

*Fisher v. University of Texas at Austin:*

**The Equal Protection Clause of the Fourteenth Amendment**

Research Provided by: The Constitutional Sources Project

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## I. RESEARCHER'S NOTES:

**Please note that all quotes are as they appear in their primary sources.**

The following project is the compilation of research done over the course of ten weeks by The Constitutional Sources Project (ConSource). While the work reflected in this document is thorough, given the amount of literature available on the Equal Protection Clause of the Fourteenth Amendment, it is not a fully comprehensive study. ConSource's work represents a sampling of major legislative initiatives and viewpoints following ratification of the Fourteenth Amendment.

The bulk of the research is derived from a thorough investigation of statutes at large passed between December 1865 and March 1867, the Congressional Globes from the Thirty-eighth, Thirty-ninth, and Fortieth Congresses, as well as newspapers from the post-ratification period, found through Harper's Weekly and the Library of Congress' free resource, "Chronicling America." Thanks to the generosity of Howard University, ConSource research fellows were also able to use materials in the Howard University Archives.

In an effort to provide historical materials relevant to the *Fisher v. University of Texas at Austin* case, ConSource has focused most of its research on the provision of educational resources and benefits during the Reconstruction era.

A sincere thank you to all those who helped during all phases of research.

## II. THE FOURTEENTH AMENDMENT

### A. Text of the Constitution

1. **Citation:** U.S. Const. amend XIV, § 1, available at

<http://www.consource.org/document/amendments-xi-xxvii/>.

**Background:** *Framed primarily by Republican Representative John Bingham, the Fourteenth Amendment was passed by the Thirty-ninth Congress as one of the Reconstruction Amendments. It was passed in part to combat Black Codes, which were statutes passed in Southern states to limit the rights of African Americans after they were freed from slavery by the Emancipation Proclamation. These statutes borrowed elements and language from antebellum slave laws and restricted rights, such as the right to move freely, vote, and testify in court. The Fourteenth Amendment addressed Black Codes and other discriminatory legislation by guaranteeing rights to all citizens, including those former slaves who were newly made citizens. The Senate passed the Fourteenth Amendment on June 8, 1866 and the House on June 13. It was ratified on July 9, 1868, when 28 of the 37 states passed the amendment. For more information on history of the Fourteenth Amendment, see 14<sup>TH</sup> AMENDMENT TO THE U.S. CONSTITUTION <HTTP://WWW.LOC.GOV/RR/PROGRAM/BIB/OURDOCS/14THAMENDMENT.HTML> (last visited July 9, 2012).*

**Quote:** 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.* (Emphasis added)

## III. ARGUMENTS FOR AND AGAINST REMEDIATING THE EFFECTS OF SLAVERY AS JUSTIFICATION FOR WHAT IS NOW TERMED AFFIRMATIVE ACTION

Following the Emancipation Proclamation and the conclusion of the Civil War, there remained a lingering question of how to transition an entire segment of the population from conditions of servitude to citizenship. There was a movement to pass federal legislation to remedy years of servitude by providing assistance to newly freed slaves to enable them to fulfill the civic duties associated with being citizens of the United States, as well as give them the tools necessary to survive as freedmen. In some cases, these proposals involved granting special privileges to newly freed slaves that were not afforded to other citizens. This movement was led predominantly by the Republican Party, which believed in the morality and constitutionality of such provisions. The debate on these proposals presented a range of views, based both in policy and on the Constitution, on what sort of assistance should be given, whom that assistance should be given to, and how long such assistance should be offered. One group of proponents of this type of

affirmative action believed that assistance for newly freed slaves should be offered only during a short period of transition. They believed that once the newly freed slaves had the skills necessary to financially support themselves, such assistance should be terminated. Others believed that slavery had created an almost irreparable debt owed to freed slaves and their progeny. They proposed that the United States make attempts to repay the debt for the foreseeable future. Still another group believed that no special preferences should be given to freedmen at all. This group believed that as newly made citizens of the United States, these freed slaves should have the same protections, privileges, and remedies as all other citizens, but no more. They believed that special remedial legislation was unconstitutional, unnecessary and even detrimental to those it was intended to assist. The laws that were eventually enacted reflect this range of views.

### ***A. ARGUMENTS FOR TEMPORARY PRIVILEGE AND ASSISTANCE FOR FREEDMEN TO REMEDY CONDITIONS OF SLAVERY***

In the aftermath of Civil War, a faction of Americans supported legislation providing temporary privileges to freedmen during their period of transition to citizens. Such privileges were drafted into laws that would provide assistance for a given number of years and then expire. Congress could then pass new legislation to continue and extend this privilege, if they determined assistance was still necessary. This is most aptly illustrated by the legislation creating the Freedmen's Bureau. The Freedmen's Bureau was a governmental entity primarily charged with providing rations and other life essentials to newly freed slaves, destitute citizens, and refugees. Refugees were both African Americans freed by the Emancipation Proclamation and those free prior to it. Refugees also encompassed southern whites fleeing from secession. Whether a citizen was destitute or not was determined by the Commissioner of the Freedmen's Bureau, who was charged with distributing rations. The Bureau was perhaps most successful in creating educational opportunities for freedmen, assisting with the education of more than 100,000 freedmen and their progeny. The legislation creating the Bureau was originally drafted to expire after a year. Later legislation continued the Bureau for an additional two years. Proponents of the Freedmen's Bureau legislation cited the war powers, Privileges and Immunities Clause of the Fourteenth Amendment and the Thirteenth Amendment as sources of Congress' authority to enact the Freedmen's Bureau. See John M. Bickers, *The Power to Do What Manifestly Must be Done: Congress, the Freedmen's Bureau, and Constitutional Imagination*, 12 ROGER WILLIAMS U. J. REV. 70, 103-9 (2006).

#### **1. STATUTES**

**1. Citation:** Act of March 3, 1865, ch. 90, § 1, 1866 Stat. 508, available at <http://www.history.umd.edu/Freedmen/fbact.htm>.

**Background:** *The Freedmen's Bureau was initiated by President Lincoln at the*

*end of the Civil War and passed by the Thirty-ninth Congress in March of 1866. It was organized under the War Department with the initial purpose of aiding former slaves during the war and for one year after the war ended. The Bureau was charged with providing temporary relief in the form of rations to freedmen, war refugees, and destitute citizens. It provided health care to those without the financial assets to purchase it. It adjudicated disputes, overturning other courts' discriminatory rulings, and in some areas, established courts where freedmen could bring their complaints. The Bureau helped to facilitate the hiring of freedmen through the drafting of employment contracts. Although the Bureau attempted to redistribute land formerly held by the confederate states to freedmen, their efforts were largely thwarted by President Johnson's efforts to return former confederate property to its pardoned owners. The Bureau's most successful efforts were those to educate newly freed slaves in schools and universities built especially for them.<sup>1</sup> Although the Bureau was only intended to exist for a year, the Act of July 16, 1866 extended its life by two years. Please see "Background" on pages 6 and 25 for more information on the Act of July 16, 1866 and the subsequent changes to the Freedmen's Bureau. For more information on the Bureau generally, please see NATIONAL ARCHIVES; THE FREEDMEN'S BUREAU, 1865- 1872, [HTTP://WWW.ARCHIVES.GOV/RESEARCH/AFRICAN-AMERICANS/FREEDMENS-BUREAU](http://www.archives.gov/research/african-americans/freedmens-bureau) (last visited July 16, 2012).*

**Quote:**

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby established in the War Department, to continue during the present war of rebellion, and for one year thereafter, a bureau of refugees, freedmen, and abandoned lands, to which shall be committed, as hereinafter provided, the supervision and management of all abandoned lands, and the control of all subjects relating to refugees and freedmen from rebel states, or from any district of country within the territory embraced in the operations of the army, under such rules and regulations as may be prescribed by the head of the bureau and approved by the President.*

- 2. Citation:** Act of July 16, 1866, ch. 200, § 12, 1866 Stat. 173, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=4>.

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<sup>1</sup> William Troost, *The Freedmen's Bureau*, EH.NET ENCYCLOPEDIA (July 30, 2012),

**Background:** *The Act of July 16, 1866 extended the life of the Freedmen’s Bureau for two years and expanded its powers, especially with regard to educational efforts. (For more information on this expansion, see the Act of July 16, 1866 on page 25). The Act was originally passed by Congress in February 1866 but was vetoed by President Andrew Johnson. In July of 1866, Congress passed the Act a second time. Although President Johnson once again vetoed the Act, Congress was able to override his veto. For more information on President Johnson’s veto, please see page 18.*

**Quote:** *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act to establish a bureau for the relief of freedmen and refugees, approved March third, eighteen hundred and sixty-five, shall continue in force for the term of two years from and after the passage of this act.*

**3. Citation:** Act of July 25, 1868, ch. 245, § 2, available at <http://www.drbronsontours.com/bronsonactrelatingtothefreedmensbureauandprovidingforitsdiscontinuancejuly251868.html>.

**Background:** *The Act of July 25, 1868 required that by January 1869, most Bureau officers were withdrawn from states and Bureau activities ceased. An exception was carved out for educational efforts. The Educational Department of the Bureau was intended to continue indefinitely as a separate entity. However, the Educational Department suffered after the General Superintendent of Education, Reverend Alvord resigned, in 1870. The Educational Department later ran out of money and dissolved in March of 1871.*

**Quote:** *And be it further enacted, That the commissioner of the bureau shall, on the first day of January next [1869], cause the said bureau to be withdrawn from the several States within which said bureau has acted and its operations shall be discontinued. But the educational department of the said bureau...shall be continued as now provided by law until otherwise ordered by act of Congress.*

## 2. LEGISLATIVE DEBATES

**4. Citation:** Cong. Globe, 38th Cong., 1st Sess. 2799 (1865), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=848>.

**Background:** *Mr. Charles Sumner, a Republican Senator from Massachusetts, spoke in favor of the establishment of a bureau that would provide educational privileges to freedmen and aid to those in need – what would become the Freedmen’s Bureau. Sumner believed the situation for freedmen in the southern states was dire. His support of the Act was based on his belief that because the newly freed slaves derived their freedom from legislative and executive acts of the United States government, the federal government should also be charged with protecting and assisting them. He noted that such aid was necessary during this period of transition, until such a point that the newly freed slaves could be “rendered useful, or at least saved from being a burden.”<sup>2</sup> While others believed aid for newly freed slaves should come from individual charities in the North, Sumner believed the assistance necessary was too vast and complex for anyone but the national government to tackle. For more information on Mr. Charles Sumner, see generally BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S001068> (last visited June 27, 2012).*

**Quote:** It is evident, then, that the freedmen are not idlers. They desire work. But in their helpless condition they have not the ability to obtain it without assistance. They are alone, friendless, and uninformed, *The curse of slavery is still upon them. Someone must take them by the hand; not to support them, but simply to help them to that work which will support them. . .The intervention of the national Government is necessary.* Without such intervention, many of these poor people, freed by our acts in the exercise of a military necessity, will be left to perish. (Emphasis added)

### 3. NEWSPAPERS

5. **Citation:** George William Curtis, Editorial, *The Veto Message*, HARPER’S WEEKLY, Mar. 3, 1866, at 130, available at <http://14thamendment.harpweek.com/asp/ViewArticleText.asp?url=content%3A%2F%2Fharpweek%2Ftitle%5BHW%5D%2Fvolume%5B1866%5D%2Fissue%5B0303%5D%23%2FTEI%2E2%5B1%5D%2Ftext%5B1%5D%2Fbody%5B1%5D%2Fdiv1%5B5%5D&pageIds=%7CHW%2D1866%2D03%2D03%2D0130%7C&title=&returnUrl=http%3A%2F%2F14thamend>

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<sup>2</sup> Cong. Globe, 38th Cong., 1st Sess. 2798 (1865), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=847>.



[ment%2Eharpweek%2Ecom%2FHubPages%2FCommentaryPage%2Easp%3FCommentary%3D04Freedmens&returnTitle=Presidential+Vetoes.](#)

**Background:** *President Andrew Johnson viewed the Freedmen's Bureau as a wartime measure. He believed that after the cessation of hostilities, the matter of how to transition the newly freed slaves to citizens should be left to the states. (For more information on Andrew Johnson's view, see his veto of the Freedmen's Bureau on page 18). Harper's Weekly editor George William Curtis, who also assisted in the drafting of the Freedmen's Bureau Bill, disagreed with this position. He believed temporary intervention by the national government during this period of transition was necessary because of the general hostility towards the newly freed slaves in many of the southern states. As editor of Harper's Weekly, Curtis sought to influence public opinion by using his newspaper to advocate for political and social reforms. Curtis was a strong supporter of civil rights and using education to overcome discriminatory attitudes and work towards social equality for African Americans. For more information on George William Curtis, please see THE IMPEACHMENT OF ANDREW JOHNSON, <http://www.andrewjohnson.com/11biographieskeyindividuals/GeorgeWilliamCurtis.htm> (last visited July 9, 2012) and HARPWEEK, <http://www.harpweek.com/09cartoon/BrowseByDateCartoon.asp?Month=July&Date=25> (last visited July 9, 2012).*

**Quote:** The President says that a system for the support of indigent persons was never contemplated by the authors of the Constitution. Certainly not, and this bill is no more such a system than an appropriation for military hospitals would be. It is a simple necessity of the situation. Shall these homeless, landless, forlorn persons be left to the mercies of those who despise and hate them, *or shall the United States say, 'We cut the bonds that bound you to the ground, and we will protect you while you are struggling to get upon your feet?'* (Emphasis added)

#### 4. LETTERS

6. **Citation:** Report from the American Freedmen's Inquiry to the Secretary of War (May 15, 1864), available at <http://www.civilwarhome.com/commissionreportchapt3.htm>.

**Background:** *The American Freeman's Inquiry Commission was created in March of 1863 by Secretary of War, Edwin McMasters Stanton to investigate both the best manner to protect the newly freed slaves and to provide the temporary assistance necessary to improve their condition. The findings of the*

*Commission helped to guide the actions of the Freedmen's Bureau. The following excerpt comes from the final report of the American Freedmen's Inquiry Commission. The Commission proposed special assistance and protection for "colored people," but only for the time necessary to safeguard their protection under general laws and overcome discriminatory legislation in the Southern states. For more information on The American Freedmen's Inquiry Commission, see The Beginning of the Bureau, Encyclopedia: The Freedmen's Bureau, <http://eh.net/encyclopedia/article/troost.freedmens.bureau> (last visited June 29, 2012).*

**Quote:** The sum of our recommendations is this: Offer the freedmen temporary aid and counsel until they become a little accustomed to their new sphere of life; secure to them, by law, their just rights of person and property; relieve them, by a fair and equal administration of justice, from the depressing influence of disgraceful prejudice; above all, guard them against the virtual restoration of slavery in any form, under any pretext, and then let them take care of themselves.

## **B. ARGUMENTS FOR REMEDIATION FOR A LONGER OR INDEFINITE PERIOD OF TIME**

The belief that slavery created an almost irreparable debt to African Americans surfaced in the wake of the Civil War and during the drafting of the Fourteenth Amendment. This view has continued into the present. The moral foundation behind this idea can be traced either to the fact that many of today's African-Americans have slaves in their lineage, or the pervasive, lingering disadvantages that slavery and discrimination have wrought for African Americans. Both historical and contemporary proponents of this belief seek legislative means through which to address and remedy the lingering effects of slavery for however long such remediation is deemed necessary. Education, particularly at the university level, is cited by many who hold this view as a means through which discriminatory attitudes can be overcome and retribution can be paid. Therefore, those who support continued remediation, often seek to provide it in the form of university education.

### **1. STATUTES**

- 1. Citation:** Act of June 21, 1866, ch. 130, § 2, 1866 Stat. 69, *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=4>.

**Background:** *The Charter for Howard University was established by the Thirty-ninth Congress on June 21, 1866 and approved by President Andrew Johnson on March 2, 1867. The original idea for the act came from the First Congregational Society of Washington, which in the wake of the Civil War desired to establish a theological seminary to educate African American clergymen. This idea was expanded by the Thirty-ninth Congress who elected to establish a larger college of Liberal Arts and Medicine primarily for freedmen, but open to people of all race and gender without distinction. The University was named after the Commissioner of the Freedmen’s Bureau, General Oliver Otis Howard, who would later become the first president of the University. The initial mission of the University was to educate newly freed slaves and aid with their transition to citizenship. Although the mission of the University has evolved over time, it has continued to seek ways to erase all vestiges of prejudice and discrimination from American society and to repay the debt created by slavery.<sup>3</sup> Originally, funding for the University came almost exclusively from the Freedmen’s Bureau. However, in 1879, after the Bureau ceased operation, Congress approved a special appropriation for the University. Between 1879 and 1910, Congress awarded Howard University financial gifts totaling \$1,217,848. In 1928, Howard’s charter was amended to authorize the appropriation of federal money for the maintenance and growth of the University. Howard University is unique in that it is a private university that receives federal appropriations to assist with its general operation, rather than just tax breaks or student loan assistance. Howard University still receives federal appropriations. For more information on the history of Howard University, see generally HOWARD UNIVERSITY, <http://www.howard.edu/explore/history.htm> (last visited July 9, 2012). For more information on Howard’s funding, please see U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/programs/howard/funding.html> (last visited July 16, 2012).*

**Quote** *And be it further enacted, That the object for which this corporation is created is declared to be the establishment of a charitable institution for the instruction of freedmen in the industrial pursuits of life and fit them for independent self-support, and to afford a temporary home*

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<sup>3</sup> See Dr. James E. Cheek, “To Seek a New Direction: Howard in the Decade of the Seventies,” Inaugural Address at Howard University (Apr. 25, 1970) (transcript available at Howard University Archives); J. Stanley Durkee, Inaugural Address at Howard University (Nov. 12, 1919) (transcript available at Howard University Archives); Dr. James M. Nabrit, “Towards the Future of Learning,” Inaugural Address at Howard University (Apr. 26, 1961) (transcript available at Howard University Archives).

for such freedmen as may, from sickness, misfortune, age, or infirmity, require fostering care until otherwise relieved.

## 2. NEWSPAPERS

2. **Citation:** George William Curtis, Editorial, *A Long Step Forward*, HARPER'S WEEKLY, Jan. 27, 1866, at 50, available at <http://14thamendment.harpweek.com/asp/ViewEntryImage.asp?page=0&imageSize=1>.

**Background:** *In his editorial article, George William Curtis advocated for the advancement and protection of African Americans. As in many of his other pieces, he emphasized the importance of public education for societal advancement. Curtis discussed the precarious position of the freedmen. He observed that they had no choice in livelihoods because they only had the skills to work for those who formerly held them as slaves. Curtis noted that military protection would not enable freedmen to work for a living or to be able to house and feed themselves. Curtis recognized that in order to overcome the effects of slavery, freedmen would have to be educated--learning valuable, marketable skills. However, he recognized this would be a slow and gradual process during which freedmen would need protection and special assistance. Curtis was also an advocate of making the freedmen landowners, since without profitable skills, they did not have the means to buy land.*

**Quote:** Give the freedmen land from which they can not be expelled; protect their rights against all aggressors by the national power; and Time, the great mediator and educator, will gradually show the present class of landholders in the late rebel States that their interest is one with that of their late slaves, now become citizens; while the occupancy of land, the laws of labor, and the education for which the freedmen are so anxious and so ripe will develop the self respecting and independent manhood which will fit them for the political power which can not long be withheld.

## 3. INDIVIDUAL OPINION

3. **Citation:** Reverend William Weston Patton, Inaugural Address at Howard University (Oct. 9, 1877), available at <http://www.huarchivesnet.howard.edu/9908huarnet/patton3.htm> and <http://www.huarchivesnet.howard.edu/9908huarnet/patton11.htm>.

**Background:** *Reverend William Weston Patton, a white abolitionist, articulated what he perceived to be the lasting implications of, and proper remedies for, slavery in his inaugural speech at Howard University. Patton believed that it would be a long time until African Americans could erase all associations with bondage, and would be accepted as intrinsically equal to Caucasians. He believed that education was an integral part of this shift in collective consciousness, thus necessitating the continuing work and mission of Howard University. Howard University, at this time, was funded primarily by the Freedmen's Bureau. However, as noted by his quote on page 19, Patton did not believe in special privilege given solely to freedmen and other African Americans. Although he spoke of the important mission of Howard in achieving racial equality and Howard was built primarily for the education of freedmen, Howard University was and is open to all people, regardless of race. His statements thus are somewhat contradictory.*

**Quote:** But the complete university-training is essential to the development of any race and nation, and must be a factor in the highest civilization.

Neither special legislation, nor military protection, nor favor extended by those in power, nor the peculiar regard and effort of philanthropists will, of themselves, avail to procure the abolition of caste-feeling, and the elevation of the colored people to an entire equality with the whites. The effects of ages of slavery are not to be removed in a day, by a mere legislative vote. An amendment to the Constitution alters no fact of ignorance, of poverty, of moral debasement. The prejudices of the whites, descending through generations, imbibed by individuals in infancy and strengthened by universal sentiment, practice, and association of ideas, cannot be easily and soon overcome, and are not, so far as feeling is concerned, wholly within the power of volition, so as to be annihilated at will. They will vanish gradually in the presence of increasing evidence of a noble manhood. *Developed intellectual power, the higher education, success in industrial pursuits, the acquirement of wealth and culture and character, will cause it to disappear as the sun does the heavy, chilly, obscuring mists which night generates in the valleys.* (Emphasis added)

**4. Citation:** Clifford L. Muse, Jr. *Ethnic and Cultural Diversity in the Establishment and Development of Howard University, 1867-1910* (Howard University Archives, 1999) (quoting *Owes Debt to Negro*, WASH. POST, May 27,

1909), available at

<http://www.huarchivesnet.howard.edu/9908huarnet/muse6.htm>.

**Background:** *At Howard University's 1909 commencement, President Taft explained his view on the relationship between the United States, as a political entity, and Howard University. He believed that as a consequence of the nation's history with slavery, the United States owed a debt to former slaves and their progeny, which could be repaid in part by the nation's financial support of Howard University, an historically African American university. For more information on the founding and financial support given to Howard, see "Background" of the Act of June 21, 1866 on page 10-11.*

**Quote:** This institution here is the partial repayment of a debt-only partial-to a race to which a government and the people of the United States are eternally indebted.... Everything that I can do in the executive in the way of helping along this university I expect to do. I expect to do it because I believe it is a debt of the people of the United States; it is an obligation of the government of the United States, and it is money constitutionally applied to that which shall work out in the end the solution of one of the great problems that God has put upon the people of the United States.

### **C. IDENTIFYING RECIPIENTS FOR FREEDMEN'S BUREAU AID**

The question of who would be assisted by the Freedmen's Bureau and receive its benefits was a hotly contested issue when legislation creating the Bureau was drafted. Between the first and second sessions of the Thirty-eighth Congress recipients of the Bureau's aid were expanded from former slaves freed by the Emancipation Proclamation to freedmen, refugees, and destitute citizens. However, educational provisions of the Freedmen's Bureau legislation only discuss schools for freedmen.

#### **1. LEGISLATIVE DEBATES**

**1. Citation:** CONG. GLOBE, 38th Cong., 1st Sess., 2799 (1864), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=066/llcg066.db&recNum=848>.

**Background:** *When the Freedmen's Bureau Bill was first introduced in the House by Representative Eliot of Massachusetts, the recipients of its aids were restricted solely to those who were freed by the Emancipation Proclamation. Therefore, freed slaves in border states were not included. This was a hotly contested issue and later revised in the second session of the Thirty-eighth Congress. For more information, please see Paul Moreno, *Racial Classifications and Reconstruction Legislation*, 61 J. of S. History 271, 275-76 (1995).*

**Quote:** A bureau which will be confined in its operations to the affairs of freedmen, and not travel beyond this increasing class to embrace others, it may be of African descent.

**2. Citation:** CONG. GLOBE, 38th Cong., 2nd Sess. 691-93 (1865), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=068/llcg068.db&recNum=692>.

**Background:** *Due to the controversy and number of objections to the original bill, the language of the Freedmen's Bureau Bill and its proposed recipients changed. Representative Schenck from Ohio suggested these changes. Rather than limit recipients based on emancipation, he proposed expanding aid to all refugees, freedmen, and destitute citizens. Refugees were considered to be African Americans, both freedmen and African Americans freed prior to the Civil War, as well as southern whites fleeing from secession. Whether citizens were destitute or not was determined by the Commissioner of the Bureau, who was charged with distributing rations and other benefits of the Freedmen's Bureau. Although most of the benefits of the Freedmen's Bureau were legislated to be available to these three categories of people, those provisions pertaining to education spoke only of schools for freedmen (see the Act of July 16, 1866 on page 25 for more information).*

**Quote:** [The bill] makes no distinction on account of color . . . it does not discriminate against whites; . . . it proposes to take care of all refugees, as well as all freemen, who may need the help of the Government . . . if we are to legislate on this subject, would provide for refugees and freedmen, refugees of all colors as well as freedmen, in order that all shall have that temporary relief.

#### ***D. ARGUMENTS AGAINST REMEDIATION BEYOND WHAT IS GUARENTEED TO ALL CITIZENS BY THE CONSTITUTION***

A faction of lawmakers opposed all legislation awarding privilege or assistance to freedmen. Some opponents fought against federal assistance, instead believing that the states should be tasked with assisting freedmen. Others fundamentally opposed legislation that was intended to provide assistance to only some citizens, based on former condition of servitude. One argument was that slavery had already been abolished through the Thirteenth Amendment. All African Americans, including newly freed slaves, were made citizens of the United States. As citizens they should be awarded the same privileges and protections as all other citizens. Some argued that legislation favoring one racial group over another was

unconstitutional and distorted the Framers's intent in drafting the Fourteenth Amendment. Furthermore, some believed that such legislation awarding privilege or assistance was detrimental, fostering the idea that African Americans were inferior and needed special attention to fulfill their civic duties.

## 1. LEGISLATIVE DEBATES

1. **Citation:** CONG. GLOBE, 38th Cong., 1st Sess. 3346 (1864), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=067/llcg067.db&recNum=419>.

**Background:** *During a debate on the enactment of the Freedmen's Bureau, Representative Hendricks spoke on what he believed was the unconstitutionality of such legislation. He believed the affirmative action measures in the Freedmen's Bureau legislation, particularly the taking of ex-Confederate land for the use of freedmen's education, was beyond what Congress was constitutionally capable of doing and a violation of the separation of powers.*

**Quote:** Can the Government of the United States appoint a guardian to take possession of the property and to take charge of the person of one who, because of tender years or because of want of intellect, is not competent and able to take care of himself or his property?...That is a power which belongs exclusively to the States of the Confederacy and not at all to the General Government...*I am not able to see that under the Constitution Congress may enact such a measure as this....Such a power would swallow up to a very large extent a very important portion of the powers enjoyed by the States.* (Emphasis added)

2. **Citation:** CONG. GLOBE, 39th Cong., 1st Sess. 240 (1866), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=070/llcg070.db&recNum=445>.

**Background:** *During a debate concerning assistance for newly freed slaves, Representative Wilson argued that assistance was needed to counter discriminatory legislation in the southern states. Mr. Cowan, a Republican Senator from Pennsylvania, took issue with this assertion. He argued that the Constitution of the United States provides that the rights of free men cannot be infringed upon. He noted that a remedy against discriminatory legislation already exists in the Fifth Amendment. He concluded that since the Constitution already safeguards the rights of all American citizens, legislation allowing for special privilege and remedy should not be allotted to the newly freed slaves. For more information on Cowan, see generally BIOGRAPHICAL DIRECTORY OF THE*



UNITED STATES CONGRESS,

<http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000819> (last visited June 27, 2012).

**Quote:** [B]ut are we to alter the whole frame and structure of the laws, are we to overturn the whole Constitution, in order to get at a remedy for these people? If they are put upon the same footings as white people, then they have the same remedies as white people ; they have the same remedies that the honorable Senator has, or that I have, or that any other Senator has; and there is no necessity for this new jurisdiction, this new power that is to be invoked for their protection. We have been told that if a man was made free, and particularly if these colored people were made free, that that was all that was necessary; that then they would take care of themselves just like other people; and if the laws were framed generally so as to operate upon all people, they would operate upon them, and they would take advantage of it and protect themselves.

**3. Citation:** CONG. GLOBE, 44th Cong., 1st Sess. 229 (1875), available at <http://www.archives.gov/legislative/guide/house/chapter-14-freedmens-affairs.html>.

**Background:** *During the opening of the Forty-fourth Congress in 1875, Representative J.G. Blaine proposed ending the Select Committee on Freedmen's Affairs. The Committee was established in 1865 and was referred all matters concerning freedmen. Members were charged with reading the reports and correspondence of the Freedmen's Bureau agents to determine the type of aid that would be most useful in assisting freedmen. They were then responsible for drafting legislation to allow for such aid. Blaine noted that the Committee was no longer necessary, as amendments to the Constitution adequately protected the newly freed slaves, without making such provisions for them.*

**Quote:** That there is no longer any distinction between American citizens; that we are all equal before the law; and that all legislation respecting the rights of any person should go through the regular standing committees.

## 2. NEWSPAPERS

**4. Citation:** *Vote of the Freedmen's Bureau Bill*, THE DAILY PHOENIX, (South Carolina), Feb. 24, 1866, available at <http://chroniclingamerica.loc.gov/lccn/sn84027008/1866-03-02/ed->

[1/seq-2/;words=Freedmen+bill+Bureau+voted?date1=1836&rows=20&searchType=basic&state=&date2=1922&proxtext=vote+of+the+freedmen%27s+bureau+bill&y=0&x=0&dateFilterType=yearRange&index=2](http://1/seq-2/;words=Freedmen+bill+Bureau+voted?date1=1836&rows=20&searchType=basic&state=&date2=1922&proxtext=vote+of+the+freedmen%27s+bureau+bill&y=0&x=0&dateFilterType=yearRange&index=2).

**Background:** *In an opinion piece arguing against the Freedmen's Bureau Bill, the Daily Phoenix challenged the continuation and expansion of the Bureau. It argued that the bill, allowing for an expansion of power, would be unconstitutional as it placed the southern states under military jurisdiction after the cessation of war hostilities and the end of slavery.*

**Quote:** The institution of slavery, for the military destruction of which the Freedmen's Bureau was called into existence as an auxiliary, has been already effectually and finally abrogated throughout the whole country by an amendment of the Constitution of the United States, and practically its eradication has received the assent and concurrence of most of those States in which it at any time had an existence. I am not, therefore, able to discern, in the condition of the country, anything to justify an apprehension that the powers and agencies of the Freedmen's Bureau, which were effective for the protection of freedmen and refugees during the actual continuance of hostilities and of African servitude, will now, in a time of peace and after the abolition of slavery, prove inadequate to the same proper ends.

### 3. INDIVIDUAL OPINIONS

5. **Citation:** President Andrew Johnson, Veto of the Freedmen's Bureau Bill (February 19, 1866), available at <http://teachingamericanhistory.org/library/index.asp?document=1940>.

**Background:** *President Johnson vetoed the bill to continue and expand the Freedmen's Bureau both in February and July of 1866 (for more information on the legislative history of the bill, please see the Act of July 16, 1866 on page 6). The quotation below comes from his remarks after vetoing the bill for the first time. Johnson believed that control of education should be left to the states and smaller entities like private associations and individuals. Johnson believed additional assistance to freedmen, who now as citizens had the full protection of the Constitution, went beyond the intent of the framers of the Fourteenth Amendment, and was thus unconstitutional.*

**Quote:** [Congress] 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 for another.

**6. Citation:** Reverend William Weston Patton, Inaugural Address at Howard University (Oct. 9, 1877), *available at* <http://www.huarchivesnet.howard.edu/9908huarnet/patton10.htm>.

**Background:** *Patton spoke against special privilege for African Americans in his inaugural address to Howard University. Although much of his address noted the lasting implications of racial discrimination and segregation, he only supported legislation that applied to all citizens equally, without regard to race. For more information on Reverend Patton, please see page 12.*

**Quote:** [I]t must never be forgotten by the colored people, or by their friends, that they can be elevated upon no principals and by no instrumentalities other than those which apply to mankind in general. As 'there is no royal road to learning' to suit dullard of kingly birth, so no peculiar and accommodating pathway to wealth and power, to civilization and culture, opens before those of African descent. Their own expectations and the efforts of those who would assist them must be based simply on their manhood. It is only as this shall be developed and brought to bear upon life's duties and opportunities, that progress can be made in outward condition and in the estimation of mankind.

#### **IV. ARGUMENTS FOR AND AGAINST ACHIEVING WHAT IS NOW TERMED AFFIRMATIVE ACTION BY DISTRIBUTING RESOURCES IN ACCORDANCE TO RACE OR FREEDMEN STATUS**

The decision about how to allocate a finite supply of governmental resources led to a debate over whether money should be appropriated based on freedmen status. Some took the position that resources should be appropriated to all those in need - meaning freedmen, refugees, and destitute citizens. Others argued that state and federal resources should be allocated only to freedmen, to remedy conditions of slavery and assist freedmen as they assumed the responsibilities of citizenship. This allocation of resources to freedmen often meant taking property and resources away from white citizens to give to, or to benefit freedmen.

## A. THE QUESTION OF WHETHER FREEDMEN STATUS SHOULD BE TAKEN INTO ACCOUNT WHEN DISTRIBUTING PUBLIC RESOURCES

### 1. LEGISLATIVE REPORTS

1. **Citation:** SUPERINTENDENT OF THE BUREAU OF REFUGEES AND FREEDMEN, 39th Cong., *reprinted in*, J.W. ALVORD, SCHOOL REPORTS: FREEDMEN'S BUREAU 1866-1868, at July 1, 1867 (available at Howard's Moorland-Spingarn Research Center).
- Background:** *The General Superintendent of Schools for the Freedmen's Bureau wrote on the question of considering freedmen status when appropriating public funds from the state for education.*
- Quote:** In a number of the southern States there are public funds to a considerable amount, originating in State enactments, appropriations of land and other property, which are for the use of the children of these States. ..The present posture of affairs, in connection with the civil rights bill; passed by Congress, makes it a question whether these funds should not be used impartially.

## B. ARGUMENTS FOR THE IMPARTIAL ALLOCATION OF RESOURCES WITHOUT REGARD TO FREEDMEN STATUS

The era following the end of the Civil War was a challenging one for many United States citizens. Legislation to assist those who suffered most in the aftermath of the war was passed. Some of this legislation distributing public resources was passed with regard only to need. Those who supported the race-neutral distribution of resources often argued that legislation reallocating federal, state, or local resources to freedmen was unconstitutional.

### 1. STATUTES

1. **Citation:** Act of July 23, 1866, ch. 217, § 1, 1866 Stat. 216, *available at* <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=4>.
- Background:** *The Act of July 23, 1866 ensured that money for segregated schools for whites and African Americans was based on the number of school-aged children of each race in the District of Columbia. Therefore, money was distributed proportionally and without regard to freedmen status.*

**Quote:** An act to provide for the public instruction of youth in the county of Washington, District of Columbia, and for other purposes,' approved June twenty-five, eighteen hundred and sixty-four, shall be so construed as to require the cities of Washington and Georgetown to pay over to the trustees of colored schools of said cities such a proportionate part of all moneys received or expended for school or educational purposes in said cities, including the cost of sites, buildings, improvements, furniture, and books, and all other expenditures on account of schools, as the colored children between the ages of six and seventeen years, in the respective cities, bear to the whole number of children, white and colored, between the same ages. (Emphasis added)

2. **Citation:** Act of July 25, 1866, ch. 248, § 3, 1866 Stat. 247, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=278>.

**Background:** The Act of July 25, 1866 created the National Soldiers' and Sailors' Orphan Home. While the Freedmen's Bureau and the Act of July 16, 1866 (see page 25) made special provisions to educate freedmen in order to remedy the previous conditions of servitude, the National Soldiers' and Sailor's Orphan Home made similar provisions for orphans and half orphans of soldiers and sailors in the service of the United States. Race was not taken into account when these resources were distributed. The Home received its first appropriation from Congress through the Act of March 30, 1867. Similar appropriations were made through 1875.

**Quote:** And be it further enacted, That said corporation shall have the power to provide a home for, and to support and educate the destitute orphans of soldiers or sailors who have died in the late war in behalf of the Union of these States...their orphans may apply to enter the Home, and which is hereby declared to be the object and purpose of said corporation ; and to such end, and for such use, the said corporation may take and hold property real or personal to an amount necessary for the support and maintenance of the Home and the orphans partaking of its benefits.

## 2. RESOLUTIONS

3. **Citation:** S.R. 69, 39th Cong. (1866), available at [http://constitution.org/uslaw/sal/014\\_statutes\\_at\\_large.pdf](http://constitution.org/uslaw/sal/014_statutes_at_large.pdf).

**Background:** *One of the many focuses of the Thirty-ninth Congress was to eliminate violence and unrest in the post-war period, while reconstructing the country. The Civil War left 62,000 soldiers dead and the economy suffering. Many African Americans left the Confederate states in which they had been slaves and moved to the North. While some provisions, especially those pertaining to education, under the Freedmen's Bureau, made some special appropriations for freedmen, other legislative acts made efforts to assist the entire suffering population, regardless of race. For more information on the state of the war during the Thirty-ninth Congress, please see Richard L. Aynes, *The 39<sup>th</sup> Congress (1865-1967) and the 14<sup>th</sup> Amendment: Some Preliminary Perspectives*, 42 AKRON L. REV. 1021 (2009), available at <http://www.uakron.edu/law/lawreview/v42/docs/aynes.pdf>.*

**Quote:** [T]he President of the United States is hereby authorized to place at the disposal, without charge, of the city authorities of Portland, Maine, such clothing, condemned, or ordered sold, and such surplus camp and garrison equipage, bedding, and hospital furniture, on hand, as can be spared by the army, for the use of families rendered homeless and destitute by the recent conflagration...

### 3. LEGISLATIVE DEBATES

4. **Citation:** Cong. Globe, 39th Cong., 1st Sess. 421 (1866), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=070/llcg070.db&recNum=526>.

**Background:** *Senator Davis from Kentucky criticized what he believed to be the unconstitutional nature of the Freedmen's Bureau during a debate on the Act of July 16, 1866 – an act to extend the Bureau two more years and expand its powers. Davis's main issue with the Act was its method of distributing public resources. The Act proposed redistributing land from ex-Confederate states to the federal government so that they could sell it to benefit educational efforts for freedmen.*

**Quote:** I move to amend the title by substituting this for it: a bill to appropriate a portion of the public land in some of the southern States and to authorize the United States Government to purchase lands to supply farms and build houses upon them for the freed negroes; to promote strife and conflict between the white and black races; and to invest the Freedmen's Bureau with unconstitutional powers to aid and assist the blacks, and to introduce military power to prevent the Commissioner and other officers of said bureau from being

restrained or held responsible in civil courts for their illegal acts in rendering such aid and assistance to the blacks; and for other purposes.

**5. Citation:** Cong. Globe, 39th Cong., 2nd Sess. 1242 (1867), available at <http://memory.loc.gov/cgi-bin/ampage?collId=llcg&fileName=076/llcg076.db&recNum=491>.

**Background:** *In 1867, Congress appropriated \$25,000 for the Freedmen's Bureau. The bill allowing this originated in the Senate where the money was appropriated solely to African Americans, although it did not specify that they were required to be freedmen. The House amended the bill to apply to all citizens of the District considered to be destitute. This included white citizens. Aid was awarded on the basis of need as determined by the Commissioner of the Freedmen's Bureau. As a result, \$3,421.22 in relief was awarded to whites of Washington and Georgetown, while \$2,665.00 was awarded to African Americans. The quotation below was given by Mr. Morrill, a Maine Republican. For more information on this bill, please see S.R. No. 49, 39th Cong. (1966), available at [http://constitution.org/uslaw/sal/014\\_statutes\\_at\\_large.pdf](http://constitution.org/uslaw/sal/014_statutes_at_large.pdf).*

**Quote:** The language of the law was such as to cover 'the poor of the District:' and therefore, although confided to the Freedmen's Bureau, the *Commissioner of that bureau did not deem that he was at liberty to confine it to the freedmen, and so the charity has been distributed to the poor of this District.* (Emphasis added)

#### 4. NEWSPAPERS

**6. Citation:** Thomas McIntyre, THE SPECTATOR (Natchitoches), Feb. 6, 1868, available at <http://chroniclingamerica.loc.gov/lccn/sn88064630/1868-02-06/ed-1/seq-1/;words=1868+NATCHITOCHEs?date1=1836&rows=20&searchType=basic&state=&date2=1922&proxtext=1868+Natchitoches&y=0&x=0&dateFilterType=yearRange&index=0>.

**Background:** *Written by a contributor from New Orleans, the Spectator published a criticism of the assistance given to newly freed slaves. The article claimed that rather than being apportioned to both freedmen and destitute whites, public money and other governmental resources were being collected from white citizens and spent on freedmen. The author recalls how whites in the*

*South had their homes burned, their property stolen, and livelihoods destroyed, yet received no monetary assistance. Instead, they were heavily taxed so that assistance could be given to freedmen.*

**Quote:**

While the negro was a slave, 'he wanted nothing; now that he is free, so-called, he is in continual want. The Government has taken him in charge, and of course, must sustain him in his indolence, or else lose his vote. To this being done at the expense of the Southern States, by means of a heavy and unjust taxation, and that, too, for their further oppression, is as seriously objected to as it is unfair.

### ***C. ARGUMENTS FOR THE REALLOCATION OF RESOURCES BASED ON RACE OR STATUS AS FREEDMEN***

With the movement to educate and assist freedmen came the question of where money to fund these educational efforts and general aid provisions would come from. Some members of the Thirty-eighth and Thirty-ninth Congress supported legislation that reallocated resources to ensure such educational and aid efforts were funded and successful. Land was taken from ex-Confederates and set aside to build schools for freedmen. Money to fund educational efforts came both from the sale of ex-Confederate land and the redistribution of state money from white schools to schools for African American children.

#### **1. STATUTES**

**1. Citation:** Act of June 25, 1864, ch. 156, § 11, 1864 Stat. 189, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=013/llsl013.db&recNum=4>.

**Background:** *The Act of June 25, 1864 was part of the "Act to provide for the public instruction of youth in the county of Washington, District of Columbia." It was approved by the Thirty-eighth Congress. The Act changed the way the segregated public school system was funded by appropriating money from the tax assessments on whites' property to African American schools. This was intended to ensure that African American schools had adequate funding. Before this legislation, public schools in the District of Columbia for African Americans and whites were funded separately. The money from tax assessments on property were kept separate to fund schools based on the race of the students. The end of the Civil War saw an influx of African Americans to the District of Columbia and other Northern cities, dramatically increasing the demand for public education for African Americans. For more*



information, see MAKING A HOME: RECONSTRUCTION AND INTEGRATION, <http://xroads.virginia.edu/~cap/anacostia/recon.html> (last visited July 9, 2012).

**Quote:** [A]nd the said board of commissioners shall apportion the school fund, after deducting such part thereof as the provisions of this act assign to the education of colored children, among the several school districts, giving to each one seventh of the whole amount of school taxes collected and then in hand, after deducting the necessary expenses of the board, and one seventh of all other funds paid in, after deducting as hereinbefore provided for the education of colored children until an amount shall have accumulated sufficient to purchase a site and erect and furnish a school-house in each district...

**2. Citation:** Act of July 16, 1866, ch. 200, § 12, 1866 Stat. 176, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=4>.

**Background:** *The Act of July 16, 1866 extended the life of the Bureau by two years and expanded its powers, especially with regard to educational efforts. Section 12 of the Act enabled the Commissioner of the Bureau to sell land and buildings previously possessed by the confederate states in order to fund efforts to educate the freed slaves. With regard to education, the provisions made by the Freedmen's Bureau applied specifically to freedmen. The money raised by the sale of Confederate lands and buildings went towards the repair and rental of school buildings for freedmen and to the salaries of the Bureau's State Superintendents of Education. The Act also gave the Bureau the ability to use military taxes to pay teacher's salaries. Although providing educational opportunities to freedmen was a cornerstone of the Bureau's work, the Bureau focused on the philosophy and organization of educational institutions. Some funding, especially in the earlier years of the Bureau's operation, came from the Bureau itself; however schools were primarily funded by independent charities and churches in the North.*

**Quote:** *And be it further enacted, That the commissioner shall have the power to seize, hold, use, lease, or sell all buildings and tenements, and any lands appertaining to the same, or otherwise, formerly held under color of title by the late so-called confederate states, and not heretofore disposed of by the United States, and any building or lands held in trust for the same by any person or persons, and to use the same or appropriate the proceeds derived therefrom to the education of the freed people ; and whenever the*

*bureau shall cease to exist, such of said so-called confederate states as shall have made provision for the education of their citizens without distinction of color shall receive the sum remaining unexpended of such sales or rentals, which shall be distributed among said states for educational purposes in proportion to their population.*

**3. Citation:** Act of July 28, 1866, ch. 309, 1866 Stat. 343, available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=4>.

**Background:** *Passed by the Thirty-ninth Congress, the "Act donating certain Lots in the City of Washington for Schools for Colored Children in the District of Columbia" reserved land for the construction of schools for African Americans. As explained in "Background" for the Act of July 16, 1866 on page 25, the Commissioner for the Freedmen's Bureau had the authority to sell land previously owned by Confederate states or use that land to build schools for African Americans.*

**Quote:** *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the commissioner of public buildings be, and he is hereby, authorized and required to grant and convey to the trustees of colored schools for the cities of Washington and Georgetown, in the District of Columbia, for the sole use of schools for colored children in said District of Columbia, all the right, title, and interest of the United States in and to lots numbered one, two, and eighteen in square nine hundred and eighty five, and in the said city of Washington, said lots having been designated and set apart by the Secretary of the Interior to be used for colored schools. And whenever the same shall be converted to other uses, they shall revert to the United States.*

## 2. LEGISLATIVE REPORTS

**4. Citation:** Assistant Comm'n of Louisiana, Freedmen's Bureau Legislation, S. Exec. Doc. No. 39-6, at 74 (2d Sess. 1866), available at [http://memory.loc.gov/cgi-bin/ampage?collId=ody\\_llmisc&fileName=ody/ody0517/ody0517page.db&recNum=73&itemLink=r?ammem/aaodysey:@OR\(@field\(AUTHOR+@3\(Washington:+War+Department,+Bureau+of+Refugees,+Freedmen,+and+Abandoned+Lands,+1866+67++\)\)+@field\(OTHER+@3\(Washington:+War+De](http://memory.loc.gov/cgi-bin/ampage?collId=ody_llmisc&fileName=ody/ody0517/ody0517page.db&recNum=73&itemLink=r?ammem/aaodysey:@OR(@field(AUTHOR+@3(Washington:+War+Department,+Bureau+of+Refugees,+Freedmen,+and+Abandoned+Lands,+1866+67++))+@field(OTHER+@3(Washington:+War+De)

[partment,+Bureau+of+Refugees,+Freedmen,+and+Abandoned+Lands,+1866+6+67++\)\)&linkText=0.](#)

**Background:** *The 1865 report of expenditures from the Office of the General Superintendent of Education, Bureau of Refugees, Freedmen and Abandoned Lands, in December 1864, reported that Louisiana spent a total of \$20,686.91 on schools for African Americans. This number was the summation of the amount spent on clerks, superintendents, travelling agents, teachers, janitors, mechanics, builders, transportation costs, and other various purchases. The Freedmen's Bureau funds came from the sale of Confederate property that was seized and sold by the Freedmen's Bureau. See "Background" for the Act of July 16, 1866 on page 25.*

**Quote:** Previous to the 31st of January, 1866, the numerous teachers of colored schools were paid out of the funds belonging to the bureau ; houses were rented and books, school materials, &c. furnished without stint, thus giving tuition free to all who might desire it. Children were almost forced to attend some one of these free schools, which were established in nearly every city and parish in the State. The expenditure, however, was enormous (see statement of cash expenditure of the month of December, 1865, which was \$20,688 91,) and it was clearly seen that it must be greatly reduced.

## **V. THE DIVERSITY JUSTIFICATION FOR WHAT IS NOW TERMED AFFIRMATIVE ACTION**

### **A. SUPPORT FOR THE DIVERSITY JUSTIFICATION FOR WHAT IS NOW TERMED AFFIRMATIVE ACTION**

In contemporary Equal Protection cases, diversity is considered a compelling interest in certain circumstances. Although this position has its opponents, the Supreme Court has held that in the context of higher education, a school can have a compelling interest in attaining a diverse student body. In the *Grutter* case, the Court concluded that among other benefits, diversity in the classroom allows for more interesting classroom discussions, it breaks down racial stereotypes, and creates cross-cultural understanding.<sup>4</sup> Although Howard University was conceived with the desire to educate freedmen and assist them in accepting the responsibilities of citizenry, it was open to people of all races and ethnicities. Past president, Reverend William Weston Patton encouraged such

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<sup>4</sup> *Grutter v. Bolinger*, 539 U.S. 306 (2003).

diversity, speaking of the benefits that could be derived from different races and classes interacting in a classroom setting.

## 1. INDIVIDUAL OPINIONS

1. **Citation:** Reverend William Weston Patton, Inaugural Address at Howard University (Oct. 9, 1877), available at <http://www.huarchivesnet.howard.edu/9908huarnet/patton11.htm>.

**Background:** *During the first decade of Howard's existence, incoming president Patton spoke to the importance of desegregating education and the benefits that would result. He believed that the effects of slavery would take a long time to subside, but as other ethnicities observed the achievements of African Americans in the classroom and in a professional atmosphere, prejudices and discrimination would slowly be overcome.*

**Quotation:** But in securing this result, so difficult and yet so essential, the process must be such as to throw the colored man under every possible quickening influence. Hence it is not best to separate him carefully from his white brother, and to raise him in an institution by himself, like a tender plant in a hothouse. He needs the contact with the more advanced race. The acknowledgement of his manhood thus given will add to his self-respect, and will fire his nobler ambitions, while the white man will be essentially benefited by laying aside his unrepublican and unchristian caste-feeling, and coming into sympathy with Burns' immortal declaration, which is true as regards the color of the skin, as well as of poverty, that 'A man's a man for a' that!

Colored youth educated wholly apart from the whites lose the stimulus of the competition which they need to have; for it is well known that the progress of a scholar depends upon his classmates as well as upon his teacher. An eager, industrious, ambitious, and able class will tone up every mind which is in it, while a set of dull, apathetic, slothful students will hang as a dead weight upon each individual associated with them. Hence it is not so important to have institutions of learning expressly for the colored race, as it is to have those which are open to them on equal terms with others.

**\*Researcher's Note:** The above quotes were the only relevant ones found in the research done to complete this report. Although not included here, there is likely other material to support and contradict the material provided.