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To Set the Law in Motion: The Freedmen's Bureau and the Legal Rights of Blacks, 1865-1868

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TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865-1868. By *Donald G. Nieman*. Millwood, N.Y.: KTO Press. 1979. Pp. xvii, 250. \$19.95.

Unpopular laws rarely work. Nowhere has this proven more true than in the history of civil rights. Over ten years after the upheavals of the 1960s — a quarter century after *Brown v. Board of Education*¹ — a disproportionate number of blacks still live in segregated neighborhoods, attend inadequate schools, and work in menial jobs.² The “sorry history of discrimination”³ continues despite all that the Government and the courts have done to arrest its progress. A lesson for the present may lie in this history: without popular support, legal remedies can achieve only partial success.⁴

Professor Nieman's⁵ monograph explores an early chapter in this sorry history, the unsuccessful first attempt by the federal government to secure legal rights for blacks. One month before the end of the Civil War, Congress established the Bureau of Refugees, Freedmen, and Abandoned Lands. Southern blacks sorely needed the Bureau's protection. Southern laws made them little more than slaves. Self-styled “regulators” assaulted them at will. Every southern state foreclosed effective judicial relief by prohibiting them from testifying against whites. Other, less direct restrictions also prevented them from asserting their rights. Lawyers' fees, court costs, and statutory bonds all required money that blacks, like many whites, simply did not have. Judges did little to encourage black plaintiffs. On one apparently typical occasion, a southern magistrate summarily dismissed a black's complaint after declaring in open court that he had not been elected “to attend to a damn lot of niggers” (pp. 128, 201). If blacks were to enjoy any rights at all beyond simple freedom *de*

1. 347 U.S. 483 (1954).

2. *Cf.* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 395 (1978) (Marshall, J., dissenting and concurring) (“Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.”).

3. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396 (1978) (Marshall, J., dissenting and concurring).

4. Busing to achieve school desegregation provides a case in point. *Compare* *Keyes v. School Dist. No. 1*, 413 U.S. 189, 238, 243-44 (1973) (Powell, J., concurring) (busing an occasionally useful remedy), *with* *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 483 (1979) (Powell, J., dissenting) (busing now a useless remedy because “[t]he process of resegregation, stimulated by resentment against judicial coercion and concern as to the effect of court supervision of education, will follow today's decisions as surely as it has in other cities subjected to similar sweeping [busing] decrees”).

5. Professor Nieman is Assistant Professor of History at Kansas State University.

jure, support had to come from the federal government. To provide this support, the Bureau established courts of limited jurisdiction, alerted military commanders of civil rights violations, and conducted labor negotiations between planters and their former slaves.⁶

Professor Nieman's "impressionistic analysis" (p. 31 n.25) indicates that while the Bureau's courts did have many small successes, they generally "fell far short of providing . . . [blacks with] adequate legal protection" (p. 11). Even in the halcyon days of the summer of 1865, the Bureau's courts could not hope to find and try all those who deprived blacks of their rights (pp. 11-24). And they ceased operation within a year because President Johnson wanted to end martial law as soon as possible (p. 19).

In its remaining two years, the Bureau unsuccessfully sought to protect blacks from the maladministration of southern laws. But if local courts and officials refused to act, or acted unfairly, the Bureau could do nothing (pp. 135, 203, 208-09). A district military commander could wholly undermine an agent's authority by failing to support him in disputes with local officials (pp. 207-09). By the end of 1866, when the military had become especially short-staffed as a result of the post-war demobilization, southern courts and law enforcement officers could safely act as though the Bureau did not exist (pp. 202-09).

The Bureau enjoyed somewhat greater success in mediating labor disputes between planters and the freedmen, but it did so largely because it established a contract-labor system that was slavery's identical twin (pp. 189-90, 221). Contracts negotiated under the Bureau's auspices bound blacks for an entire year to labor for white plantation owners under the "supervision of overseers and drivers" according to rules "usual and common for . . . slaves heretofore" (p. 171). Professor Nieman concludes that the Bureau's agents were too few in the field (p. 133), too weakly supported in Washington,⁷ and too strongly opposed by white southerners to have given blacks any real help in dealing with the planters. In this recipe for failure, the paternalistic, even condescending attitude of Bureau officials was only a minor ingredient (p. ix). Professor Nieman's point here is a conventional one: without the direct aid of a larger army than Con-

6. Although at first unclear, the Bureau's responsibilities eventually included: (1) giving food and medical aid to refugees; (2) distributing abandoned land to homeless blacks; (3) aiding education; (4) conducting labor negotiations between planters and their former slaves; and (5) establishing courts of limited jurisdiction and other procedures to help blacks. See J. FRANKLIN, *RECONSTRUCTION: AFTER THE CIVIL WAR* 36-38 (1961).

7. Professor Nieman notes that Andrew Johnson firmly opposed granting to blacks anything that even resembled equal rights. Pp. 18-20, 115.

gress was willing to provide, no Bureau could have secured equal rights for blacks in the Reconstruction South.⁸

Although Professor Nieman supports these conclusions with extensive archival research, *To Set the Law in Motion* remains painful to read. Both the prose and the year-by-year, state-by-state organization of most of the book distract the reader. Combined with elliptical summaries of some of the more interesting points, the mass of seemingly irrelevant detail inherent in such an artificial arrangement prevents the reader from assessing the book's importance. Part of the problem is that Nieman has not identified his audience. Does he write for the general reader, the specialist in Reconstruction history, or the legal historian? For the first, the book provides insufficient general background; for the second, the book fails to indicate what relation it bears to the historiography of the Reconstruction. This period has elsewhere been called "the bloody battleground of American historians."⁹ Its historiography is important. A narrowly drawn monograph such as Professor Nieman's should ordinarily place its insights in perspective by identifying which of the principal findings are new and how they alter previously accepted doctrine.

The legal historian, however, may provide his own perspective. Though the book has little to offer the general reader, scholars interested in the early history of civil rights will find in Professor Nieman's book a fascinating case study in the failure of purely legal remedies.¹⁰

8. See, e.g., J. FRANKLIN, *supra* note 6, at 32-39.

9. Boorstin, *Preface* to J. FRANKLIN, *supra* note 6, at vii.

10. Three reviews of *To Set the Law in Motion* have appeared. See Gillette, Book Review, 46 J.S. HIST. 444 (1980); Perman, Book Review, 67 J. AM. HIST. 419 (1980); Westwood, Book Review, 80 COLUM. L. REV. 204 (1980).