and terror visited upon enslaved persons was both routine and extraordinary.<sup>45</sup> Slaveholders killed and maimed their human property with impunity.<sup>46</sup> This quotidian process of dehumanization and terrorism relied upon and reinforced the sub person status of the enslaved. This phenomenon was simultaneously both race-based and status-based, as both enslaved and free people of African descent fell vulnerable to its logic.

39. Brophy, *supra* note 31, at 121 (“The states established the legal framework that permitted the exploitation of African Americans. They established laws with the understanding that particular people would be enslaved, separated from their families, denied education—just about everything that can be done to destroy a person’s humanity was contemplated or mandated by the laws of the slave states.”).

40. See Wenger, *supra* note 30, at 220 (“Government actors conducted a large percentage of slave auctions, allowing neutral devices such as probate and the seizure of debtors’ assets to become part of the slave trade.”).

41. See Taja-Nia Y. Henderson, *Property, Penalty, and (Racial) Profiling*, 12 STAN. J. C.R. & C.L. 177, 179 (2016) (“As local law functionaries—constables, sheriffs, and jailors—systematized slave discipline, detention, rendition, and sale under the auspices of public authority, an administrative and legal regime emerged whereby putative slaveowners called upon the state to secure, return, ‘correct,’ and sell private property in persons.”).

42. PHILIP J. SCHWARZ, *SLAVE LAWS IN VIRGINIA* 11 (1996); see also Henderson, *supra* note 41, at 178 (2016) (“Slaveholders routinely called upon local law enforcement personnel to assist with maintaining ‘the most rigid discipline’ among slaves.”).

43. Wenger, *supra* note 30, at 220–21.

44. See David Lyons, *Reparations and Equal Opportunity*, 24 B.C. THIRD WORLD L.J. 177, 182 (2004) (arguing that slavery and Jim Crow “were in large part public, not private wrongs”).

45. See SAIDIYA V. HARTMAN, *SCENES OF SUBJECTION: TERROR, SLAVERY, AND SELF-MAKING IN NINETEENTH-CENTURY AMERICA* 4 (1997) (describing the “terror of the mundane and quotidian”).

46. Colonial Virginia and South Carolina, for example, enacted laws absolving owners from any criminal liability for killing or maiming a slave where the death was associated with discipline or “correction.” See, e.g., An Act for the Better Ordering of Slaves, No. 57 S.C. Stat. 343 (1690), reprinted in *THE STATUTES AT LARGE OF SOUTH CAROLINA* 343 (David J. McCord ed., 1840). Virginia similarly “excus[ed] slave killings caused accidentally while ‘correcting’ them.” Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and “Cruel and Unusual” Punishment*, 94 N.C. L. REV. 817, 835 (2016).

### III. SLAVERY'S DEMISE AND THE COMING OF RECONSTRUCTION

The preceding Part argues that the theft of labor intrinsic to the institution of chattel slavery in the U.S. satisfies Atuahene's theoretical framework for dignity takings. In this Section, I provide a brief timeline of federal policy towards the formerly enslaved in the years following emancipation. The efforts of the Reconstruction-era Congress to bestow legal personhood to the formerly enslaved—as articulated in the Thirteenth Amendment, successive Freedmen's Bureau bills, and the Civil Rights Act of 1866—had clear dignity restoration effects.

#### *A. The Thirteenth Amendment to the U.S. Constitution*

Ratified in December 1865,<sup>47</sup> the Thirteenth Amendment abolished slavery and involuntary servitude in the U.S., “except as a punishment for crime whereof the party shall have been duly convicted.”<sup>48</sup> The Amendment's sphere of protection extended (and extends), however, beyond human bondage. As tenBroek observed, the Amendment's framers entrusted Congress, specifically, with a “constitutional mandate to enforce . . . not just the liberty of blacks but the liberty of the whites as well and included not just freedom from personal bondage but protection in a wide range of natural and constitutional rights.”<sup>49</sup> Section 2 of the Amendment specifically “authorizes Congress to enforce that promise and create rights of belonging—rights that promote an inclusive vision of who belongs to the national community of the United States and facilitate equal membership in that community.”<sup>50</sup>

This anti-subordination ethos functions to bestow a baseline quantum of constitutional dignity upon the populace. In recognition of this function, the Amendment has been construed by the Supreme Court to ensure protection for all persons from the “badges and incidents of slavery.”<sup>51</sup> The twin concepts of inclusion and dignity are key to this guarantee: “[A victim] need only be suffering today under conditions that could reasonably be called symptoms of a slave society, inability to raise a family with dignity

47. Proclamation No. 52, William H. Seward, Secretary of State, 13 Stat. 774, 775 (Dec. 18, 1865).

48. U.S. CONST. art. XIII.

49. Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 183 (1951).

50. Rebecca E. Zeitlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 258 (2009).

51. The Civil Rights Cases, 109 U.S. 3, 20 (1883). See generally Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561 (2012).

caused by unemployment, poor schools and housing, and a lack of place in the body politic.”<sup>52</sup>

### *B. The Freedmen’s Bureau Acts*<sup>53</sup>

The first Freedmen’s Bureau Act, passed in March 1865, established the Bureau as an agency within the War Department, and authorized its operation for a single year.<sup>54</sup> The statute authorized the Secretary of War to “direct such issues of provisions, clothing, and fuel, as he may deem needful” for the temporary benefit of “destitute and suffering” freedpeople and refugees.<sup>55</sup> Property redistribution was written into the text of the first Freedmen’s Bureau Act: Section 4 of the statute authorized the Bureau commissioner to “set apart” for lease up to forty acres of abandoned and confiscated lands for “loyal refugees and freedmen.”<sup>56</sup>

A Second Freedmen’s Bureau Bill, which purported to extend the authorization for the Bureau beyond the single year provided for in the earlier bill, was vetoed by Andrew Johnson.<sup>57</sup> Congress overrode the president’s veto on July 16, 1866, thereby extending the agency’s work for an additional two years. This bill had included similar provisions for land redistribution; however, instead of planning to redistribute confiscated Confederate lands to the refugees and freedmen, this bill targeted only “unoccupied public lands.”<sup>58</sup>

The Second Freedmen’s Bureau Act included express language authorizing the Commissioner to “provide or cause to be erected suitable buildings for asylums and schools.”<sup>59</sup> The Freedmen’s Bureau bills also

52. Note, Jones v. Mayer: *The Thirteenth Amendment and the Federal Anti-Discrimination Law*, 69 COLUM. L. REV. 1019, 1026 (1969).

53. See generally BRUCE FROHNER, *THE AMERICAN NATION: PRIMARY SOURCES* (2008) (reproducing the Original Freedmen’s Bureau Bill, March 3, 1865; the Second Freedmen’s Bureau Bill, December 4, 1865; and the First Reconstruction Act, establishing military districts throughout former Confederacy, March 2, 1867).

54. Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. 507, 507 (1865) (“That there is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands . . .”). Congress clearly expected the Bureau’s to have a limited lifespan. In addition to its single year authorization, the legislation included no budget appropriation for the new agency. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877*, at 69 (1988).

55. Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. at 508.

56. See *id.*

57. An Act to Enlarge Powers of the Freedmen’s Bureau, S. 60, 39th Cong. (1866) (“That the act to establish a Bureau for the relief of Freedmen and Refugees . . . shall continue in force until otherwise provided by law . . .”); see FONER, *supra* note 54, at 247 (noting that Johnson ultimately vetoed the Freedmen’s Bureau Bill of 1866).

58. S. 60 §4.

59. *Id.*

provided that the rights enumerated therein (including the right to hold property, give evidence, and bear arms) could be enforced in specially-convened military courts (as opposed to local civil or criminal courts, which were believed to be hostile to enforcing any newly-bestowed “rights” upon the former slaves).

### *C. The Civil Rights Act of 1866*

The Civil Rights Act of 1866 declared that people born in the U.S. and not subject to any foreign power were entitled to be citizens, without regard to race, color, or (critically) previous condition of slavery or servitude.<sup>60</sup> The Act also proclaimed that any citizen, as so defined, had the same rights as white citizens to make and enforce contracts, sue and be sued, give evidence in court, and inherit, purchase, lease, sell, hold, and convey real and personal property.<sup>61</sup> Additionally, the Act guaranteed to all citizens the “full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and . . . like punishment, pains, and penalties . . .”<sup>62</sup> Persons found to have deprived citizens of these civil rights were to be “deemed guilty of a misdemeanor” crime.<sup>63</sup>

At least with respect to its provisions regarding citizenship, the 1866 Civil Rights Act paralleled and presaged Section 1 of the Fourteenth Amendment. New York Congressman Henry Raymond praised the Act as “one of the most important bills ever presented to this House for its action.” President Andrew Johnson found the bill so broad that he vetoed it (although Congress would later override the President’s veto, firing the opening salvo in the conflicts between the President and Congress and ushering in the period of broad-based remedial and punitive legislative enactments that came to be known as Radical Republicanism).

## IV. THE FREEDMEN’S BUREAU AND DIGNITY CONTRADICTIONS

With field agents posted throughout the South, bringing the spectre of federal authority to the most remote rural areas, the Freedmen’s Bureau arguably had a greater impact on the day-to-day lived experiences of formerly enslaved persons than either the Thirteenth Amendment or the Civil Rights Act of 1866. The Bureau’s primary responsibility was “promoting

60. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1982, 1987–88, 1991–92 (2016)).

61. *Id.*

62. *Id.*

63. *Id.*

the welfare of the freedmen” through food and cloth relief rations,<sup>64</sup> transportation subsidies, mediation and arbitration of wage disputes between freedpeople and planters, and overseeing the establishment of schools.<sup>65</sup> The Bureau provided support for the reunification of forcibly displaced black families in the region,<sup>66</sup> and also adjudicated civil and criminal complaints of freedmen (against both black and white defendants).<sup>67</sup> In this work, the Bureau was central to the bestowing of dignity upon the formerly enslaved. In some areas, Bureau agents were even the first public officials to announce the coming of freedom.<sup>68</sup> As a former slave from Burke County, Georgia recounted:

When freedom was declared, I went down to Augusta to de Freedman’s Bureau to see if ‘twas true, we was free . . . De man got up and stated to de people: ‘You all is just as free as I am. You ain’t got no mistis [*sic*] and no master. Work when you want.’<sup>69</sup>

In 1870, in his *New Era* newspaper, Frederick Douglass editorialized the Bureau as “the first friend of the freedmen, as their champion and defender under military rule, and after the re-establishment of civil authority, as their advocate.”<sup>70</sup>

#### A. “The First Friend of the Freedmen”<sup>71</sup>: The Bureau’s Anti-Whipping Campaign

64. Between 1865 and 1869, the Bureau issued a total of 20,135,930 rations to freedmen and refugees throughout the South. See PAUL SKEELS PEIRCE, *THE FREEDMEN’S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION* 98 (1904); see also HOWARD A. WHITE, *THE FREEDMEN’S BUREAU IN LOUISIANA* 66 (1970) (noting that, in Louisiana, “[r]ations consisted of pork or beef, flour or bread, corn meal, beans, peas, hominy, sugar, vinegar, candles, soap, salt, and pepper”).

65. MARTIN ABBOTT, *THE FREEDMEN’S BUREAU IN SOUTH CAROLINA, 1865–1872*, at 23–24 (1967).

66. *Id.* at 50 (noting that, for South Carolina, “perhaps four thousand freedmen and possibly five hundred whites received free transportation from the Bureau to enable them to return to their original homes or to go to localities where they could find work”); see also GEORGE R. BENTLEY, *A HISTORY OF THE FREEDMEN’S BUREAU* 86 (1970) (“Sometimes the Bureau’s officials were able to reunite husbands and wives who had been separated as a result of slave sales, or in the hurried wartime migrations, and they succeeded in restoring some lost children to their parents.”).

67. See ABBOTT, *supra* note 65, at 24 (detailing the “endless stream of [freedmen’s] complaints to be heard, investigated, and acted upon” in South Carolina). See generally BENTLEY, *supra* note 66, at 152–68 (detailing the efforts of the Bureau to secure civil and criminal justice for freedpeople).

68. Ruby Lorraine Radford, *Slavery*, in FEDERAL WRITERS’ PROJECT, *SLAVE NARRATIVES: A FOLK HISTORY OF SLAVERY IN THE UNITED STATES FROM INTERVIEWS WITH FORMER SLAVES* 309, 347 (1941) (“The Freedmen’s Bureau in Augusta gave out the news officially to the negroes . . .”).

69. SMITH, *supra* note 16, at 26–27 (citation omitted).

70. *Review of the Work of the Freemen’s [sic] Bureau*, *NEW ERA* (Washington, D.C.), Jan. 20, 1870, reprinted in SMITH, *supra* note 16, at 63.

71. *Id.*

In its role as “first friend” and as the mediator and arbitrator of labor disputes, the Bureau earned the ire of the planter class. In testimony before Congress, black politician Oscar J. Dunn testified that because of its work, “[t]he Freedman’s Bureau is a great eyesore to the planters; they do not like it at all.”<sup>72</sup> The planters’ critique was attributable in part to the Bureau’s efforts to “end a lingering vestige of slavery—the whipping of blacks.”<sup>73</sup> In the minds of planters, the Bureau’s anti-whipping campaign interfered with their ability to “correct” or “discipline” the black workforce.<sup>74</sup> Prior to emancipation, slaveholders had relied upon the spectacle of targeted brutality against individual slaves to instill terror and exact discipline among other slaves.<sup>75</sup> The Bureau’s interference with this mode of discipline, therefore, compromised planters’ dominance and authority and threatened the “well being” of the racial order.<sup>76</sup> When confronted by Bureau agents over the beating of a black girl in 1866, for example, A.J. White of Covington, Kentucky admitted to the beating, “saying that any person he employed would be corrected when doing wrong.”<sup>77</sup> Another Kentucky planter insisted to Bureau agents that a woman on his plantation “wants to be a lady and I can do nothing with her without whipping her.”<sup>78</sup> The woman’s refusal to submit to the planter’s authority posed a problem larger than simply recalcitrance; in his estimation, whipping her was “necessary for the well being of his plantation.”<sup>79</sup>

In an effort to counteract planter resistance to the Bureau’s “free labor” modes of labor discipline, agents throughout the former Confederacy referred criminal charges to local courts in an attempt to eradicate the whip

72. BACKGROUND FOR RADICAL RECONSTRUCTION: TESTIMONY TAKEN FROM THE HEARINGS OF THE JOINT COMMITTEE ON RECONSTRUCTION, THE SELECT COMMITTEE ON THE MEMPHIS RIOTS AND MASSACRES, AND THE SELECT COMMITTEE ON THE NEW ORLEANS RIOTS, 1866 AND 1867, at 4 (Hans L. Trefousse ed., 1970).

73. GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865–1940: LYNCHINGS, MOB RULE, AND “LEGAL LYNCHINGS” 24 (1990).

74. SMITH, *supra* note 16, at 66 (“White farmers and planters complained that the bureau’s rule against whites whipping blacks denied them an effective means to discipline their workers . . .”).

75. See, e.g., IRA BERLIN ET AL., REMEMBERING SLAVERY: AFRICAN AMERICANS TALK ABOUT THEIR PERSONAL EXPERIENCES OF SLAVERY AND EMANCIPATION 140, 294 (1996) (transcribing the testimony of Jordan Johnson wherein he recounted how his owners forced husbands “to stay dere” and watch their wives being whipped, “not darin’ even look like dey didn’t like it” (dialect in original)); Henderson, *supra* note 41, at 178 (observing how, in 1819, President James Monroe sought a public flogging for a recalcitrant slave on the grounds that such spectacles “served as an ‘example’ to others” (citation omitted)).

76. WRIGHT, *supra* note 73, at 24.

77. *Id.*

78. *Id.* at 25.

79. *Id.*

from southern labor relations.<sup>80</sup> In Louisville, for example, Bureau agents went so far as to arrest white employers accused of using the whip against their employees.<sup>81</sup> Louisiana Assistant Commissioner Thomas Conway ordered agents to “[b]e inflexible in your defense of the Freedmen . . . . Arrest, try and punish old slave holders who commit violence upon the Freedmen.”<sup>82</sup>

### B. Education, Voting, and Dignity

Central to the Bureau’s work was the establishment of schools for freed children and adults. As Mark Graber observes, the framers of the Second Freedmen’s Bureau Bill identified education as one of the “central conditions of freedom and full citizenship” for the formerly enslaved.<sup>83</sup> In collaboration with Northern benevolent societies, the Bureau leveraged private and public capital for the construction, staffing, and maintenance of primary, secondary, and post-secondary schools for freedpeople throughout the region.<sup>84</sup> In 1867, the Bureau Commissioner reported to Congress that the agency’s efforts to promote and secure an educational infrastructure for freedpeople had reached even “the remotest counties of each of the confederate states.”<sup>85</sup>

With the passage of the Reconstruction Act of March 2, 1867—and the extension of the franchise to black men in the South—Bureau agents

80. See, e.g., MARY FARMER-KAISER, *FREEDWOMEN AND THE FREEDMEN’S BUREAU: RACE, GENDER, AND PUBLIC POLICY IN THE AGE OF EMANCIPATION* 78–79 (2010) (collecting reports of Bureau agents referring cases involving planter violence against freedwomen in Virginia, Mississippi, Texas, and Georgia).

81. See *id.* (describing how “[i]n June 1867, [Bureau agents] arrested five whites for beating blacks and lodged them in the military prison”). The outcomes of such cases are unknown.

82. Conway to L.S. Butler, July 17, 1865, in WHITE, *supra* note 64, at 135.

83. Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1364 (2016) (citing CONG. GLOBE, 39th Cong., 1st Sess. 630 (1866) (statement of Rep. Hubbard) (“Another object is to give them an opportunity to learn to read . . . . They ought not to be left to perish by the wayside in poverty . . . .”)).

84. See Paul A. Cimbala, *Making Good Yankees: The Freedmen’s Bureau and Education in Reconstruction Georgia, 1865–1870*, reprinted in THE FREEDMEN’S BUREAU AND BLACK FREEDOM 58–59 (Donald G. Nieman ed., 1994) (describing sentiments of Gen. Davis Tillson, fist assistant commissioner for Bureau in Georgia, who outlined the Bureau’s policy in the state as “to be the medium of distributing the charity of benevolent individuals and societies”). For example, thirteen colleges and universities were founded by the Bureau between 1866 and 1869. See W.E.B. DUBOIS, *THE COLLEGE-BRED NEGRO* 12 (1900) (noting “[t]his group of schools was established directly after the war by Missionary and Freedmen’s Aid Societies under the protection and for the most part under the direct patronage of the Freedmen’s Bureau”).

85. *Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, House Exec. Docs., 40th Cong., 2d Sess., Vol. 2, Part 1*, in WILLIAM H. BURKS, *THE FREEDMEN’S BUREAU, POLITICS, AND STABILITY OPERATIONS DURING RECONSTRUCTION IN THE SOUTH* 68 n.31 (M.M.A.S., U.S. Army Command & Gen. Staff Coll. 2009).

also served as voter registrars.<sup>86</sup> In June 1867, Louisiana Bureau commissioner General Joseph Mower pressed agents “to make every effort for the instruction of the freedmen in order that they may vote intelligently.”<sup>87</sup> These efforts threatened white political dominance in the state by organizing and protecting ballot access for the formerly enslaved.<sup>88</sup> The agency’s facilitation of black political participation thus had clear dignity bestowing properties.

### C. *The Bureau as Dignity Extraction*

In its dual roles as organizer of black labor and “mediator” of labor disputes, the Bureau pressured black agricultural workers to accept year-long contracts. As Mary Farmer-Kaiser describes, the Bureau deployed vagrancy laws to “induce” former slaves into labor contracts:

Thus bureau labor policies ordered, first, that all freedpeople be urged to find work and make contracts and, second that those who rejected labor be considered vagrants, fined, imprisoned, and “hired out” to employers until they understood the virtue of honest toil.<sup>89</sup>

Bureau-approved labor contracts often provided that laborers were to be paid at the end of the contract term and tied compensation to the productivity of the crop, thereby limiting mobility and bolstering planters’ authority over workers’ lives.<sup>90</sup>

When freedmen and freedwomen resisted Bureau efforts to bind them to the soil (and their former owners), Bureau agents castigated them for idleness. John William De Forest, an agent in Greenville, South Carolina, complained in his memoir that “myriads of women who once earned their own living now have aspirations to be like white ladies [and] instead of using the hoe, pass the days in dawdling over their trivial housework, or

86. See SMITH, *supra* note 16, at 100 (“Throughout the South, agents of the Freedmen’s Bureau registered black voters.”).

87. WHITE, *supra* note 64, at 27 n.46 (1970).

88. *Id.* at 30 (“The New Orleans *Picayune* complained that the Bureau’s political indoctrination of freedmen was ‘an element of partisan strength . . . wielded entirely from the North, and a perpetual source of political weakness’ that rendered the white people politically impotent.”).

89. See SMITH, *supra* note 16, at 81.

90. *Id.* at 66 (“[Black farm laborers] complained that this restricted their freedom of movement and limited their right to take advantage of new economic opportunities.”); see LEON LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 284–85, 408–28 (1979) (detailing the coercive measures taken by Bureau agents in an effort to control black labor).



gossiping with their neighbors.”<sup>91</sup> In Louisiana, the Bureau “arrested and returned freedmen who had run away in default of their obligations.”<sup>92</sup>

Beyond the market distortions occasioned by its insistence upon year-long contracts, Bureau agents were not unbiased arbiters of labor fairness. In jurisdictions where local whites were employed as Bureau agents, freedmen suffered. In Georgia, for example, “many [native white agents] clearly allied themselves with their white neighbors.”<sup>93</sup> In 1867, for example, the editor of the New Orleans *Tribune*—a publication that one author called “the voice of blacks in the lower Mississippi Valley”<sup>94</sup>—claimed that Bureau agents were “prejudiced” and unlikely to mete out “impartial justice” to the formerly enslaved:

The laborer on the plantations is, to a very great extent, in the clutches of his employer. Should he be abused or wronged what are the means of redress? Practically he has none. If he goes to the Bureau’s agent, he finds there an officer who rides with his employer, who dines with him, and who drinks champaign [*sic*] with him.<sup>95</sup>

Beyond accusations of bias, Bureau agents were also directly implicated in “outrages” against black workers. In Georgia, a Bureau agent hung a woman “by the thumbs for two hours and a half upon the representation [of her employer].”<sup>96</sup>

The Bureau’s role in land policy concerning the freedpeople was similarly problematic. Although the Bureau also had primary administrative authority over federal land redistribution policy after 1865, less than one percent of former Confederate lands were ever vested in the hands of the agency.<sup>97</sup> The Bureau’s inability to provide a secure path to landownership exacerbated regional economic disruptions and left the former slaves with “few alternatives to working for white landowners.”<sup>98</sup>

91. FARMER-KAISER, *supra* note 80, at 83 (citation omitted).

92. WHITE, *supra* note 64, at 122.

93. DONALD G. NIEMAN, *TO SET THE LAW IN MOTION: THE FREEDMEN’S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868*, at 27 (1979).

94. SMITH, *supra* note 16, at 99.

95. *Justice for All*, *TRIBUNE* (New Orleans, La.), Oct. 31, 1867, at 1, *reprinted in* SMITH, *supra* note 16, at 74–75.

96. FARMER-KAISER, *supra* note 80, at 80. Reporting on a Georgia freedmen’s convention in 1866, a Bureau official described that, at the hands of Bureau agents, “both men and women have been tied up by the thumbs for five hours.” NIEMAN, *supra* note 93, at 27 (citation omitted).

97. PAUL SKEELS PEIRCE, *THE FREEDMEN’S BUREAU: A CHAPTER IN THE HISTORY OF RECONSTRUCTION 129–30* (1904).

98. Donald G. Nieman, *Introduction to THE FREEDMEN’S BUREAU AND BLACK FREEDOM*, *supra* note 85, at ix.

Crafted in response to the “problem” of enslaved men and women seeking freedom behind Union lines, the Confiscation Act of 1861 declared all property “used for insurrectionary purposes” to be “the lawful subject of prize and capture” subject to seizure and conversion by the federal government.<sup>99</sup> Notwithstanding the statute’s breadth, President Abraham Lincoln declined to pursue large-scale land confiscations, thereby hindering future efforts to redistribute such property to the freedpeople.<sup>100</sup> The Second Confiscation Act of 1862 similarly provided that confiscated lands “be condemned as enemies’ property and become the property of the United States,” and included explicit grants of freedom to those enslaved men and women either belonging to specified classes of persons-in-rebellion,<sup>101</sup> captured by Union forces,<sup>102</sup> or those fleeing to or living in areas under the control of Union forces.<sup>103</sup> By its text, the Second Confiscation Act provided the statutory basis for large-scale seizures and redistribution of land to the freedpeople, and throughout the South, land trickled into the possession of former slaves. Federal military forces also executed on tax debts in regions under Union control. In the South Carolina Sea Islands, for example, “the federal courts seized 76,775 acres of land for non-payment of the direct tax,” and subsequently made the land available for sale to black heads of households.<sup>104</sup> In 1862, General Benjamin Butler “established a system for leasing plantations and paying wages to former slaves” in Louisiana under the auspices of a sub-agency of the Department of the Gulf.<sup>105</sup> In 1864, General Ulysses S. Grant organized a communitarian community of black farmers on lands formerly owned by Jefferson Davis and his brother.<sup>106</sup> Instead of ushering in a radical redistribution of land to the region’s freedpeople, however, these “rehearsals for reconstruction” were frustrated as “military necessity began to siphon away black farm workers.”<sup>107</sup> Even General Sherman’s Special Field Order No. 15—which purported to “reserve[] and set apart” land in the Georgia and South Carolina Sea Islands

99. 12 Stat. 319 (1861).

100. See CLAUDE F. OUBRE, *FORTY ACRES AND A MULE: THE FREEDMEN’S BUREAU AND BLACK LAND OWNERSHIP* 2 (1978) (“Lincoln interpreted the [first Confiscation Act] conservatively.”).

101. Confiscation Acts, ch. 195, § 5, 12 Stat. 589 (1862).

102. *Id.* § 9.

103. *Id.*

104. See OUBRE, *supra* note 100, at 8–11.

105. See *id.* at 13 n.28 (“In the Department of the Gulf the military agency assigned to provide for the freedmen was initially called the Freedmen’s Bureau (not to be confused with the Bureau of Refugees, Freedmen, and Abandoned Lands, which was not created until March, 1865).”).

106. See *id.* at 16–17.

107. Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 *YALE L.J.* 1916, 1935, 1935 n.68 (citing the settlement of former slaves on lands in the South Carolina Sea Islands)

“for the settlement of the negroes”<sup>108</sup>—failed to secure permanent property rights to the 40,000 resettled freedpeople: Five months later, Confederate owners of those lands, with presidential pardons in hand, returned to their estates to assert rights to which the Bureau acquiesced.<sup>109</sup> Freedpeople recognized this expropriation of their possessory rights to land in favor of their former enslavers as a dignitary harm:

We were promised homesteads by the government. If it does not carry out the promises its agents made to us . . . we are left in a more unpleasant condition than our former . . . You will see this is not the condition of really free men. You ask us to forgive the landowners of our island . . . The man who tied me to a tree and gave me 39 lashes; who stripped and flogged my mother & sister & who will not let me stay in his empty hut except I will do his planting & be satisfied with his price & who combines with others to keep away land from me, well knowing I would not have anything to do with him if I had land of my own—that man, I cannot well forgive.<sup>110</sup>

Land ownership was central to the former slaves’ conception of freedom.<sup>111</sup>

As one author described the Bureau’s conundrum surrounding land, “land distribution, however, because of jurisdictional disputes and divided authority, proved to be the most perplexing of the [Bureau’s] economic problems.”<sup>112</sup> Ultimately, as a result, the Bureau was ill-equipped to effec-

108. William Tecumseh Sherman, Special Field Order No. 15: “Forty Acres and a Mule” (Jan. 16, 1865), *reprinted in* WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE 365, 365–66 (Roy L. Brooks ed., 1999).

109. See OUBRE, *supra* note 95, at 49 (noting how, in September 1865, having received presidential pardons, “the former owners of land within the Sherman reservation . . . demanded that their lands be restored to them”); Special Field Orders No. 3 (Feb. 14, 1866), *in* S. EXEC. DOC. NO. 39-6, at 53-54 (1867); Report of R.K. Scott to Maj. Gen. O. O. Howard, Commissioner (Nov. 1, 1866), *in* S. EXEC. DOC. NO. 39-6, at 114. Similar restoration efforts occurred throughout the former Confederacy. See OUBRE, *supra* note 95, at 24–25 (describing the restoration of land to Confederate owners in South Carolina, Georgia, and Virginia).

110. Registers and Letters Received, Selected Series of Records, Record Group 105, Bureau of Refugees, Freedmen & Abandoned Lands, *microformed on* M752, Roll 19, 839–41 (National Archives), *reprinted in* OUBRE, *supra* note 95, at 53.

111. See also Paul A. Cimbala, *A Black Colony in Dougherty County: The Freedmen’s Bureau and the Failure of Reconstruction in Southwest Georgia*, 4 J. SW. GA. HIST. 72, 73 (1986) (“As Capt. A. P. Ketchum, a bureau officer and long-time sea island veteran, concluded at the end of Reconstruction’s first summer, ‘the negro regards the ownership of land as a privilege that ought to be co-existent with his freedom.’” (citation omitted)).

112. OUBRE, *supra* note 100, at 23; see also *id.* at 67 (“Some bureau officers helped the freedmen in every way possible to secure land immediately, while others, who were equally concerned about the welfare of the freedmen, preferred to establish them as workers until they had sufficient financial resources to become successful landowners.”).



tuate large-scale land redistribution.<sup>113</sup> As one historian of the agency observed:

[T]he amount of land in the control of the bureau was relatively small. Only two-tenths of one per cent of the land in the insurrectionary states was ever held by the bureau. It would have been impossible to give even one acre to each family of freedmen.<sup>114</sup>

President Johnson's amnesty and restoration policies further frustrated the ability of the Bureau to permanently transform the freedpeople into a landholding class.<sup>115</sup> This entrenched landlessness stymied black self-determination in the region and limited the economic mobility of those who had previously been promised "dignity" and "citizenship."<sup>116</sup>

## V. CONCLUSION

The Bureau was not the only arm of the federal government engaged in this dignitary give-and-take. Occupying federal military forces also worked to bestow and extract dignity and property from the formerly enslaved. As one Roanoke freedman noted in an 1865 petition to President Lincoln: "[T]hose head men have done every thing to us that our masters have done except by [*sic*] and sell us and now they are trying to starve the women and children to death cutting off they ration . . . ."<sup>117</sup> The same petition further claimed that, in addition to "trying to starve" the freed people, military officials were also conscripting black children into labor without their parents' consent: "[They] send them to Newbern to work to pay for they ration without they parent consint . . . . Some of these little ones . . . . Wasen oer 12 years old."<sup>118</sup> A petition by Louisiana freedmen protesting the mobilization of black labor by the Department of the Gulf under the leadership of General Nathaniel P. Banks similarly contended that Banks's labor system "does not pratically [*sic*] differ from slavery,

113. The Bureau did have some success with resettling freedpeople on condemned lands. In Beaufort County, South Carolina, under the leadership of black Bureau agent Martin R. Delaney, freedpeople purchased "the entire county of Beaufort, with the exception of the plantations bought by northerners at tax sales during the war." OUBRE, *supra* note 100 at 69–70.

114. PEIRCE, *supra* note 97, at 129–30 (1904).

115. *Id.*; see also OUBRE, *supra* note 100, at 35, 35–45. (describing how President Johnson "gradually forced restoration of much of the property").

116. See NIEMAN, *supra* note 93 at 221–22 ("Because the Bureau had lacked the ability to provide freedmen with land, blacks had no choice but to work as agricultural laborers, and consequently, they remained highly vulnerable to control by white landowners.").

117. Letter from the Colored Men of Roanoke Island, N.C. (Mar. 9, 1865), in FREE AT LAST: A DOCUMENTARY HISTORY OF SLAVERY, FREEDOM, AND THE CIVIL WAR 222, 224 (Ira Berlin & Barbara J. Fields eds., 1992).

118. *Id.* at 225–26 (dialect in original).

except by the interdiction from selling and whipping to death, the laborers.”<sup>119</sup>

Incompatible, conflicting, and politically unpopular policy goals compounded to frustrate the efforts of the Freedmen’s Bureau to guarantee black political rights while limiting the agency’s ability to permanently instantiate the “badges and incidents” of freedom upon the formerly enslaved. In the wake of an emancipation motivated by war, and a reeling regional economy still desperate for cheap labor, the promise of the Freedman’s Bureau to restore proprietary or political dignity to the freedpeople was limited.<sup>120</sup> Historian Donald G. Nieman asks: “Whose Bureau was it, then, the freedmen’s or the planters?”<sup>121</sup>

The availability and scope of dignity restoration is necessarily constrained by forces both within and external to a polity. As Atuahene argues, the remedial reparations inhering in dignity restoration require, at base, political will. When such will is absent, or when the dispossessed remain a political or economic underclass, compensation alone has limited capacity to restore stolen dignity. Instead of the “sliding scale” of dignity restoration contemplated by Alfred Brophy in his article on the 1921 Tulsa Race Riots,<sup>122</sup> this Essay suggests that justice-as-restoration may be more of a *moving target*. The contradictions inhering in U.S. federal policy toward blacks in the immediate wake of the Civil War and emancipation lay bare the limits of dignitary property restoration to effectuate freedom and citizenship.<sup>123</sup> Atuahene’s work invites us to continue to consider seriously the conditions, circumstances, and criteria for reparative remedies in the face of such seemingly-intractable (and persistent) harms.

119. Resolution (Mar. 21, 1865,) in *FREE AT LAST*, *supra* note 117 at 3.

120. ABBOTT, *supra* note 17, at 22 (“The Bureau had planted and tilled and harvested, though its planting had occasionally been thoughtless, its tilling sometimes careless, and its harvesting almost always uncertain.”); NIEMAN, *supra* note 93, at 222 (“In the face of massive resistance from white southerners, a temporary and poorly staffed agency which possessed only limited authority could not perform the herculean task of providing blacks with a firm basis for freedom.”).

121. NIEMAN, *supra* note 84, at x.

122. Alfred L. Brophy, *When More than Property Is Lost: The Dignity Losses and Restoration of the Tulsa Riot of 1921*, 41 *LAW & SOC. INQUIRY* 824, 831 (2016).

123. See Atuahene, *Dignity Takings and Dignity Restoration*, *supra* note 11, at 802 (“Full dignity restoration requires that disposed people receive adequate material compensation as well as uniquely fashioned remedies for the dehumanization, infantilization, and community destruction experienced.”).