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## AFFIRMATIVE ACTION AND THE LEGISLATIVE HISTORY OF THE FOURTEENTH AMENDMENT\*

*Eric Schnapper\*\**

FOR over a decade the Supreme Court has grappled inconclusively with constitutional challenges to voluntary race-conscious affirmative action.<sup>1</sup> During this period no single opinion has garnered as many as five votes, and the shifting pluralities have never been able to agree upon the relevant legal standards. The members of the Court have drawn disparate conclusions from language in decisions predating affirmative action and addressing different issues. The divergent approaches often appear to reflect little more than the philosophical or social views of their various authors. With one exception,<sup>2</sup> this entire body of case law is devoid of any reference to the original intent of the framers of the fourteenth amendment.<sup>3</sup>

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\* The historical material in this article is revised from the author's Brief for the NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae at 10-53, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Portions of this argument are reflected in Justice Marshall's separate opinion in that case. 438 U.S. at 397-98.

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<sup>1</sup> See *Minnick v. California Dep't of Corrections*, 452 U.S. 105 (1981); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

<sup>2</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 397-98 (1978) (Marshall, J., dissenting). In contrast to the Court's failure to rely on legislative history in construing the fourteenth amendment, the Court gives great weight to the legislative histories of Title VI and Title VII of the Civil Rights Act of 1964 in determining the permissibility of affirmative action under those statutes. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 201-207 (1979); *id.* at 230-254 (Rehnquist, J., dissenting); *Bakke*, 438 U.S. at 285-87 (opinion of Powell, J.); *id.* at 328-340 (Brennan, White, Marshall, and Blackmun, JJ., concurring and dissenting); *id.* at 413-417 (Stevens, J., concurring and dissenting).

<sup>3</sup> U.S. Const. amend. XIV. Section 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This article contends that the legislative history of the fourteenth amendment is not only relevant to but dispositive of the legal dispute over the constitutional standards applicable to race-conscious affirmative action plans. From the closing days of the Civil War until the end of civilian Reconstruction some five years later, Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves,<sup>4</sup> and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious Reconstruction programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection. This history strongly suggests that the framers of the amendment could not have intended it generally to prohibit affirmative action for blacks or other disadvantaged groups.

Part I of this article details the legislative history of eight Reconstruction measures establishing programs limited, in varying degrees, to blacks. The most important of these measures is the 1866 Freedmen's Bureau Act,<sup>5</sup> which provoked the most detailed arguments for and against race-conscious programs, and which Congress considered and approved at the same time as the fourteenth amendment. Part II discusses the debates in Congress on the fourteenth amendment, and the relationship of those debates to the race-conscious programs of the Reconstruction era. Part III examines the constitutionality of present-day affirmative action in light of this legislative history.

#### I. RECONSTRUCTION LEGISLATION PROVIDING SPECIAL ASSISTANCE TO BLACKS

The following sections review in detail the legislative history of the various race-conscious Reconstruction measures, first discussing the establishment and subsequent development of the Freed-

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<sup>4</sup> A provision of the Freedmen's Bureau Act of 1866, however, confirmed the title of certain blacks to land granted to them by General Sherman. Act of July 16, 1866, ch. 200, 14 Stat. 173, 174-76. Sherman's grant extended only to slaves who were freed as a result of the Civil War. See *infra* note 106.

<sup>5</sup> Act of July 16, 1866, ch. 200, 14 Stat. 173. See *infra* notes 49-118 and accompanying text.

men's Bureau, the agency charged with administering these programs. The record of Congress' consideration of Freedmen's Bureau legislation contains arguments for and against benign racial classifications that are surprisingly similar to the arguments made in today's affirmative action debate. Second, two postwar hunger relief programs are compared to shed light on the circumstances in which Congress believed racial classifications proper. The legislative history of these measures suggests that although Congress readily approved other race-conscious programs, it rejected racial limitations in programs providing basic necessities to those in need. Finally, Congress' consideration of measures addressing the payment of black servicemen and the education of freedmen is discussed to highlight further the Reconstruction-era debate on race-conscious legislation.

#### A. *The 1864 Freedmen's Bureau Bill*

The first major Reconstruction legislation<sup>6</sup> to aid blacks was initially proposed in 1863 by Congressman Thomas Eliot,<sup>7</sup> later chairman of the House Committee on Freedmen. The bill called for the creation of a new agency, named the Bureau of Emancipation in early drafts and later the Bureau of Freedmen's Affairs, to provide special assistance and protection for blacks. The Bureau's responsibilities were to include overseeing the enforcement of all laws "in any way concerning freedmen," aiding the freedmen in fashioning and enforcing their leases and labor contracts, participating in litigation "as next friends of the freedmen," and renting to them the "abandoned" Confederate real estate that came into the possession

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<sup>6</sup> Even prior to 1864 Congress had awarded federal charters to organizations established for the purpose of "supporting . . . aged or indigent and destitute colored women and children," Act of Feb. 14, 1863, ch. 33, 12 Stat. 650; to serve as a bank for "persons heretofore held in slavery in the United States, or their descendants," Act of March 3, 1865, ch. 92, 13 Stat. 510; and "to educate and improve the moral and intellectual condition of . . . the colored youth of the nation." Act of March 3, 1863, ch. 103, 12 Stat. 796. Congress assisted these organizations by providing funds and land grants. Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 651 (land grants); Act of July 28, 1866, ch. 296, 14 Stat. 310, 317 (funds). Similar assistance continued after the end of Reconstruction. See, e.g., Act of March 3, 1875, ch. 130, 18 Stat. 371, 387 (funds for the National Association for the Relief of the Colored Women and Children of the District of Columbia); Act of March 3, 1875, ch. 201, 18 Stat. 521 (land granted to "The Free Youngmen's Benevolent Association" and "The Colored Union Benevolent Association").

<sup>7</sup> Cong. Globe, 38th Cong., 1st Sess. 19 (1863).

of the United States.<sup>8</sup> The beneficiaries of this plan were defined in the House bill as "persons of African descent,"<sup>9</sup> and in the Senate version as "such persons as have once been slaves."<sup>10</sup> The Senate rejected a draft that would have limited coverage to "such persons as have become free since the beginning of the present war,"<sup>11</sup> the bill's sponsor arguing that blacks might require its "help and protection" even if freed decades before.<sup>12</sup> The legislation applied, however, only to blacks in "the rebel States."<sup>13</sup>

Legislators advanced a variety of arguments in opposition to the bill. The Democrats contended that such social legislation was traditionally the exclusive concern of the states and therefore should be left to them.<sup>14</sup> Opponents framed in several different ways their objection that the bill benefitted only blacks. A minority of the House Select Committee on Emancipation protested that under the bill taxes paid by whites would assist only blacks:

A proposition to establish a bureau of Irishmen's affairs, a bureau of Dutchmen's affairs, or one for the affairs of those of Caucasian descent generally, who are incapable of properly managing or taking care of their own interests by reason of a neglected or deficient education, would, in the opinion of your committee, be looked upon as the vagary of a diseased brain. . . . Why the freedmen of African descent should become these marked objects of special legislation, to the detriment of the unfortunate whites, your

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<sup>8</sup> Cong. Globe, 38th Cong., 1st Sess. 2798 (1864) (Senate version of the bill). The confiscation of "abandoned" lands was highly controversial. Theoretically, property was not abandoned unless the owner had left it to fight for the Confederacy; but in practice Union authorities occupied and took possession of all vacant lands until the owners' "loyalty" was proved. If the plan to rent such lands to freedmen had become law, the resulting breakup of plantations and redistribution of property might have revolutionized society in the South. President Johnson, however, insisted on restoring the property of southerners who proved their "loyalty" to the Union, undermining the whole system the Bureau was designed to implement. See G. Bentley, *A History of the Freedmen's Bureau* 89-102 (1955).

<sup>9</sup> Cong. Globe, 38th Cong., 1st Sess. 2801 (1864).

<sup>10</sup> *Id.* at 2798.

<sup>11</sup> *Id.* This language was proposed by the Senate committee, and was amended on the floor at the urging of the bill's Senate sponsor, Senator Sumner. *Id.* at 2800-01.

<sup>12</sup> *Id.* at 2973 (statement of Sen. Sumner).

<sup>13</sup> *Id.* at 2798.

<sup>14</sup> *Id.* at 760 (statement of Rep. Kalbfleisch) ("[the states] are themselves, as distinct political societies, capable of managing their own affairs and governing their own people . . ."); *id.* app. at 54 (statement of Rep. Knapp) ("If there is any power clearly and exclusively within the province of the several states, it is that to control and direct the social relations of their inhabitants.").

committee fails to comprehend. . . . The propriety of incurring an expenditure of money for the sole benefit of the freedmen, and laying a tax upon the labor of the poor and, perhaps, less favored white men to defray it, is very questionable . . . .<sup>15</sup>

The minority also criticized the provisions on abandoned lands for excluding whites: "Your committee cannot conceive of any reason why this vast domain, paid for by the blood of white men, should be set apart for the sole benefit of the freedmen of African descent, to the exclusion of all others . . . ." <sup>16</sup> Congressman Knapp, one of the Committee minority, later voiced the same objection in opposing other provisions of the bill:

If there is any duty on the part of the Government to support these persons who have been rendered destitute by the operation of this war, I ask why not support all the bruised and maimed men, the thousands and tens of thousands of widows, and the still larger number of orphans left without the protection of a father? . . . If this bill is to be put upon the ground of charity, I ask that charity shall begin at home. . . . I shall claim my right to decide who shall become the recipients of so magnificent a provision, and with every sympathy of my nature in favor of those of my own race.<sup>17</sup>

As the hypothetical tone of this statement suggests, Knapp did not actually favor extending the benefits of the bill to whites. He and the other Democrats did not want to enact a comprehensive social welfare scheme, but relied on this argument to strengthen their objection to the racial distinctions drawn by the bill. Indeed, Congressman Kalbfleisch opposed the Freedmen's Bureau bill precisely because it might have led to comprehensive federal social legislation for both whites and blacks.<sup>18</sup> Senate opponents, on the

<sup>15</sup> H.R. Rep. No. 2, 38th Cong., 1st Sess. 2-4 (1864).

<sup>16</sup> *Id.* at 3. Whether the bill in fact prohibited leases to whites was uncertain. See Cong. Globe, 38th Cong., 1st Sess. 775 (1864).

<sup>17</sup> Cong. Globe, 38th Cong., 1st Sess. app. at 54 (1864) (statement of Rep. Knapp).

<sup>18</sup> Kalbfleisch asked:

If Congress possesses the power to provide in this manner for these emancipated slaves, where, let me ask, is the power to end? Is it confined to freedmen of African descent, or can Congress legislate to provide as well for the unfortunate whites and the remnant of colored people to be found in the free States? If so, it requires but little sagacity to foretell what results might be caused in consequence of allowing this bill to become the entering wedge to a system of legislation which could not be other than deplorable in its effects upon our social condition.

*Id.* at 761; see also *id.* at 763 (statement of Rep. Brooks) ("Do not abandon this beautiful

other hand, did not focus specifically on the exclusion of whites from the proposed programs, but criticized what they saw as a general Republican policy of preferential treatment for blacks.<sup>19</sup>

Proponents emphasized that the bill was needed to overcome the effects of past mistreatment of blacks. Senator Sumner quoted Secretary of War Stanton's recommendation for the bill: "We need a freedmen's bureau, not because these people are negroes, but because they are men who have been for generations despoiled of their rights."<sup>20</sup> Congressman Eliot emphasized that assistance was necessary to help blacks become self-supporting:

After a life of servitude, inherited from slave ancestors stolen from their homes and subjected by force to the control of their masters, these freedmen . . . have this right, which will not be denied by any theorist of any party; that is to say, the right to earn among us their own subsistence. To that end this legislation is required.<sup>21</sup>

Eliot acknowledged that the bill might use taxes raised from whites to aid blacks, but urged that helping blacks to become self-sufficient was less costly than maintaining them indefinitely on public assistance:

Is it the purpose of these gentlemen [opposing the bill] . . . that our Government shall maintain these freedmen without system and at unlimited and indefinite cost, furnishing rations and hospi-

theory of States, and convert this government into a consolidation and centralization, solely for the money-making purposes of this bill.").

<sup>19</sup> See, e.g., *id.* at 2787 (statement of Sen. Powell) ("We have legislated a great deal for the negro, and I think we ought to give a day or two for the white man."); *id.* at 2801 (statement of Sen. Richardson) (discrimination in favor of blacks "has characterized the legislation of Congress and all the acts of the President and his Cabinet for the past three years"); *id.* at 2933 (statement of Sen. Saulsbury) ("Scarcely a single day since the commencement of this Congress has passed that the African race has not occupied a considerable portion of the attention of the Senate, much more, I apprehend, than the white race."); *id.* at 3336 (statement of Sen. Hicks) ("no regard seems to be paid now to any other than the colored race.").

<sup>20</sup> *Id.* at 2800. Congressman Kelley argued:

They have not owned themselves. Marriage has been a rite denied them. They were not permitted to identify themselves or their children by the use of family names. History, science, and literature have been sealed books to them; nay, it has been a felony to teach them to read the word of God! . . . Let us, then, by the provisions of this bill, secure these things to them, and they will prove their fitness for liberty.

*Id.* at 774 (1864) (statement of Rep. Kelley).

<sup>21</sup> *Id.* at 572 (statement of Rep. Eliot). See also *id.* at 2799 (statement of Sen. Sumner) ("Somebody must take them by the hand; not to support them, but simply to help them to that work which will support them.").

tal supplies and clothing and keep them in camps under military rule?

. . . .  
 [This bill] will enable the Government to help into active, educated, and useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering to themselves, and with heavy and needless loss to us.<sup>22</sup>

Proponents of the legislation argued in addition that constitutional authority to provide such assistance for blacks was analogous to that already exercised for the benefit of Indians.<sup>23</sup>

The House and Senate passed essentially identical versions of the Freedman's Bureau bill.<sup>24</sup> The House, however, wished to place the Bureau in the Department of War, while the Senate preferred the Department of the Treasury.<sup>25</sup> This difference ultimately proved fatal to the bill. The conference committee, unable to agree on the Bureau's location, instead reported to the next session of Congress a bill establishing an independent Department of Freedmen and Abandoned Lands.<sup>26</sup> The conference proposal was widely criticized as being a new bill altogether, rather than merely a compromise of the House and Senate versions.<sup>27</sup> Despite this objection the House passed the conference version,<sup>28</sup> but the Senate rejected the new proposal and requested another conference.<sup>29</sup> The Civil War was virtually over by this time, and the need for some federal aid was particularly urgent. Congress therefore turned from the complex legislation it had been considering for over a year to a

<sup>22</sup> Id. at 572-73 (statement of Rep. Eliot).

<sup>23</sup> The Supreme Court has unanimously affirmed the constitutionality of preferential treatment for Indians. See *Morton v. Mancari*, 417 U.S. 535, 551-55 (1974). Opponents of the Freedmen's Bureau legislation, however, vigorously disputed the analogy. See, e.g., Cong. Globe, 38th Cong., 1st Sess. 3346 (1864) (statement of Sen. Hendricks) ("There are many reasons why Congress may legislate in respect to the Indians which do not apply to a measure like this. The Indians occupy towards this Government a very peculiar position. They were in possession of the public domain; they had what the Government recognized as a possessory right . . .").

<sup>24</sup> The House vote was 69 to 67. Cong. Globe, 38th Cong., 1st Sess. 895 (1864) (March 1, 1864). The Senate vote was 21 to 9. Id. at 3350 (June 28, 1864).

<sup>25</sup> G. Bentley, *supra* note 8, at 39-43.

<sup>26</sup> Cong. Globe, 38th Cong., 2d Sess. 563-64, 766-67 (1865).

<sup>27</sup> Id. at 689 (statement of Rep. Washburne); id. at 691 (statement of Rep. Schenck); id. at 785 (statement of Sen. Davis); id. at 958 (statement of Sen. Hendricks); id. (statement of Sen. Grimes).

<sup>28</sup> Id. at 694. The vote was 64-62, the same two-vote margin as on the original bill.

<sup>29</sup> Id. at 990. The vote was 24-14 to reject the bill.

simpler measure for a Freedmen's Bureau of more limited authority and with a less controversial location.

### B. *The 1865 Freedmen's Bureau Act*

While the conference version of the 1864 Freedmen's Bureau bill was still being debated, Congressman Schenck urged the House to accept instead legislation providing more limited relief for blacks and including assistance for white refugees.<sup>30</sup> Although the House agreed to the conference report, it also passed Schenck's bill shortly thereafter without debate.<sup>31</sup> Following the Senate's rejection of the first conference proposal, another conference was convened on the original 1864 bill with Schenck among the House conferees.<sup>32</sup> This conference reported out a substitute proposal creating a Bureau of Refugees, Freedmen and Abandoned Lands, to be located within the War Department,<sup>33</sup> that would operate until one year after the end of hostilities. The House and Senate adopted this conference report without significant debate, and President Lincoln signed it into law on March 3, 1865.<sup>34</sup>

The 1865 Act contained three substantive provisions. First, the Secretary of War was authorized to furnish "provisions, clothing, and fuel" for "destitute and suffering refugees and freedmen."<sup>35</sup> Second, the statute authorized the Commissioner of the Bureau to lease, and ultimately to sell, up to forty acres of abandoned land to any refugee or freedman. Third, the Bureau was invested with "the control of all subjects relating to refugees and freedmen." Although the statute did not explicitly mention all the powers enumerated in

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<sup>30</sup> Id. at 566. During the debates on the 1864 bill Schenck and others argued for including white refugees because they faced many of the same problems of poverty and local hostility that affected freedmen. Id. at 691 (statement of Rep. Schenck); id. at 960 (statement of Sen. Sprague); id. at 962 (statement of Sen. Henderson); id. at 984 (statement of Sen. Hale); id. at 985 (statement of Sen. Lane).

<sup>31</sup> Id. at 908. The House agreed to the conference report on February 9, 1865, and passed the Schenck bill on February 18.

<sup>32</sup> Id. at 1004.

<sup>33</sup> Id. at 1182, 4037.

<sup>34</sup> Act of March 3, 1865, ch. 90, 13 Stat. 507, 508.

<sup>35</sup> The statute was limited to freedmen or refugees "from the rebel states." Id. at 507. Historians of this period have not regarded the inclusion of white refugees as a significant impetus in the adoption of the Act. See, e.g., P. Pierce, *The Freedmen's Bureau* 42-45 (1904).

the 1864 bill,<sup>36</sup> its language was broad enough to incorporate them; also, the 1865 Act did not require that freedmen and refugees be treated in the same manner. Once in operation the Bureau undertook all the remedial activity contemplated by the earlier bill and generally provided that assistance to blacks alone.<sup>37</sup>

In December of 1865 General Howard, the Commissioner of the Freedmen's Bureau, submitted to Congress a report describing the activities of the Bureau under the new statute.<sup>38</sup> The report revealed that in practice most of the Bureau's programs applied only to freedmen. Freedmen were the only beneficiaries of programs such as education,<sup>39</sup> labor regulation,<sup>40</sup> Bureau farms, land distribution, adjustments of real estate disputes,<sup>41</sup> supervision of the civil and criminal justice systems through the freedmen's courts,<sup>42</sup> registration of marriages,<sup>43</sup> and aid to orphans.<sup>44</sup> Both freedmen and refugees received medical assistance, but not in equal numbers: as of October 30, 1865, there were 6,645 freedmen under treatment, but only 238 refugees.<sup>45</sup> Moreover, freedmen received about three quarters of all rations distributed. Only in the area of transportation were the benefits to freedmen and refugees approximately equal, but this represented less than one percent of the Bureau's budget and was a function that Howard's report described as "nearly ceased."<sup>46</sup> Finally, General Howard, in urging Congress to improve the educational opportunities available to the poor,<sup>47</sup>

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<sup>36</sup> See text accompanying *supra* note 8.

<sup>37</sup> See text accompanying *infra* notes 39-48.

<sup>38</sup> H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. (1865).

<sup>39</sup> *Id.* at 2, 3, 12, 13.

<sup>40</sup> *Id.* at 2, 12.

<sup>41</sup> *Id.* at 4, 7-12.

<sup>42</sup> *Id.* at 22.

<sup>43</sup> *Id.* at 23.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 20-21.

<sup>46</sup> *Id.* at 14, 17. The regulations issued by Assistant Commissioners in the various states paralleled the racial distinctions in Howard's report. Regulations dealing with education, contracts, labor conditions, orphans, or courts referred almost exclusively to freedmen, whereas regulations pertaining to rations, medicine, and transportation referred to both freedmen and refugees. H.R. Exec. Doc. No. 70, 39th Cong., 1st Sess. (1865).

<sup>47</sup> Howard observed:

Education is absolutely essential to the freedmen to fit them for their new duties and responsibilities . . . Yet I believe the majority of the white people to be utterly opposed to educating the negroes. The opposition is so great that the teachers, though they may be the purest of Christian people, are nevertheless visited, publicly

presented recommendations focusing almost entirely on the needs of freedmen.<sup>48</sup>

### C. *The 1866 Freedmen's Bureau Act*

After consulting at length with General Howard,<sup>49</sup> Senator Trumbull introduced a new Freedmen's Bureau bill, S. 60,<sup>50</sup> as a companion to the Civil Rights Act of 1866.<sup>51</sup> S. 60 proposed to continue the operations of the Bureau "until otherwise provided by law," and to extend the Bureau's jurisdiction to refugees and freedmen "in all parts of the United States."<sup>52</sup> The bill contemplated an extensive administrative apparatus, with agents, if necessary, in every county. The bill authorized Congress to appropriate funds for the purchase of school buildings for refugees and freedmen. It also empowered the President to reserve up to three million acres of "good" public land, to be rented and ultimately sold to freedmen and refugees in parcels not exceeding forty acres. Blacks occupying certain lands south of Savannah were assured possession for another three years and the Commissioner was authorized to provide them with other property thereafter. The bill prohibited discrimination against freedmen or refugees in the administration of the criminal or civil law in terms similar to the 1866 Civil Rights Act, except that violations were to be tried before agents of the Bureau under rules and regulations issued by the War Department.<sup>53</sup>

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and privately, with undisguised marks of odium.

H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 33 (1865). Howard urged that sites and buildings be provided for schools, and that they "not be exclusively for freedmen; for any aid given to educate the numerous poor white children of the south will be most important, and conducive to the object our government has in view; I mean the harmony, the elevation, and the prosperity of our people." *Id.* at 34. Congress did not accept this suggestion. The Senate limited its version of the 1866 Freedmen's Bureau Act to children of "refugees and freedmen," and the law ultimately adopted provided educational assistance to freedmen alone. Act of July 16, 1866, ch. 200, 14 Stat. 173, 176; see text accompanying *infra* note 105.

<sup>48</sup> H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 32-35 (1865).

<sup>49</sup> 2 O. Howard, *Autobiography*, 280-81 (1907).

<sup>50</sup> The bill in the form ultimately adopted by Congress, but vetoed by the President, is reprinted in E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 72-74 (1871).

<sup>51</sup> Civil Rights Act of 1866, ch. 31, 14 Stat. 27. The provisions of the 1866 Civil Rights Act are now incorporated in 42 U.S.C. §§ 1981 and 1982.

<sup>52</sup> E. McPherson, *supra* note 50, at 73.

<sup>53</sup> *Id.* at 72-74.

Objections to the 1866 bill were similar to those advanced earlier, but the arguments against special treatment for blacks were more fully developed. Although S. 60 made no significant racial distinctions on its face, opponents and supporters generally viewed it as largely, if not exclusively, for the assistance of freedmen. Congressmen Taylor and Ritter, opposing the bill, contended that there were no longer any refugees for the Bureau to assist. Taylor explained that "the great change wrought by the termination of the war . . . leaves the name of refugee without a meaning" and therefore that S. 60 was "solely and entirely for the freedmen."<sup>54</sup> Similarly, Representative Chanler reviewed the Bureau's report<sup>55</sup> in detail to demonstrate the paucity of assistance to refugees: "This present bill is to secure the protection of government to the blacks exclusively, notwithstanding the apparent liberality of the measure to all colors and classes. . . . General Howard's report establishes the fact that the present bureau gave most of its aid exclusively to the negro freedmen."<sup>56</sup>

Most opponents of the 1866 bill complained, in the words of Senator Willey, that it made "a distinction on account of color between the two races."<sup>57</sup> Congressman Taylor most forcefully expressed this argument, in language that bears an uncanny resemblance to modern objections to affirmative action programs:

This, sir, is what I call class legislation—legislation for a particular class of the blacks to the exclusion of all whites . . . .

Such partial legislation, Mr. Speaker, cannot be lasting; it seems to me to be in opposition to the plain spirit pervading nearly every section of the Constitution that congressional legislation should in

<sup>54</sup> Cong. Globe, 39th Cong., 1st Sess. 544 (1866) (statement of Rep. Taylor); see also *id.* at 634 (statement of Rep. Ritter).

<sup>55</sup> See *supra* notes 38-48 and accompanying text.

<sup>56</sup> Cong. Globe, 39th Cong., 1st Sess. app. at 78 (1866) (statement of Rep. Chanler). Proponents of the bill did not seriously contest that its scope was as Taylor, Ritter, and Chanler suggested, but grounded their arguments on the special needs of blacks. See *infra* notes 76-87 and accompanying text. Congressman Eliot, the House sponsor, referred only to freedmen in describing the bill, and mentioned the coverage of refugees only at the urging of another supporter. Cong. Globe, 39th Cong., 1st Sess. 513-16 (1866) (statements of Reps. Smith and Eliot).

<sup>57</sup> *Id.* at 397 (statement of Sen. Willey); see also *id.* at 342 (statement of Sen. Cowan) ("such a discrimination on the part of the Government . . . is fatal to the claims on the part of the advocates of negro suffrage and negro equality."); *id.* at 544 (statement of Rep. Taylor) ("this act discriminates and favors one class at the expense of another . . ."); *id.* app. at 82 (statement of Rep. Chanler).

its operation affect all alike.

No special and discriminating legislation that I am aware of has yet in this Republic stood the test of time, nor do I believe that it ought or will; and I warn the gentlemen in their zeal to elevate and ameliorate the condition of the freedmen not to allow this bill to pass regardless of the great principle, equality before the law, about which so much has been said during the past four years.

. . . .

It is said that it is a characteristic of zealots and fanatics to carry things to extremes. Many persons in our community have been proclaiming equality before the law so long, taking their text from the institution of slavery, that now there is an opportunity to establish so desirable a principle in our Government, that perhaps it would be well to stop and consider whether or not by passing this bill in its present shape we shall not overleap the mark and land on the other side, and before we are aware of it, not have the freedmen equal before the law, but superior.<sup>58</sup>

Similarly, Senator McDougall, who believed in the superiority of the white race, objected that "[t]his bill undertakes to make the negro in some respects their superior . . . and gives them favors the poor white boy in the North cannot get."<sup>59</sup>

Congressmen Marshall and Ritter contended the bill would result in two separate governments, "one government for one race and another for another."<sup>60</sup> Several members of Congress renewed the objection advanced without success in 1864 that the bill would result in whites being taxed to assist blacks.<sup>61</sup> Representative Ritter asked, "Will the white people who have to support the Government ever get done paying taxes to support the negroes?"<sup>62</sup> Others argued that the bill would actually harm blacks either by increasing their dependence<sup>63</sup> or by provoking white resentment.<sup>64</sup> A num-

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<sup>58</sup> Id. at 544 (statement of Rep. Taylor).

<sup>59</sup> Id. at 401 (statement of Sen. MacDougall).

<sup>60</sup> Id. at 627 (statement of Rep. Marshall); see also id. at 634 (statement of Rep. Ritter) ("it is, in other words, a government within a Government . . . it is not made for the white people of these United States, but for the colored people . . .").

<sup>61</sup> See supra note 15 and accompanying text.

<sup>62</sup> Id. at 635 (statement of Rep. Ritter); see also id. at 362 (statement of Sen. Saulsbury) ("hundreds and thousands of the negro race have been supported out of the Treasury of the United States, and you and I and the white people of this country are taxed to pay that expense."); id. app. at 83 (statement of Rep. Chanler).

<sup>63</sup> Id. at 401 (statement of Sen. McDougall).

<sup>64</sup> Id. app. at 69-70 (statement of Rep. Rousseau) ("You raise a spirit of antagonism be-

ber of speakers thought the measure a device "to practice injustice and oppression upon the white people of the late slave-holding States for the benefit of the free negroes. . . ." <sup>65</sup>

Opponents singled out various sections of the 1866 Freedmen's Bureau bill for special criticism. Senator Saulsbury objected in particular to the lands provision, complaining that "[n]o land is to be provided for the poor white men of this country, not even poor land; but when it comes to the negro race three million acres must be set apart, and it must be 'good land' at that." <sup>66</sup> Senator Hendricks was less concerned about setting aside lands in southern states, but found it "very objectionable" to reserve such property for blacks in the midwest where "white settlers are most crowding at this time." <sup>67</sup>

Critics of the bill also focused on the Bureau's legal machinery. Senator Guthrie complained that the litigation Bureau agents were authorized to adjudicate was solely for the protection of the freedmen: "All the suits to be instituted under this bill are to be those in which justice shall be administered in favor of the blacks; and there is not a solitary provision in it relative to suits in cases where the blacks do wrong to the whites." <sup>68</sup> The Bureau's educational programs were again criticized for excluding whites. Congressman Rousseau cited the example of several schools in Charleston that were established with the assistance of the Bureau for the education of colored children, while federal authorities forbade the opening of all-white public schools. <sup>69</sup> In addition, Senator Johnson

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tween the black race and the white race in our country, and the law-abiding will be powerless to control it.").

<sup>65</sup> Id. at 402 (statement of Sen. Davis); see also id. app. at 78 (statement of Rep. Chanler).

<sup>66</sup> Id. at 362 (statement of Sen. Saulsbury).

<sup>67</sup> Id. at 372 (statement of Sen. Hendricks).

<sup>68</sup> Id. at 336 (statement of Sen. Guthrie). See also id. at 342 (statement of Sen. Cowan) (the creation of the Freedmen's Bureau "derives from the fact that we occupy a belligerent attitude toward the States lately in rebellion, and not because we have authority by municipal enactments to carry our tribunals there and interfere in their internal police regulations.").

<sup>69</sup> Rousseau asserted:

Mr. Speaker, when I was a boy, and in common with all other Kentucky boys was brought in company with negroes, we used to talk, as to any project, about having "a white man's chance." It seems to me now that a man may be very happy if he can get "a negro's chance." Here are four schoolhouses taken possession of, and unless they mix up white children with black, the white children can have no chance in these schools for instruction. And so it is wherever this Freedmen's Bureau operates.

Id. app. at 71 (statement of Rep. Rousseau).

urged:

If there is an authority in the Constitution to provide for the black citizen, it cannot be because he is black; it must be because he is a citizen; and that reason being equally applicable to the white man as to the black man, it would follow that we have the authority to clothe and educate and provide for all citizens of the United States who may need education and providing for.<sup>70</sup>

The legislation before Congress, however, made no provision for educating white children, other than refugees, even on an integrated basis.

Opponents of S. 60 also claimed that various white groups were as entitled to assistance as were blacks. Senator Hendricks emphasized the plight of the defeated white supporters of the Confederacy,<sup>71</sup> while Senator Stewart focused on the families of fallen Union soldiers.<sup>72</sup> Congressman Marshall argued that aid should be given instead to loyal white southerners whose property the Union army had seized or used. Congress had earlier rejected claims by loyal whites, insisting that the federal government lacked the funds necessary to provide compensation. Marshall observed that "[t]hey happen, unfortunately, to be white men and white soldiers, and they may starve and die from want . . . but when money is wanted to feed and educate the negro I do not hear any complaints of the hardness of the times or of the scarcity of money."<sup>73</sup> Senator Davis, although opposing any federal social welfare program, argued that "[i]f there is an obligation or a duty or a power to take

<sup>70</sup> *Id.* at 372 (statement of Rep. Johnson).

<sup>71</sup> Hendricks stated:

It is all very well for us to have sympathy for the poor and the unfortunate, but both sides call for our sympathy in the South. The master, who, by his wickedness and folly, has involved himself in the troubles that now beset him, has returned, abandoning his rebellion, and has bent down upon his humbled knees and asked the forgiveness of the Government, and to be restored again as a citizen.

*Id.* at 319 (statement of Sen. Hendricks).

<sup>72</sup> Stewart stated:

I have also sympathy for the widows and orphans of the North that have been bereaved by this terrible contest, who are forgotten in our efforts for the negro. I have sympathy for the poor negro who is left in a destitute and helpless condition. I am anxious to enter upon any practical legislation that shall help all classes and all sufferers, without regard to color — the white as well as the black.

*Id.* at 297 (statement of Sen. Stewart).

<sup>73</sup> *Id.* at 629 (statement of Rep. Marshall).

care of the negro paupers, there is, I suppose, an equal obligation to take care of the white paupers of the different states.”<sup>74</sup> Finally, Senator McDougall saw no reason to treat freedmen better than the “[t]housands of white boys in the North . . . the poor boys of our own race and people.”<sup>75</sup>

Supporters of the 1866 Freedmen’s Bureau bill again stressed the special needs of blacks. Senator Fessenden, for example, pointed out that millions of former slaves, “who had received no education, who had been laboring from generation to generation for their white owners and masters, able to own nothing, to accomplish nothing, are thrown, without protection, without aid, upon the charities of the world, in communities hostile to them . . . .”<sup>76</sup> Congressman Donnelly urged: “We have liberated four million slaves in the South. It is proposed by some that we stop right here and do nothing more. Such a course would be a cruel mockery. These men are without education, and morally and intellectually degraded by centuries of bondage.”<sup>77</sup> Assistance to this disadvantaged minority was said to be in the best interests of the country as a whole. Congressman Hubbard insisted:

They ought not to be left to perish by the wayside in poverty and by starvation when the country so much needs their work. It is not their crime nor their fault that they are so miserable. From the beginning to the present time they have been robbed of their wages, to say nothing of the scourgings they have received. I think that the nation will be a great gainer by encouraging the policy of the Freedmen’s Bureau, in the cultivation of its wild lands, in the increased wealth which industry brings and in the restoration of law and order in the insurgent States.<sup>78</sup>

Congressman Donnelly urged that with such assistance the negro “becomes perforce a property-holder and a law-maker, and he is interested with you in preserving the peace of the country.”<sup>79</sup>

<sup>74</sup> Id. at 370 (statement of Sen. Davis).

<sup>75</sup> Id. at 393 (statement of Sen. McDougall).

<sup>76</sup> Id. at 365 (statement of Sen. Fessenden).

<sup>77</sup> Id. at 588 (statement of Rep. Donnelly); see also id. app. at 75 (statement of Rep. Phelps) (“Four million slaves liberated, not for the sake of humanity, but by a stroke of policy, not for their sakes, but our own, are not now to be so coolly dropped by a Government which will in that case have made so shrewd and cruel a use of them.”).

<sup>78</sup> Id. at 630 (statement of Rep. Hubbard).

<sup>79</sup> Id. at 589 (statement of Rep. Donnelly).

Congressman Moulton distinguished the Bureau's assistance to blacks from unfair discrimination:

[Congressman Marshall] says the bill provides one law for one class of men, and another for another class. The very object of the bill is to break down the discrimination between whites and blacks . . . . Therefore I repeat that the true object of this bill is the amelioration of the condition of the colored people.<sup>80</sup>

Congressman Phelps urged that the bill properly gave special assistance to blacks because they lacked the political influence of whites to advance their own interests:

The very discrimination it makes between "destitute and suffering" negroes and destitute and suffering white paupers, proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection.<sup>81</sup>

Supporters emphasized that the Freedmen's Bureau was formed to assist blacks to better their own position, rather than merely to provide relief. Senator Trumbull, the 1866 bill's author and Senate sponsor, explained that the legislation was intended "to educate, improve, enlighten, and Christianize the negro; to make him an independent man; to teach him to think and to reason; to improve that principle which the great Author of all has implanted in every human breast . . . ." <sup>82</sup> Trumbull argued that "[w]e shall not long have to support any of these blacks out of the public Treasury if we educate and furnish them land upon which they can make a living for themselves."<sup>83</sup> Congressman Donnelly similarly stressed the importance of educating blacks not only for the blacks themselves but for "the safety of the nation" as well.<sup>84</sup>

As it had been in 1864, Congress in 1865 was divided on the existence of constitutional authority to enact the Freedmen's Bu-

<sup>80</sup> Id. at 631-32 (statement of Rep. Moulton).

<sup>81</sup> Id. app. at 75 (statement of Rep. Phelps). Justice Marshall quotes this passage in his dissent in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 397 (1978); cf. *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (right to vote helps ensure nondiscriminatory treatment and equal protection of the laws).

<sup>82</sup> Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull).

<sup>83</sup> Id. (statement of Sen. Trumbull).

<sup>84</sup> Id. at 590 (statement of Rep. Donnelly).

reau legislation. Among other things, proponents of the bill relied on Congress' enforcement power under section 2 of the thirteenth amendment.<sup>85</sup> Senator Trumbull argued that "under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing."<sup>86</sup> In addition, supporters analogized the Bureau's activities and aid to Indians, which Congress had unquestioned authority to provide.<sup>87</sup> A substantial majority of the House and Senate, agreeing that the Freedmen's Bureau legislation was both constitutionally sound and urgently needed, passed the bill.<sup>88</sup>

President Johnson, however, unexpectedly vetoed the bill. His lengthy veto message raised a variety of objections to the legislation, including doubts about its necessity, the risk of creating a permanent institution, and a desire that the states be left to address the problems that might exist.<sup>89</sup> The President saw both the adoption of social welfare programs by the federal government and the selection of one group for special treatment as unprecedented. Congress, he explained,

has never founded schools for any class of our own people, not even for the orphans of those who have fallen in the defense of the Union, but has left the care of education to the much more competent and efficient control of the States, of communities, of private

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<sup>85</sup> Section 2 of the thirteenth amendment gave Congress the power to enforce the article "by appropriate legislation." U.S. Const. amend XIII, § 2.

<sup>86</sup> Cong. Globe, 39th Cong., 1st Sess. 322 (1866) (statement of Sen. Trumbull) (Trumbull added that "[i]t was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery."); see also *id.* at 366 (statement of Sen. Fessenden) (under section 2 "we might do all that we judged essential in order to secure him in that liberty the enjoyment of which we have conferred upon him."); *id.* at 631 (statement of Rep. Moulton) (listing section 2 of the thirteenth amendment along with various article I powers as constitutional authority for the Freedmen's Bureau legislation); but see *id.* at 393 (statement of Sen. McDougall) (asserting that the only valid legislation under section 2 would prevent deprivations of liberty, rather than create new rights); *id.* at 623 (statement of Rep. Kerr) ("Such legislation only is authorized by this amendment as is necessary to prevent [slavery].").

<sup>87</sup> See, e.g., *id.* at 631 (statement of Rep. Moulton); *id.* at 319 (statement of Sen. Trumbull); but see *supra* note 23.

<sup>88</sup> The bill passed the Senate on January 25, 1866 by a vote of 37-10. Cong. Globe, 39th Cong., 1st Sess. 421 (1866). The House approved the bill on February 6, 1866, by a 136-33 vote. *Id.* at 688.

<sup>89</sup> 5 Messages and Papers of the Presidents 3596-3603 (1914).

associations, and of individuals. It has never deemed itself authorized to expend the public money for the rent or purchase of homes for the thousands, not to say millions, of the white race who are honestly toiling from day to day for their subsistence. A system for the support of indigent persons in the United States was never contemplated by the authors of the Constitution; nor can any good reason be advanced why, as a permanent establishment, it should be founded for one class or color of our people more than another.<sup>90</sup>

He urged that Congress limit federal protection to whatever relief might be provided by the federal courts.<sup>91</sup>

The Senate took up the Freedmen's Bureau bill the day after President Johnson's veto. Senator Trumbull responded to the arguments in the veto message paragraph by paragraph. To the President's contention that Congress had never before enacted class legislation, Trumbull responded:

[N]ever before in the history of this Government have nearly four million people been emancipated from the most abject and degrading slavery ever imposed upon human beings; never before has the occasion arisen when it was necessary to provide for such large numbers of people thrown upon the bounty of the Government, unprotected and unprovided for. . . . [C]an we not provide for those among us who have been held in bondage all their lives, who have never been permitted to earn one dollar for themselves, who, by the great constitutional amendment declaring freedom throughout the land, have been discharged from bondage to their masters who had hitherto provided for their necessities in consideration of their services?<sup>92</sup>

As he had done in previous debates, Trumbull asserted that the thirteenth amendment provided ample constitutional authority for the bill.<sup>93</sup> Despite Trumbull's efforts, and although the bill had earlier passed with better than a two-thirds majority in both houses, several supporters unexpectedly switched their positions

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<sup>90</sup> Id. at 3599.

<sup>91</sup> Id. at 3603.

<sup>92</sup> Cong. Globe, 39th Cong., 1st Sess. 939 (1866).

<sup>93</sup> Id. at 941 (statement of Sen. Trumbull) ("If legislation be necessary to protect the former slaves against State laws which allow them to be whipped if found away from home without a pass, has not Congress, under the second clause of the amendment, authority to provide it?").

and the Senate vote was insufficient to override the veto.<sup>94</sup>

Johnson's veto of the Freedmen's Bureau bill precipitated the final and irreparable break between the President and the Republican Congress. In the days immediately following the veto, Republican papers and leaders across the country attacked the President.<sup>95</sup> Johnson responded by denouncing the radical Republicans as traitors and disunionists, citing Thaddeus Stevens, Charles Sumner and Wendell Phillips by name.<sup>96</sup> With that, Republican support for the President virtually disappeared. The next month, the President vetoed the Civil Rights Act of 1866, in part because it provided blacks with what Johnson regarded as unprecedented and unwarranted special treatment:

In all our history, in all our experience as a people living under Federal and State law, no such system as that contemplated by the details of this bill has ever before been proposed or adopted. They establish for the security of the colored race safeguards which go infinitely beyond any that the General Government has ever provided for the white race. In fact, the distinction of race and color is by the bill made to operate in favor of the colored and against the white race.<sup>97</sup>

Johnson complained in particular that the automatic citizenship conferred upon blacks entailed "discrimination against large numbers of intelligent, worthy, and patriotic foreigners" who were still required to meet the statutory standards for naturalization.<sup>98</sup> He complained that the bill required federal courts, "which sit only in one place for white citizens," to move to any part of their district at the direction of the President to hear civil rights cases.<sup>99</sup> Unpersuaded by these arguments, Congress passed the Civil Rights Act over the President's veto.

Emboldened by the success of the Civil Rights Act, Congress again attempted to enact a Freedmen's Bureau bill. The House Committee on Freedmen reported a new bill, H.R. 613,<sup>100</sup> which

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<sup>94</sup> Id. at 943. The Senate vote to override the veto was 30-18.

<sup>95</sup> J. McPherson, *The Struggle for Equality* 347-48 (1964).

<sup>96</sup> Id. at 348-49.

<sup>97</sup> 5 Messages and Papers of the Presidents 3610-11 (1914).

<sup>98</sup> Id. at 3604-3605.

<sup>99</sup> Id. at 3610.

<sup>100</sup> Cong. Globe, 39th Cong., 1st Sess. 2743 (1866). The House committee reported the bill on May 22, 1866, and the Senate bill was reported out of committee on June 11. Id. at 3071.

omitted two provisions that had provoked particular criticism of S. 60. H.R. 613 extended the Bureau for only two years, not indefinitely, and made no express provision for the appointment of agents for every county.<sup>101</sup> In addition, the reservation of a million or more acres of federal public lands for refugees and freedmen was deleted as unnecessary because the Southern Homestead Act, adopted after S. 60 was first proposed, had opened up federal lands in five southern states for settlement.<sup>102</sup>

The new bill, however, contained four race-conscious provisions not included in the earlier proposal. First, section 1 of S. 60 would have extended the statute's coverage to "refugees and freedmen in all parts of the United States."<sup>103</sup> In contrast, section 1 of H.R. 613 limited coverage to

all loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States, and to aid them in making the freedom conferred by proclamation of the commander-in-chief, by emancipation under the laws of States, and by constitutional amendment, available to them and beneficial to the Republic.<sup>104</sup>

Thus, although the Bureau was authorized to aid blacks in almost any manner related to their newly-won freedom, white refugees could be provided only that assistance necessary to make them self-supporting. Second, section 6 of S. 60 had authorized the construction of schools "for refugees and freedmen dependent on the Government for support," but H.R. 613 limited educational programs to blacks.<sup>105</sup>

<sup>101</sup> Congressman Eliot explained these modifications on the floor of the House. *Id.* at 2772.

<sup>102</sup> Southern Homestead Act, ch. 127, 14 Stat. 66 (1866). Freedmen enjoyed an indirect but significant priority under the Southern Homestead Act over most whites. For six months after the bill went into effect the public lands were not available to any person who had "borne arms against the United States, or given aid and comfort to its enemies." *Id.* at 67. This prohibition excluded a large proportion of southern whites.

Oliver Howard urged his assistant commissioners to take immediate advantage of this restrictive proviso, to present information about the opportunity offered "in the strongest manner," and to make every effort to secure homes for the Negroes before the "rebels" could take up the lands. "*Do all you can,*" he emphasized.

G. Bentley, *supra* note 8, at 134.

<sup>103</sup> See *supra* notes 49-52 and accompanying text.

<sup>104</sup> Act of July 16, 1866, ch. 200, 14 Stat. 173, 174.

<sup>105</sup> Section 12 of H.R. 613 authorized the use of land, buildings or the proceeds derived therefrom for "the education of the freed people," and section 13 directed the Bureau to

Third, although the general lands provision of S. 60 was deleted, H.R. 613 provided protection to blacks who had already occupied certain abandoned lands.<sup>106</sup> Moreover, Congressman Eliot contemplated that Bureau would use the Southern Homestead Act only "to provide for the freedmen."<sup>107</sup> Finally, sections 7 and 8 of the old bill, which had protected "negroes, mullatoes, freedmen [and] refugees" from the discriminatory administration of civil and criminal law, were redrawn to prohibit only discrimination on the basis of "race or color, or previous condition of slavery."<sup>108</sup> In sum, although weakened in other respects, the new bill provided special aid and protection for blacks substantially more explicit than the vetoed bill or the 1865 Freedmen's Bureau Act.

Because Congress had exhaustively discussed S. 60 earlier in the year, the debates on H.R. 613 were brief. Nevertheless, the objection to the Freedmen's Bureau as special treatment for blacks, even more pertinent to H.R. 613, was renewed. Congressman LeBlond urged that it was "the duty of this Congress to strike down that system at once, leaving these colored people, free as they are, to make a living in the same way that the poor whites of our country are doing."<sup>109</sup> He opposed in particular the provision of H.R. 613 authorizing the Secretary of War "to issue such medical stores or other supplies and transportation, and afford such medical or other aid" necessary to carry out the purposes of section 2 of the 1865 Freedmen's Bureau Act, that is, the assistance of "destitute and suffering refugees and freedmen."<sup>110</sup>

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cooperate with and assist "private benevolent associations of citizens in aid of freedmen . . . for purposes of education. . . ." *Id.* at 176. Congressman Eliot noted that the broader provisions of S. 60 had been opposed on the ground "that the United States ought not to educate," but noted "[i]t is perfectly plain that education cannot be secured to these freedmen" without federal assistance. *Cong. Globe*, 39th Cong., 1st Sess. 2773 (1866) (statement of Rep. Eliot).

<sup>106</sup> 14 Stat. at 174-176. The statute referred simply to "such persons and to such only as have acquired and are now occupying lands under and agreeably to the provisions of General Sherman's special field order, dated at Savannah, Georgia, January sixteenth, eighteen hundred and sixty-five. . . ." *Id.* That order, as Congress knew, provided that the land in question in South Carolina and Georgia was "reserved and set apart for the settlement of the negroes now made free by the acts of war and the proclamation of the President of the United States." Special Field Order No. 15 (January 16, 1865), reprinted in 1 W. Fleming, *Documentary History of Reconstruction* 350 (1906).

<sup>107</sup> *Cong. Globe*, 39th Cong., 1st Sess. 2773 (1866) (statement of Rep. Eliot). See *supra* note 102.

<sup>108</sup> 14 Stat. at 176-77.

<sup>109</sup> *Cong. Globe*, 39th Cong., 1st Sess. 2780 (1866) (statement of Rep. LeBlond).

<sup>110</sup> See ch. 90, 13 Stat. 508 (1865 Act); ch. 200, 14 Stat. 174 (1866 Act).

It is true it only purports upon its face to confer the power to furnish medical aid; yet the power is there given not only to feed but to clothe the colored people who have been slaves. That of itself is objectionable. It is class legislation; it is doing for that class of persons what you do not propose to do for the widows and orphans throughout the length and breadth of this whole country.<sup>111</sup>

Congressman Eliot urged that special treatment for blacks was entirely proper. Referring to the lands provisions of H.R. 613, he argued:

We owe something to these freedmen, and this bill rightly administered, invaluable as it will be, will not balance the account. We have done nothing to them, as a race, but injury. They, as a people, have done nothing to us but good. . . . We reduced the fathers to slavery, and the sons have periled life to keep us free. That is the way history will state the case. Now, then, we have struck off their chains. Shall we not help them to find homes? They have not had homes yet.<sup>112</sup>

H.R. 613 easily passed the House, and the Senate later approved a similar draft.<sup>113</sup> President Johnson, however, again vetoed the bill, arguing that it fell "within the reasons assigned" in his veto message concerning S. 60.<sup>114</sup> After claiming that any unique problems of blacks had already been resolved, Johnson criticized the lands sections for providing property only "to a particular class of citizens."<sup>115</sup> The new veto message closed with an emphasis on the undesirability of special treatment for any "favored class of citizens": "In conclusion I again urge upon Congress the danger of class legislation, so well calculated to keep the public mind in a

<sup>111</sup> Cong. Globe, 39th Cong., 1st Sess. 2780 (1866) (statement of Rep. LeBlond).

<sup>112</sup> Id. at 2779 (statement of Rep. Eliot). Eliot found constitutional authority for the bill in section 2 of the thirteenth amendment, which he read as giving Congress power to adopt such legislation as it "shall deem to be appropriate to make fairly effective the great grant of freedom." Id. at 2773.

<sup>113</sup> Id. at 2878 (House passage, 96-32, on May 29, 1866); id. at 3413 (Senate passage, unrecorded vote, on June 26); id. at 3524 (Senate passage of conference report, unrecorded vote, on July 2); id. at 3562 (House passage of conference report, 25-102 defeating motion to table, on July 3).

<sup>114</sup> 5 Messages and Papers of the Presidents 3620 (1914).

<sup>115</sup> Id. at 3623. Johnson added that "[w]hile the quieting of titles is deemed very important and desirable, the discrimination made in the bill seems objectionable. . . ." Id.

state of uncertain expectation, disquiet, and restlessness . . . .”<sup>116</sup>

President Johnson returned the bill to Congress and it was immediately voted on by both houses. Senator Saulsbury, who had opposed legislation for freedmen since the first proposals in 1864, once again questioned the bill’s preferential treatment for blacks:

What is the principle involved? No less a principle than this: has the Congress of the United States the power to take under its charge a portion of the people, discriminating against all others, and put their hand in the public Treasury, take the public money, appropriate it to the support of this particular class of individuals, and tax all the rest of the people of the country for the support of this class?<sup>117</sup>

Congress, which had consistently rejected such arguments, did so again. The House voted 104 to 33 to override the veto, and the Senate voted the bill into law by a margin of 33 to 12.<sup>118</sup>

#### *D. 1867 Relief Legislation*

In March of 1867 Congress adopted two statutes authorizing the federal government to furnish food and other aid to the poor. The contrasting provisions and legislative histories of these statutes indicate the care with which Congress acted when deciding whether to limit participation in federal programs on racial lines. The first measure appropriated funds “for the relief of freedmen or destitute colored people in the District of Columbia, the same to be expended under the direction of the commissioner of the bureau of freedmen and refugees.”<sup>119</sup> Senator Morrill urged that “the necessities of this class of people in this District . . . commend themselves very strongly to [the Senate’s] sense of humanity and charity.”<sup>120</sup> Congressman Holman argued for its adoption on the ground “that great destitution exists among the colored population here, and that an appropriation of this kind is imperatively demanded by considerations of common humanity.”<sup>121</sup> The supporters of this legislation described the extreme poverty with which it

<sup>116</sup> *Id.*

<sup>117</sup> *Cong. Globe*, 39th Cong., 1st Sess. 3840-41 (1866) (statement of Sen. Saulsbury).

<sup>118</sup> *Id.* at 3842 (Senate vote); *id.* at 3850 (House vote).

<sup>119</sup> Resolution of March 16, 1867, No. 4, 15 Stat. 20.

<sup>120</sup> *Cong. Globe*, 40th Cong., 1st Sess. 28 (1867) (statement of Sen. Morrill).

<sup>121</sup> *Id.* at 76 (statement of Rep. Holman).

was concerned as a problem limited to blacks. The members of Congress who had earlier opposed the Freedmen's Bureau legislation neither challenged this description of the situation in the District of Columbia nor objected to the fact that the relief bill covered only blacks.

Two weeks later Congress enacted "a Resolution for the Relief of the Destitute in the Southern and Southwestern States." The measure was adopted in response to a crop failure and resulting famine that imperiled whites as well as blacks; General Howard advised Congress, in a letter quoted by Senator Trumbull, that the number of destitute whites in the south exceeded the number of similarly desperate blacks.<sup>122</sup> The resolution enacted to remedy this situation authorized the Secretary of War, "through the commissioner of the freedmen's bureau," to provide from funds previously allocated to the Bureau "supplies of food sufficient to prevent starvation and extreme want to any and all classes of destitute or helpless persons. . . ."<sup>123</sup> The decision to give indigent whites equal access to Bureau food supplies originally intended for freedmen provoked great controversy. Congressman Butler objected to this plan to aid "the white men at the expense of freedmen." He asked, rhetorically, for whom Congress should encroach "upon the provision made for the freedmen," and concluded that the food would benefit

[n]ot merely the women and the children, not merely the sick and the disabled, but the able-bodied rebel who, lounging at the corner grocery, refuses to work, while the "mudsills" of the North are obliged to work in order that they may pay taxes for the support of the Government.<sup>124</sup>

Others again criticized the general exclusion of whites from the Bureau's aid programs,<sup>125</sup> and urged Congress to extend other benefits to whites.<sup>126</sup> A number of speakers expressed the view, apparently well founded, that the Bureau had already begun to treat all

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<sup>122</sup> Id. at 39 (32,662 whites; 24,238 blacks).

<sup>123</sup> Resolution of March 30, 1867, No. 28, 15 Stat. 28.

<sup>124</sup> Cong. Globe, 40th Cong., 1st Sess. 257 (1867) (statement of Rep. Butler).

<sup>125</sup> Id. at 85 (statement of Rep. Chanler).

<sup>126</sup> Id. at 237. Rep. Pile proposed to extend the Bureau's distribution of food and clothing to "any destitute women or children or helpless aged persons." Id.

starving whites as "refugees" because of their urgent need.<sup>127</sup> The sense of Congress was expressed by Congressman Bingham, the author of the fourteenth amendment, who saw no objection to the general racial limitation in the Freedmen's Bureau Act,<sup>128</sup> but argued that no such distinction should be made in the case of actual starvation:

Do not then, I pray you, ask that this Government shall degrade itself in the presence of the civilized world by refusing supplies to its own citizens who are famishing for bread, and stop to inquire of the starving thousands whether they were friends or enemies. Sir, you cannot discriminate, if you would, between friends and enemies when famishing men ask for bread.<sup>129</sup>

The resolution's supporters argued mainly against the discrimination between loyal "refugees" and rebels, rather than between blacks and whites. Nevertheless, their fundamental position was that in the face of a famine affecting southerners of all races and political persuasions, Congress should not give aid to any favored class at the expense of others. Congressman Boyer argued that simple humanity demanded assistance for "our countrymen of all sections, parties, and complexions."<sup>130</sup> He thus supported extension of the Bureau's aid programs to include "starving men, women, and children, who are neither negroes nor refugees. Since we have the Freedmen's Bureau, let us at least ingraft upon it this feature of universal instead of restricted humanity."<sup>131</sup>

The different approaches taken in the two relief measures demonstrate that Congress was not indiscriminate in the creation of race-conscious programs. If, as in the District of Columbia, the particular problem was essentially limited to blacks, not even the conservative members of Congress objected to identifying by race

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<sup>127</sup> Id. at 235 (statement of Rep. Schenck); id. at 236 (statement of Rep. Stevens). See M. Abbott, *The Freedmen's Bureau in South Carolina* 40 (1967); G. Bentley, *supra* note 8, at 140.

<sup>128</sup> Id. at 235-36 (statement of Rep. Bingham).

<sup>129</sup> Id. at 90. Bingham stated that Commissioner Howard was unable "to relieve all the suffering indiscriminately" because the act limited relief to "freedmen and refugees." Bingham wanted to help all alike, "whether the famishing poor in the South be black or white, whether they be freedmen, refugees or other persons." Id. at 236 (statement of Rep. Bingham).

<sup>130</sup> Id. at 86 (statement of Rep. Boyer).

<sup>131</sup> Id.

the beneficiaries of a federal program. On the other hand, if whites as well as blacks were in need of basic necessities such as food and clothing, even the Radical Republicans, who had supported the race-conscious provisions of the Freedmen's Bureau legislation, rejected distinctions made on the basis of race or any other characteristic.

### *E. Claims of Black Servicemen*

During the Civil War Congress authorized special bounties and other payments for soldiers who enlisted in the Union forces, to be payable at the conclusion of hostilities or upon completion of the period of enlistment. In the years following the war unscrupulous claim agents, offering to represent black servicemen in obtaining sums owed to them, took advantage of their often uneducated and unsophisticated clients and pocketed unwarranted portions of the funds obtained.<sup>132</sup> To protect the black soldiers, Congress in 1866 established a schedule of maximum fees payable to agents or attorneys handling these claims.<sup>133</sup> When this measure proved inadequate, Senator Wilson proposed that the claims of black servicemen from southern states that were being handled by agents or attorneys be paid to the Commissioner of the Freedmen's Bureau, who would then pay each claimant and agent or attorney the sum authorized by law.<sup>134</sup>

Opponents criticized this proposal, like other legislation pertaining to the Freedmen's Bureau, as a form of discriminatory legislation. Senator Grimes said he had long maintained that

class legislation was a great error, that it was wrong, that it was wicked; that we should not single out one class and say that the nation should take the guardianship of that class to the exclusion of another class; that we should not single out one class and confer upon them a consequence which we would not confer upon another class.<sup>135</sup>

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<sup>132</sup> The Bureau had been attempting since July, 1865 to protect black servicemen from such abuses by helping them, without charge, to collect money owed to them. G. Bentley, *supra* note 8, at 87.

<sup>133</sup> Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368.

<sup>134</sup> Even though the Freedmen's Bureau began processing servicemen's claims on a voluntary basis in 1866, freedmen still fell prey to "bounty agents" who promised quick action but then charged commissions up to 50 percent. See G. Bentley, *supra* note 8, at 87.

<sup>135</sup> Cong. Globe, 40th Cong., 1st Sess. 79 (1867) (statement of Sen. Grimes). See also *id.* at

Congressman Holman saw no basis for treating blacks as less than self-sufficient in financial matters, if Congress believed them qualified to vote:

If, as you assert, the colored man is competent to control the affairs of the nation, I insist that all public laws and regulations which are made applicable to any class of our citizens who participate in controlling public affairs should be alike applicable to all who are invested with that high right; and that our laws should be sufficiently effective in their provisions to protect all men in their just rights of property.<sup>136</sup>

Moreover, Senator Howe thought the bill covered too many blacks because it did not "discriminate at all between . . . those who are educated and those who are not."<sup>137</sup>

Proponents of the legislation based their arguments on the special needs of black servicemen. For example, Congressman Garfield pointed out that black soldiers and sailors, unlike their white counterparts, generally were not represented by state government agents from their home states.<sup>138</sup> Congressman Scofield argued similarly that conditions requiring special treatment for black servicemen resulted from past discrimination:

[W]e have passed laws for the protection of white soldiers, but not going quite as far as this, because, unlike the blacks, they have not been excluded from your schools by legal prohibition, nor have they all their lives been placed in a dependent position. I know the colored people are ignorant, but it is not their own fault, it is ours. We have passed laws that make it a crime for them to be taught and now, because they have not the learning that the white man has, gentlemen say we must not pass laws to protect them against plunder by the sharks that hang around the bounty offices.<sup>139</sup>

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444 (statement of Rep. Chanler) (the legislation would "put the soldier and sailor who happens by the misfortune of nature or by the blessing of nature to be colored in a classification distinct from his fellow-soldiers and sailors. . . ."); *id.* at 80 (statement of Sen. Henderson) ("My impression is that the negroes understand their rights as well as anybody; and I protest against the idea that we must be eternally legislating for the negro in order to protect his interest and regarding him as a ward of the Government.").

<sup>136</sup> *Id.* at 445 (statement of Rep. Holman).

<sup>137</sup> *Id.* at 81 (statement of Sen. Howe).

<sup>138</sup> *Id.* at 445 (statement of Rep. Garfield). See also *id.* at 79 (statement of Sen. Wilson) (colored servicemen "have scattered about; there is nobody to watch for or take care of them; and there are a great many agents who are plundering them and getting all they can out of them.").

<sup>139</sup> *Id.* at 444 (statement of Rep. Scofield).

Congress found these arguments for special treatment persuasive, and passed the bill by a substantial margin.<sup>140</sup>

#### F. Freedmen's Bureau Legislation, 1868-70

The 1866 Freedmen's Bureau Act had extended the Bureau's operations until July, 1868. In his report of December 1867, General Howard noted that although the scope of other Bureau activities had gradually diminished, the operation of schools for freedmen had continued to expand.<sup>141</sup> Howard, initially believing that the reconstructed southern states would treat the freedmen fairly, recommended that Congress permit the Bureau to expire as planned, transferring its educational work to another agency and the payment of black servicemen's claims to the War Department.<sup>142</sup> When the Bureau began to withdraw its agents, however, Howard discovered that the consequence was "to close up the schools; to intimidate Union men and colored people, and, in fact, to paralyze almost completely the work of education which, until then, was in a healthful condition and prospering."<sup>143</sup> Accordingly, Howard recommended that Congress continue the Bureau for another year.<sup>144</sup>

General Howard regarded education as the most important aspect of the Freedmen's Bureau's work. He explained that "the most urgent want of the freedmen was a practical education; and from the first I have devoted more attention to this than to any other branch of my work."<sup>145</sup> In most years more than two-thirds

<sup>140</sup> *Id.* at 294 (Senate vote); *id.* at 445 (House vote). The House vote was 62 to 24; the Senate vote was not recorded. The statute is set out at Resolution of March 29, 1867, No. 25, 15 Stat. 26 (1867). "In five years the Bureau paid to freedmen from Boston to Galveston over seven and a half million dollars." G. Bentley, *supra* note 8, at 148.

<sup>141</sup> For the year ending September 1, 1867, educational activities accounted for \$208,445 of the Bureau's \$284,117 in expenditures. Report of the Commissioner of the Bureau of Refugees, Freedmen and Abandoned Lands, reprinted in Annual Report of the Secretary of War, 2 H.R. Exec. Doc. No. 1, pt. 1, no. 1, 40th Cong., 2d Sess. 654 (1867).

<sup>142</sup> *Id.* at 691.

<sup>143</sup> Cong. Globe, 40th Cong., 2d Sess. 1817 (1868).

<sup>144</sup> *Id.*

<sup>145</sup> 2 O. Howard, *supra* note 49, at 368. See also G. Bentley, *supra* note 8, at 63 ("In his earliest interviews with [Secretary of War] Stanton he had maintained that education of the freedmen was 'the true relief,' and in public addresses through the summer and fall of 1865 he continued to stress the need for Negro schools."); *id.* at 169 ("[Howard] thought that

of all funds expended by the Bureau were used for the education of freedmen.<sup>146</sup> In each of the years immediately prior and subsequent to the adoption of the fourteenth amendment, the Freedmen's Bureau educated approximately 100,000 students, nearly all of them black.<sup>147</sup> Among black students no distinctions were made according to the degree of past disadvantage. Because comparable free public education was not generally available in the south during this period, the consensus among historians is that southern black children received a better education in these years than most white children.<sup>148</sup>

The Bureau also provided funds, land, and other assistance to help establish more than a dozen colleges and universities for the education of black students.<sup>149</sup> In 1867, following the incorporation of Howard University, the Bureau provided the University with the down payment for its property and then constructed its build-

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with proper schooling the Negroes would be able to command and secure for themselves 'both the privileges and rights that we now have difficulty to guarantee.'")

<sup>146</sup> See the reports of the Commissioner of the Bureau of Refugees, Freedmen, and Abandoned Lands for 1866, reprinted in Annual Report of the Secretary of War, 3 H.R. Exec. Doc. No. 1, 39th Cong., 2d Sess. 714 (1866); for 1867, reprinted in 2 H.R. Exec. Doc. No. 1, pt. 1, 40th Cong., 2d Sess. 654 (1867); for 1868, reprinted in 3 H.R. Exec. Doc. No. 1, 40th Cong., 3d Sess. 1020 (1868); for 1869, reprinted in 2 H.R. Exec. Doc. No. 1, pt. 1, 41st Cong., 2d Sess. 521 (1869); for 1870, reprinted in 2 H.R. Exec. Doc. No. 1, pt. 1, 41st Cong., 3d Sess. 325 (1870).

<sup>147</sup> Howard "refused to spend Bureau money on [school] buildings unless they were on sites secured by deed for Negro education forever." G. Bentley, *supra* note 8, at 174.

The Semi-Annual Reports on Schools for Freedmen refer on occasion to a small number of white children, less than one percent of the total, enrolled in the schools that were included in their statistical summaries. A majority of these whites attended one or more schools operated by the Soldiers Memorial Society of Boston for children of white refugees in Virginia. The federal assistance, if any, these schools may have received is not disclosed in the reports. The rest of the white students appear to have been children of the white, generally northern, teachers who were instructors in the freedmen's schools. R. Morris, *Reading, Writing, and Reconstruction* 51, 264 n.164 (1981).

<sup>148</sup> H. Carter, *The Angry Scar* 57 (1959); R. Henry, *The Story of Reconstruction* 129 (1938). A conservative Georgia editor complained in 1871 that "[t]he colored people of Georgia are receiving more educational advantages than the poor whites." 2 W. Fleming, *supra* note 106, at 203.

<sup>149</sup> Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen, July 1, 1868, at 60-632; O. Howard, *supra* note 49, at 390-422. Only one institute of higher education for white refugees, the Lookout Mountain Educational Institute, was ever assisted by the Bureau. G. Bentley, *supra* note 8, at 255 n.43. From 1867 to 1870 the Bureau expended a total of \$407,752.21 on black colleges, and only \$3,000 on white colleges. *Id.* at 175.

ings at a cost of one-half million dollars.<sup>150</sup> Underlying the decision to assist the University was General Howard's view that, following the end of the war, "Negro pharmacists and other medical men were soon required, and contentions with white men in the courts demanded friendly advocates at law."<sup>151</sup> Although Howard University was open to all races, the Bureau required as a condition of its aid that the University make "special provision for freedmen."<sup>152</sup>

In 1868 Congressman Eliot introduced legislation to extend the life of the Bureau, emphasizing the importance of its educational work:

[I]f the protecting care of the General Government, feared by those whose hearts are rebel as their hands were hostile during the war, should be removed, there is no doubt at all that schools would be abolished and a war upon the freedmen be begun. . . . School-houses are in some places rented and everywhere protected by the Government, and it is this protection which is needed, and without which they cannot be continued.<sup>153</sup>

Extension of the Bureau was opposed on the same grounds as in past years.<sup>154</sup> Congress again rejected these arguments by a decisive margin<sup>155</sup> and in June, 1868 renewed the Bureau for another

<sup>150</sup> 2 O. Howard, *supra* note 49, at 398-401.

<sup>151</sup> *Id.* at 394.

<sup>152</sup> Bureau Refugees, Freedmen and Abandoned Lands, Sixth Semi-Annual Report on Schools for Freedmen, July 1, 1868, at 60. In 1870 the House Committee on Education and Labor investigated General Howard's administration of the Bureau following charges of misconduct by Congressman Fernando Wood. The first of the fifteen specific accusations considered was that the Bureau's aid to Howard University was "without authority of law." H.R. Rep. No. 121, 41st Cong., 2d Sess. 2 (1870). General Howard defended that assistance by referring to the special provision in the University's charter:

If it be claimed that the University charter does not call for the education of refugees and freedmen, or their children, the answer is, that its charter is not limited; that in the reception of all the funds derived from the government the university corporation formally accepted the conditions expressed in the order of transfer and in the contracts for building. The deeds of transfer of the buildings also expressly demand and secure the fulfillment of this important condition.

*Id.* at 517. The Committee found Howard's explanation of this and other disputed conduct persuasive, and exonerated him. H.R. Rep. No. 121, 41st Cong., 2d Sess. 20-21 (1870). On March 2, 1871, the House adopted a resolution from the Committee formally acquitting Howard of all charges and praising his administration of the Bureau. Cong. Globe, 41st Cong., 3d Sess. 1851 (1871).

<sup>153</sup> Cong. Globe, 40th Cong., 2d Sess. 1816 (1868) (statement of Rep. Eliot).

<sup>154</sup> See, e.g., *id.* app. at 292 (statement of Rep. Adams); *id.* at 1994 (statement of Rep. Wood); *id.* at 3054 (statement of Sen. Hendricks).

<sup>155</sup> The House vote was 97 to 38. *Id.* at 1998. The Senate vote was not recorded. *Id.* at

year.<sup>156</sup> In July of 1868, without significant debate, Congress passed over the President's veto<sup>157</sup> a new statute continuing indefinitely "the educational department of . . . said Bureau and the collection and payment of moneys due the soldiers, sailors, and marines."<sup>158</sup> The bill terminated all other Bureau functions as of January 1, 1869.

Except for a single appropriation in 1866, the Bureau had been self-supporting, paying for its programs in part with funds received from the rental of abandoned property. With the termination of all but the education and colored servicemen programs, however, these sources of income were lost. After continuing on reserves for two years the Bureau ran out of funds in the spring of 1870.<sup>159</sup> The Bureau's insolvency forced Congress to consider General Howard's recommendation that federal funding for the operation of local educational facilities be continued on a permanent basis. In March of 1870, Congressman Arnell introduced legislation to create an Office of Education "to exercise the same powers as those hitherto exercised by Freedmen's Bureau in its educational division."<sup>160</sup> The measure passed the House<sup>161</sup> but never reached a vote in the Senate.<sup>162</sup>

With the defeat of the Arnell bill the educational activities of the Bureau ended, and all too soon thereafter most of the freedmen's schools were closed. The Bureau, moribund except for the payment of black servicemen's claims, was finally abolished in 1872.<sup>163</sup>

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3058.

<sup>156</sup> Act of July 6, 1868, ch. 135, 15 Stat. 83 (1868). The bill became law without the President's signature. *Id.* at 84.

<sup>157</sup> The veto was based on limitations placed by the new statute on the President's authority to appoint Bureau personnel. 5 Messages and Papers of the Presidents 3852 (1914).

<sup>158</sup> Act of July 25, 1868, ch. 245, 15 Stat. 193.

<sup>159</sup> H.R. Rep. No. 30, 40th Cong., 2d Sess. 17 (1868); H. R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 16 (1865); H. Carter, *supra* note 148, at 187; R. Morris, *supra* note 147, at 243.

<sup>160</sup> H.R. 1486, Cong. Globe, 41st Cong., 2d Sess. 2295 (1870).

<sup>161</sup> Cong. Globe, 41st Cong., 2d Sess. 2431 (1870). The vote was 104-55.

<sup>162</sup> *Id.* at 5286. The Senate also did not vote on a similar bill introduced by Senator Patterson (S. 431). *Id.* at 2953, 4309. The primary objection to the measure in the House was that providing for education was a matter for the states. See, e.g., *id.* at 2317-19 (statement of Rep. McNeely); *id.* at 2320 (statement of Rep. Lawrence). The old arguments against special aid to freedmen were not raised again.

<sup>163</sup> A number of minor federal programs for blacks continued for several years after 1872. See, e.g., *supra* note 6 and statutes cited therein; Act of March 3, 1871, ch. 113, 16 Stat. 475,

## II. THE ADOPTION OF THE FOURTEENTH AMENDMENT

The race-conscious federal programs discussed in Part I are of decisive importance for the construction of the fourteenth amendment because they were enacted in the same era in which the amendment itself was framed. The thirty-ninth Congress, which adopted the fourteenth amendment, also enacted the 1866 Freedmen's Bureau Act, the most far-reaching, racially restricted and vigorously contested of those programs. The House passed the amendment on May 10, 1866, the Senate voted a modified version on June 8, and the House agreed to the Senate changes on June 13.<sup>164</sup> The House approved the Freedmen's Bureau Act on May 29, 1866, the Senate adopted a modified version on June 26, and the Conference Report was approved on July 2 and 3.<sup>165</sup> On several occasions the Act was debated in one house at the same time the amendment was being considered in the other.<sup>166</sup> The composition of the majority supporting the amendment was nearly identical to that which supported the Act.<sup>167</sup> The sponsors of the fourteenth amendment, Congressman Stevens and Senator Wade, as well as its author, Congressman Bingham, all voted for the Freedmen's Bureau Act. The sponsors of the Act, Senator Trumbull and Congressman Eliot, voted for the amendment. Indeed, Eliot spoke at length in support of the amendment,<sup>168</sup> and Trumbull wrote and sponsored the 1866 Civil Rights Act, whose substantive provisions

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506 (Freedmen's Hospital and Asylum in Washington, D.C.); Act of June 10, 1872, ch. 415, 17 Stat. 347, 366.

<sup>164</sup> Cong. Globe, 39th Cong., 1st Sess. 2545 (1866) (House passage, 128-37); *id.* at 3042 (Senate passage, 33-11); *id.* at 3149 (House concurrence with Senate amendments, 120-32).

<sup>165</sup> *Id.* at 2878 (House passage, 96-32); *id.* at 3413 (Senate passage, unrecorded vote); *id.* at 3524 (Senate passage of conference report, unrecorded vote); *id.* at 3562 (House passage of conference report, 25-102 defeating motion to table).

<sup>166</sup> See, e.g., *id.* at 2799 (fourteenth amendment in Senate, May 24); *id.* at 2807 (Freedmen's Bureau Act in House, May 24); *id.* at 2869 (fourteenth amendment in Senate, May 29); *id.* at 2877 (Freedmen's Bureau Act in House, May 29).

<sup>167</sup> Of the 33 Senators and 104 Representatives who voted to overrule President Johnson's veto of the Freedmen's Bureau Act, all who were present voted for the fourteenth amendment. Of the 33 Senators and 120 Representatives who voted for the amendment, all but 4 representatives who were present voted to override the President's veto. *Id.* at 3042 (Senate vote on fourteenth amendment); *id.* at 3149 (House vote on fourteenth amendment); *id.* at 3842 (Senate vote on Freedmen's Bureau); *id.* at 3850 (House vote on Freedmen's Bureau).

<sup>168</sup> See, e.g., *id.* at 2511-12 (statement of Rep. Eliot) (urging adoption so that "the great work committed to us will be quickly and well accomplished.").

were the basis of section 1 of the fourteenth amendment.<sup>169</sup>

Congressman Stevens, introducing the fourteenth amendment in the House, characterized its basic purpose as "the amelioration of the condition of the freedmen."<sup>170</sup> These are nearly the same words Congressman Moulton used only three months before to describe the object of the Freedmen's Bureau bill.<sup>171</sup> Stevens' choice of language reflects the identity of purpose underlying the two measures. Congress, fully aware of the racial limitations in the Freedmen's Bureau programs, cannot have intended the amendment to forbid the adoption of such remedies by itself or the states. On the contrary, the supporters of the Act and the amendment regarded them as consistent and complementary, and opponents viewed the two, together with the Civil Rights Act of 1866, as part of a single coherent policy.<sup>172</sup> No member of Congress hinted at any inconsistency between the fourteenth amendment and the Freedmen's Bureau Act. Indeed, while debating the amendment, opponents frequently went out of their way to criticize the Freedmen's Bureau,<sup>173</sup> while supporters of the amendment praised it.<sup>174</sup>

There is, moreover, substantial evidence that Congress adopted the fourteenth amendment in part to provide a constitutional basis for the Freedmen's Bureau Act.<sup>175</sup> When President Johnson vetoed the 1866 Freedmen's Bureau bill, he questioned whether the Constitution permitted the measure and challenged in particular the

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<sup>169</sup> See H. Flack, *The Adoption of the Fourteenth Amendment* (1965).

<sup>170</sup> Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

<sup>171</sup> *Id.* at 632 (statement of Rep. Moulton). See text accompanying note 80 *supra*.

<sup>172</sup> Cong. Globe, 39th Cong., 1st Sess. 2501 (1866) (statement of Rep. Shanklin) (urging the Republican majority to "[d]ischarge your joint committee on reconstruction; abolish your Freedmen's Bureau; repeal your civil rights bill; and admit all the delegates from the seceded States to their seats in Congress."); *id.* at 2537-38 (statement of Rep. Rogers); *id.* at 2941 (statement of Sen. Hendricks); *id.* app. at 239-40 (statement of Sen. Davis).

<sup>173</sup> *Id.* at 2501 (statement of Rep. Shanklin) (alleging, during debate on the fourteenth amendment, that the purpose of the Reconstruction was "supporting a pet institution called the Freedmen's Bureau.").

<sup>174</sup> *Id.* at 1092 (statement of Rep. Bingham) (citing southern opposition to the Freedmen's Bureau as evidence of the need for the amendment); *id.* at 3034-35 (statement of Sen. Henderson) (the object of the Freedmen's Bureau was to secure "in the respective States those fundamental rights of person and property which cannot be denied to any person without disgracing the Government itself.").

<sup>175</sup> "The one point upon which historians of the Fourteenth Amendment agree, and, indeed which the evidence places beyond cavil, is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills . . . beyond doubt." J. TenBroek, *Equal Under Law* 201 (1965).

authority of Congress to spend funds, at least outside the District of Columbia, to aid any needy class.<sup>176</sup> At the time of the veto, Congress was already debating an early draft of the fourteenth amendment giving Congress enforcement authority similar to that now contained in section 5.<sup>177</sup> During debate on the draft Congressman Woodbridge, after reciting the need for federal aid to destitute freedmen, argued:

[It] may be said that all this may be done by legislation. I am rather inclined to think that the most of it may be so accomplished. But the experience of this Congress in that regard has been most unfortunate. Sir, I cast no imputation upon the President of the United States. . . . But inasmuch as the President, honestly, I have no doubt, has told us that there were constitutional difficulties in the way, I simply suggest that we submit the proposition to the people, that they may remove these objections by amending the instrument itself.<sup>178</sup>

Later in that day's debate Congressman Bingham, the sponsor of the draft amendment, placed in the record a newspaper article describing the "rejoicing by the people of the South" at news that "the President had vetoed the Freedmen's Bureau bill."<sup>179</sup> When opponents objected that the article was irrelevant to the debate on the proposed amendment, the Speaker ruled that it was pertinent:

This constitutional amendment proposes to give Congress "power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." And if the Chair is correctly informed by the remarks of the gentleman from Ohio as to what this extract is, it relates to the veto by the President of a bill passed by Congress in regard to the rights of certain persons, and if that is the case, it may be within the province of

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<sup>176</sup> See *supra* notes 89-91 and accompanying text.

<sup>177</sup> The amendment then before the House provided:

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

H.R. 63, Cong. Globe, 39th Cong., 1st Sess. 1033-1034 (1866). See U.S. Const. amend. XIV, § 5.

<sup>178</sup> Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Woodbridge).

<sup>179</sup> *Id.* at 1092 (the article was from an unidentified edition of the Norfolk, Virginia Post).

Congress to pass a constitutional amendment to secure those rights and the rights of others generally, and therefore, as a part of the remarks of the gentlemen from Ohio, this is certainly in order.<sup>180</sup>

In other words, the Speaker viewed the Freedmen's Bureau bill as an example of federal legislation securing equal protection, precisely the sort of legislation for which the fourteenth amendment would provide clear constitutional authority. Congress, or at least the Speaker of the House, regarded the race-conscious assistance programs of the Freedmen's Bureau as furthering rather than violating the principle of equal protection.

Of course, the fourteenth amendment applied only to the states, and it was not until the twentieth century that the Supreme Court found an "equal protection component" in the fifth amendment, applicable to the federal government.<sup>181</sup> But there is substantial evidence that the framers of the fourteenth amendment also believed that Congress was, and indeed always had been, bound by the principles that the amendment extended to the states. During debate on the amendment, Congressman Bingham remarked that "[t]he proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today."<sup>182</sup> While introducing the amendment in the House, Thaddeus Stevens said:

I can hardly believe that any person can be found who will not admit that every one of these provisions [in section 1] is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.<sup>183</sup>

The Supreme Court was therefore not without support when it

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<sup>180</sup> Id.

<sup>181</sup> Fullilove v. Klutznick, 448 U.S. 448, 473 (1980). The "reverse incorporation" of the fourteenth amendment's equal protection requirement into the due process clause of the fifth amendment was accomplished in *Bolling v. Sharpe*, 347 U.S. 497 (1954). See also *Weinberger v. Weisenfeld*, 420 U.S. 636, 639 n.2 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); *Schneider v. Rusk*, 377 U.S. 163, 168 (1964); see generally Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C.L. Rev. 541 (1977).

<sup>182</sup> Cong. Globe, 39th Cong., 1st Sess. 1088 (1866) (statement of Rep. Bingham).

<sup>183</sup> Id. at 2459 (statement of Rep. Stevens) (capitalization and italics in original).

concluded in this century that "[c]oncern for equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment expressed it most directly in applying it to the States."<sup>184</sup> Any legislation that Congress passed in 1866, when equal protection occupied so much of its attention, must have been consistent with that principle even if the terms of the fourteenth amendment were literally applicable only to the states.

The terms of section 1 of the Civil Rights Act of 1866 also make clear that the race-conscious Reconstruction programs were consistent with the fourteenth amendment's guarantee of equal protection. Proponents of the fourteenth amendment repeatedly emphasized that one of its primary purposes was to place in the Constitution the principles of section 1 of the Civil Rights Act.<sup>185</sup> Unlike the fourteenth amendment, section 1 of the Act contains no state action requirement, and is thus enforceable against federal officials as well as private parties.<sup>186</sup> Therefore, if the Civil Rights Act had forbidden benign race-conscious programs, it would have virtually shut down the Freedmen's Bureau. For example, section 1 of the Act assured all persons the right to contract, but only blacks could contract for education by paying tuition to Bureau schools.<sup>187</sup> Because Congress could not have intended the Civil Rights Act to prohibit the Bureau's activities, the amendment that constitutionalized the Act should not be construed to invalidate other race-conscious programs.

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<sup>184</sup> *Vance v. Bradley*, 440 U.S. 93, 94 n.1 (1979).

<sup>185</sup> See, e.g., *Cong. Globe*, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens); *id.* at 2462 (statement of Rep. Garfield); *id.* at 2896 (statement of Sen. Howard). Section 1 of the Civil Rights Act guaranteed to all persons "of every race and color . . . the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for security of person and property." Ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1981 and 1982 (1982)).

<sup>186</sup> See *Runyon v. McCrary*, 427 U.S. 160, 163-69 & n.8 (1976) (section 1 of the Civil Rights Act of 1866 intended to reach private conduct); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975) (same).

<sup>187</sup> See H.R. Exec. Doc. No. 11, 39th Cong., 1st Sess. 16 (1865) (listing tuition as a source of revenue for Bureau schools). The Supreme Court has recognized that discrimination in school admissions may violate the right to contract guaranteed by section 1 of the Civil Rights Act. See *Runyon v. McCrary*, 427 U.S. 160, 172-74 (1976).

## III. THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION

The contemporaneous creation of the race-conscious Freedmen's Bureau programs and the fourteenth amendment illuminates the amendment's meaning in several ways. First, the framers of the fourteenth amendment cannot have intended it to nullify remedial legislation of the sort Congress simultaneously adopted. Second, the debates concerning the Reconstruction programs provide clear examples of the kinds of reasons and circumstances that would justify the use of race-conscious remedies in the eyes of those who adopted the fourteenth amendment. Conversely, the arguments made unsuccessfully against those programs by legislators who also opposed the fourteenth amendment cannot represent the standards embodied in the amendment. Third, the particular contours of the Reconstruction measures—for example, the provision of basic necessities on a race-neutral basis—give some indication of the circumstances in which affirmative action would be constitutionally impermissible. This evidence demonstrates that some of the constitutional standards proposed over the last decade by members of the Supreme Court are inconsistent with the intent of the framers of the fourteenth amendment.

The Supreme Court most recently addressed at length the constitutionality of affirmative action in *Fullilove v. Klutznick*.<sup>188</sup> *Fullilove* upheld by a vote of six to three a provision of the Public Works Employment Act of 1977<sup>189</sup> requiring that ten percent of all federal grants for local projects be channeled to minority firms. Each of the five separate opinions in *Fullilove* proposed a different constitutional standard.

Justice Stewart's dissent advanced the simplest standard.<sup>190</sup> For Justice Stewart all racial classifications by government are per se unconstitutional whether or not the classification is part of a program to assist disadvantaged minorities:

Under our Constitution, the government may never act to the detriment of a person solely because of that person's race. . . . The rule cannot be any different when the persons injured by a racially biased law are not members of a racial minority. . . . From the perspective of a person detrimentally affected by a racially dis-

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<sup>188</sup> 448 U.S. 448 (1980).

<sup>189</sup> Pub. L. No. 95-28, 91 Stat. 116 (1977).

<sup>190</sup> 448 U.S. at 522-32 (Stewart, J., dissenting). Justice Rehnquist joined in the opinion.

criminary law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly "for the promotion of the public good" or otherwise.<sup>191</sup>

Justice Stewart would read into the fourteenth amendment an absolute prohibition against race-conscious programs, a rule that clearly would have invalidated the very programs that the framers of the amendment adopted in 1866 to assist the freedmen. The theory that benign racial classifications are indistinguishable from those adopted out of malice is precisely the absolutist view of "class legislation"<sup>192</sup> articulated by the congressional minority that opposed both civilian Reconstruction and the fourteenth amendment. Justice Stewart expressly condemned the suggestion that correcting past discrimination, the repeatedly expressed purpose of the race-conscious Reconstruction programs, is sufficient justification for such programs.<sup>193</sup> Quoting from Justice Powell's opinion in *Regents of the University of California v. Bakke*,<sup>194</sup> Justice Stewart contended that "[p]refering members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."<sup>195</sup> Conceding that the statute under review was enacted to compensate for past disadvantages, he insisted that "[n]o race . . . has a monopoly on social, educational, or economic disadvantage, and any law that indulges in such a presumption clearly violates the constitutional guarantee of equal protection."<sup>196</sup>

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<sup>191</sup> Id. at 525-26. Justice Stewart expressed a similar view in *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 128-29 (1981) (dissenting opinion).

<sup>192</sup> See *supra* text accompanying note 58.

<sup>193</sup> Justice Stewart argued:

The Court's attempt to characterize the law as a proper remedial measure to counteract the effects of past or present racial discrimination is remarkably unconvincing. The Legislative Branch of government is not a court of equity. It has neither the dispassionate objectivity nor the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination.

*Fullilove*, 448 U.S. at 527. In *Minnick v. California Dep't of Corrections*, 452 U.S. 105 (1981), Justice Stewart argued even more bluntly that "California's policy of racial discrimination was sought to be justified as an antidote for previous discrimination in favor of white people. But, even in this context, two wrongs do not make a right. Two wrongs simply make two wrongs." Id. at 128 n.3 (Stewart, J., dissenting).

<sup>194</sup> 438 U.S. 265 (1978).

<sup>195</sup> *Fullilove*, 448 U.S. at 529 (Stewart, J., dissenting) (quoting 438 U.S. at 307).

<sup>196</sup> 448 U.S. at 529 (Stewart, J., dissenting).

These arguments echo the objections raised a century ago by opponents of the Freedmen's Bureau and rejected by the same Congress that enacted the fourteenth amendment. It is inconceivable that the majority of Congress, by approving the amendment, intended to condemn their most important domestic program or to embody in the Constitution the social theories of their opponents. The fourteenth amendment may have applied explicitly only to the states, but supporters of the amendment clearly believed that the principle of equality embodied in it was entirely consistent with the Freedmen's Bureau legislation. Congress concluded that such race-conscious measures would not violate "that great principle, equality before the law, about which so much" had been said in the years leading up to the amendment.<sup>197</sup>

Justice Stevens' opinion in *Fullilove* set forth a different standard for holding the ten percent minority set-aside unconstitutional. He accepted in principle the idea that Congress could adopt race-conscious legislation to remedy previous acts of discrimination: "Racial characteristics may serve to define a group of persons who have suffered a special wrong and who, therefore, are entitled to special reparations."<sup>198</sup> Justice Stevens insisted, however, upon "the most exact connection between justification and classification."<sup>199</sup> Even the history of class-based discrimination against blacks in the United States could not justify "a random distribution of benefits on racial lines," necessitating some attempt "either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way."<sup>200</sup> Furthermore, a program must be "narrowly tailored" to guarantee that no individual will receive any benefits without in fact being a victim of discrimination.<sup>201</sup>

Justice Stevens applied these standards in *Fullilove* and found wanting the absolute precision suggested by the phrase "exact connection." He concluded that the set-aside program was defective

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<sup>197</sup> See *supra* text accompanying note 58.

<sup>198</sup> 448 U.S. at 537 (Stevens, J., dissenting). For an interesting pre-*Bakke* argument in favor of a race-based remedy, see B. Bittker, *The Case for Black Reparations* (1973).

<sup>199</sup> 448 U.S. at 537 (Stevens, J., dissenting).

<sup>200</sup> *Id.* at 539 (Stevens, J., dissenting).

<sup>201</sup> *Id.* at 541 (Stevens, J., dissenting). Justice Stevens borrowed this phrase from Chief Justice Burger's opinion that any use of racial criteria to remedy the present effects of past discrimination must be "narrowly tailored to the achievement of that goal." *Id.* at 480.

because it provided the same benefit to all victims of discrimination, rather than attempting to calculate the particular degree of assistance that each minority contractor required to neutralize the effects of past discrimination.<sup>202</sup> Justice Stevens candidly acknowledged in a footnote that such calculations were probably impossible.<sup>203</sup> He also objected that participation in the set-aside program was open to all minority-owned firms.<sup>204</sup> In his view the necessary "exact connection" would exist only if Congress demonstrated that each assisted firm had been the victim of unfair treatment.<sup>205</sup> Justice Stevens did not explain, however, how such a determination could be made for each of the nation's 382,000 minority-owned firms.<sup>206</sup>

A practicable affirmative action program that could meet Justice Stevens' extraordinarily stringent standard is difficult to imagine. None of the race-conscious Reconstruction programs could have passed the Stevens test. The programs applied to all blacks, not just to recently freed slaves or to blacks who had been denied an education because of their race. Indeed, the thirty-ninth Congress expressly rejected such limitations.<sup>207</sup> The amount of assistance extended under the Reconstruction programs, like the benefits of the set-aside program condemned by Justice Stevens, was not in any way adjusted to match the amount of harm that each individual had earlier suffered. During the 1860's only those members of Congress who opposed both Reconstruction and the fourteenth amendment ever suggested that the scope and nature of race-conscious

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<sup>202</sup> Justice Stevens objected in particular that blacks, Hispanics, Indians, Orientals, Eskimos and Aleuts all received the same benefits. *Id.* at 537-38 (Stevens, J., dissenting). Justice Stevens does not explain how a white contractor could have standing to complain, for example, that the law provided more complete reparations for Orientals than for Aleuts.

<sup>203</sup> *Id.* at 541 n.13 (Stevens, J., dissenting):

I recognize that the EDA has issued a Technical Bulletin . . . which distinguishes between higher bids quoted by minority subcontractors which are attributable to the effects of disadvantage or discrimination and those which are not. That is, according to the Bulletin, if it is determined that a subcontractor's uncompetitive high price is not attributable to the effects of discrimination, a contractor may be entitled to relief from the 10% set-aside requirement. But . . . it is not easy to envision how one could realistically demonstrate with any degree of precision, if at all, the extent to which a bid has been inflated by the effects of disadvantage or past discrimination.

<sup>204</sup> *Id.* at 540-41 (Stevens, J., dissenting).

<sup>205</sup> *Id.* at 541 (Stevens, J., dissenting).

<sup>206</sup> See *id.* at 465.

<sup>207</sup> See text accompanying *supra* notes 10-13, 137.

relief ought to match precisely the harm previously sustained by the individuals who were to benefit from the programs.<sup>208</sup> Those members of Congress who favored the programs and the amendment framed their arguments and their legislation in far broader terms than Justice Stevens now regards as acceptable, emphasizing the past harm to blacks as a group and providing relief that encompassed the entire race. Whether this approach was based on Congress' concept of social justice or its doubts about the feasibility of making an "exact connection," those who framed the fourteenth amendment deliberately rejected Justice Stevens' approach to remedying the effects of past discrimination.

Justice Powell asserted in *Fullilove*, as he had in *Regents of the University of California v. Bakke*,<sup>209</sup> that race-conscious programs adopted to ameliorate the effects of past discrimination are constitutional only if they meet three requirements: first, the entity that establishes the program must have the "authority and capability" to make findings of past discrimination;<sup>210</sup> second, it must in fact make sufficient findings of relevant past discrimination;<sup>211</sup> and third, it must choose a "permissible means" for redressing the identified past discrimination.<sup>212</sup> The first two criteria would have posed no apparent problem for the race-conscious Reconstruction programs, because Justice Powell regards Congress as preeminently qualified to make findings of discrimination,<sup>213</sup> and because the legislative history of the Reconstruction programs is replete with references to prior discrimination.<sup>214</sup> Whether those race-conscious programs could have satisfied Justice Powell's third requirement, however, is uncertain.

In assessing the permissibility of race-conscious means chosen to

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<sup>208</sup> See, e.g., supra note 137 and accompanying text.

<sup>209</sup> 438 U.S. 265 (1978).

<sup>210</sup> Id. at 309. In *Fullilove* Justice Powell asserted that the entity must have "the authority to act in response to identified discrimination" and that it must be "competent to make findings of unlawful discrimination." 448 U.S. at 499 (Powell, J., concurring).

<sup>211</sup> *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). Justice Powell uses the phrases "unlawful discrimination" and "discrimination" interchangeably without any explanation of whether illegality is a constitutional prerequisite to a race-conscious remedy. None of the discrimination that led to the race-conscious programs adopted during Reconstruction was illegal at the time it occurred.

<sup>212</sup> Id. at 499 (Powell, J., concurring).

<sup>213</sup> Id. at 499-502 (Powell, J., concurring).

<sup>214</sup> See, e.g., supra text accompanying notes 20-21, 67-68, 85, 103.

correct past discrimination, Justice Powell suggested in *Fullilove* that a variety of factors should be considered, including the efficacy of alternative remedies, the planned duration of the remedy, whether minorities receive more than their pro rata share under the program, the flexibility of the program, and the effect of the remedy on innocent whites.<sup>215</sup> Justice Powell voted for upholding the set-aside program, emphasizing that the required 10% level of minority participation was lower than the 17% of the population that is non-white, and that only 0.25% of the funds expended nationally for construction work each year was reserved under the set-aside program for minority contractors.<sup>216</sup>

Despite Justice Powell's analysis, the imposition of any ceilings on the proportion of minority participation in a race-conscious remedial program clearly would be inconsistent with the intent of the framers of the fourteenth amendment—under the Reconstruction programs blacks typically received *all* of the benefits. For example, all of the participants in the Freedmen's Bureau's education program were black, and that program comprised all of the federal assistance to education.<sup>217</sup> The race-conscious Reconstruction measures were designed to assure not only prospective nondiscrimination, as the *Fullilove* set-aside program may have been, but also to provide compensatory treatment and benefits to redress past discrimination. Whether Justice Powell adheres to a comparably broad view of Congress' remedial authority is far from clear.

Chief Justice Burger's opinion in *Fullilove* rejected the arguments against the set-aside program without articulating any specific constitutional standard. Like Justice Powell, the Chief Justice accepted the propriety of congressional action to correct past racial discrimination, and noted that the use of racial criteria is often necessary to provide effective relief.<sup>218</sup> Responding to the petitioners' objection that the set-aside program burdened white-owned enterprises, the Chief Justice offered three arguments: first, such burdens are permissible in correcting past discrimination; second, the burden imposed in *Fullilove* was "relatively light"; and third, nonminority firms may well have benefitted in the past from the

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<sup>215</sup> 448 U.S. at 510-15 (Powell, J., concurring).

<sup>216</sup> *Id.* at 513-15 (Powell, J., concurring); see also *id.* at 485 n. 72 (opinion of Burger, C.J.).

<sup>217</sup> See *supra* notes 39, 69, 105 and accompanying text.

<sup>218</sup> 448 U.S. at 482-84.

exclusion of minority businesses.<sup>219</sup> The opinion, however, did not elaborate on the comparative importance of these three factors or on the constitutionality of a program that placed a relatively heavy burden on whites. The Chief Justice also rejected the criticism that the set-aside program might in some instances benefit a minority-owned firm that had not been injured by past discrimination, asserting somewhat vaguely that a race-conscious program must provide "a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives."<sup>220</sup> Although this requirement is less stringent than Justice Stevens' approach,<sup>221</sup> it is unclear whether the race-conscious Reconstruction programs could meet even the Chief Justice's standard.

The three-part standard first proposed by Justices Marshall, Brennan, Blackmun and White in *Bakke*, and reiterated by Marshall, Brennan and Blackmun in *Fullilove*, is the only standard proposed that is clearly consistent with the legislative history of the fourteenth amendment. This plurality view requires that an ostensibly benign race-conscious program be based on "an important and articulated purpose," not "stigmatize[] any group," and not "single[] out those least well represented in the political process to bear the brunt of [the] benign program."<sup>222</sup> The race-conscious Reconstruction programs that are the benchmark for the fourteenth amendment would easily satisfy each of these requirements. The first criterion demands no more than an intermediate standard of review: the program must be "substantially related" to "important governmental objectives,"<sup>223</sup> but need not withstand the kind of strict scrutiny Justice Powell would apply.<sup>224</sup> The second and third criteria are well-designed to separate "invidious" discrimination from the "ameliorative" race-conscious programs that the thirtieth Congress believed were not only constitutional but also sound policy.

The framers of the fourteenth amendment, although considera-

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<sup>219</sup> *Id.* at 484-85.

<sup>220</sup> *Id.* at 487.

<sup>221</sup> See *supra* notes 199-201 and accompanying text.

<sup>222</sup> 448 U.S. at 519 (Marshall, J., concurring in judgment); see *Bakke*, 438 U.S. at 361.

<sup>223</sup> 448 U.S. at 519 (Marshall, J., concurring in judgment).

<sup>224</sup> *Id.* at 507 (Powell, J., concurring). Powell would require the program to be "necessary to accomplish a compelling governmental purpose." *Id.*

bly more enthusiastic about affirmative action than many members of the present Supreme Court, indicated a concern about the scope of such programs rather different than the objections voiced today. The major race-conscious Reconstruction programs were deliberately aimed at equipping blacks to meet their own economic and other needs. Most of the assistance provided to blacks by the Freedmen's Bureau was in the form of farm land or education,<sup>225</sup> and the congressional proponents of the Bureau stressed that its work would enable the freedmen to become self-supporting.<sup>226</sup> But although these programs were deliberately limited to blacks, Congress provided food "to all classes of destitute or helpless persons"<sup>227</sup> during the famine of 1867. Representative Bingham, both a supporter of the Freedmen's Bureau and the principal drafter of section 1 of the fourteenth amendment, rejected arguments against extending the aid to white former rebels as well as to black former slaves, insisting that Congress should not "discriminate . . . between friends and enemies when famishing men ask for bread."<sup>228</sup>

This history suggests that the fourteenth amendment limitations on affirmative action concern not the amount of any burden on whites or the precision with which black victims of past discrimination are identified, but the type of benefit bestowed by a program. The thirty-ninth Congress approved race-conscious programs designed to enable blacks to improve their situation and, although the programs were remedial in purpose, no attempt was made to screen individual black participants to assure that they were actual victims or to measure the degree of past disadvantage. That same Congress, however, rejected discrimination in programs providing food for the starving, insisting that when the government undertook to meet essential human needs it should make no distinctions on the basis of race or past loyalties. The federal government provided education only for freedmen, but it fed all who were hungry, black and white alike.

All of the affirmative action programs considered by the Supreme Court in the last decade provided minorities with opportu-

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<sup>225</sup> See *supra* text accompanying notes 145-52.

<sup>226</sup> See *supra* text accompanying notes 21-22.

<sup>227</sup> Resolution of March 30, 1867, No. 28, 15 Stat. 28; see text accompanying *supra* note 123.

<sup>228</sup> See text accompanying *supra* note 129.

nities for self-support and self-advancement in the form of education,<sup>229</sup> job training,<sup>230</sup> business opportunities,<sup>231</sup> or employment.<sup>232</sup> These programs were similar in content and purpose to the affirmative action measures of a century ago, and were considerably less restrictive than the 100 percent quotas enforced by the Freedmen's Bureau. Benign race-conscious measures related to voting<sup>233</sup> are also analogous to the nineteenth-century programs because they help minorities to advance their individual or collective political interests. A very different constitutional problem would arise if a state or the federal government were to adopt racial distinctions in programs providing for essential human needs, such as food or clothing. A program that provided food stamps only to blacks or that allotted blacks more food stamps than whites would certainly be unconstitutional. Justice Powell's opinion in *Fullilove* suggests that such a distinction might be permissible if it represented only a portion of the overall program. Alternatively, Justice Stevens' *Fullilove* opinion suggests affirmative action in food stamps would be possible if all the black participants were shown to have been actual victims of discrimination. But the legislative history of the fourteenth amendment indicates that its framers would not have regarded either limitation as sufficient to justify racial distinctions among families in need of food. Of course, even in dealing with necessities race-conscious action would remain constitutional if needed to assure fairness within the program; if all blacks are denied food stamps in June, they could be given a double allocation in July.

The line between programs providing basic necessities and programs providing opportunities for self-advancement and self-support will not always be clear. Nevertheless, virtually every affirmative action program adopted in our generation falls clearly within the second category. The vast majority of current programs concern education and jobs, the two major areas addressed by the race-conscious Reconstruction programs. This similarity suggests that public officials today have a sense of when benign racial dis-

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<sup>229</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

<sup>230</sup> *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

<sup>231</sup> *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>232</sup> *Minnick v. California Dep't of Corrections*, 452 U.S. 105 (1981).

<sup>233</sup> See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977).

tinctions are appropriate that is quite faithful to the views that prevailed in Congress 120 years ago. Consequently, the Court's role in enforcing the constitutional limitations on affirmative action should remain minor.

The last two decades of debate regarding affirmative action have produced a great flowering of social and philosophical theories about race, equality, and social justice. This outburst of creativity may be interesting from an intellectual perspective, and the diverse ideas that have emerged warrant consideration by legislators and executive officials charged with formulating government policy. Today's critics of affirmative action have taken up with great vigor the arguments unsuccessfully advanced over a century ago by President Andrew Johnson and the confederate sympathizers in the Democratic party. Their ideas are entitled to a full hearing in the halls of Congress and among the electorate. No such hearing is warranted in the federal courts.

The historical intent behind the various provisions of the Constitution is often obscure, but where it is clear that intent must be faithfully implemented by the judiciary. In such situations the Constitution accords to the Supreme Court no mandate to develop a new theory of its own, or to reconsider arguments first bruited and rejected over a century ago. Justices Rehnquist, Stewart, Stevens and Powell evidently believe that legislation such as the Freedmen's Bureau Acts of 1865 and 1866 was unfair or unwise. The interpretation of the fourteenth amendment's limitations on affirmative action should turn, however, not on whether a majority of the present Supreme Court would have voted for these race-conscious Reconstruction programs, but on the fact that the thirty-ninth Congress repeatedly chose to do so.