

BORNE BACK CEASELESSLY INTO THE PAST:
FISHER V. UNIVERSITY OF TEXAS, THE FREEDMEN'S
BUREAU ACT, AND THE "ORIGINALIST" MEANING OF
COLOR BLINDNESS

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The Supreme Court's decision in *Fisher v. University of Texas at Austin*¹ is the most recent iteration of the notion that the U.S. Constitution requires—and American society should aspire to—color blindness. This idea, which seems to be the only point upon which opponents and proponents of race-conscious affirmative action programs agree, is more ancient than we sometimes suppose. Between 1863 and 1868, Congress took up a series of social welfare legislation generally termed the Freedmen's Bureau Act and mostly designed to ease assimilation of newly freed slaves into American society.² In the course of congressional debates over these pieces of legislation, and long before Justice Harlan would declare in *Plessy v. Ferguson*³ that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens,"⁴ there developed a basic narrative of color blindness that race-conscious remedies are per se unconstitutional; that they only serve to confer benefits upon a special class of citizens; that they are better apportioned on the basis of social class rather than race; that they inevitably breed dependency in blacks and resentment in whites; that they create the impression that blacks are unable to succeed through their own hard work; and that, once adopted, these remedies risk extending into perpetuity. Not much has changed in the intervening 150 years. The narrative of color blindness has remained remarkably consistent, as has the seemingly sincere belief on the part of some that it is—or ought to be—the answer to every race question, the solution to every race problem, and the cure to every race conflict.

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¹ 133 S. Ct. 2411 (2013).

² See Part II.

³ 163 U.S. 537 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁴ *Id.* at 559 (Harlan, J., dissenting).

I. YOUR PEOPLE SHALL BE MY PEOPLE: THE CIVIL RIGHTS ACT OF 1875

On January 6, 1874, Robert Brown Elliot, a congressman from South Carolina and one of the first in the class of African Americans to serve in Congress, rose in the U.S. House of Representatives in defense of the bill that would eventually be enacted as the Civil Rights Act of 1875. The Act was the last major piece of civil rights legislation enacted during Reconstruction and indeed the last significant civil rights statute Congress would adopt for almost the next century.⁵ Charles Sumner, a principal architect of the Fourteenth Amendment to the U.S. Constitution, had first introduced the bill in the U.S. Senate in May 1870.⁶ For Sumner, the Bill was the culmination of antiracial apartheid work he'd begun when slavery was still the law of the land.⁷ In 1849, more than a decade before the Civil War and the Emancipation Proclamation, Sumner challenged the practice of government-enforced racial segregation when he sued the City of Boston for refusing to enroll five-year-old Sarah Roberts in her neighborhood school because she was black.⁸ In a foreshadowing of the Fourteenth Amendment, Sumner argued that racial segregation in public schools violated the Constitution of Massachusetts because "maintenance of separate schools tends to deepen and perpetuate the odious distinction of caste, founded in a deep-rooted prejudice in public opinion."⁹ The Massachusetts Supreme Judicial Court denied the claim and, in language that the U.S. Supreme Court would cite approvingly almost half a century later in *Plessy v. Ferguson*, explained that

[t]his prejudice, if it exists, is not created by law, and probably cannot be changed by law. Whether this distinction and prejudice, existing in the opinion and feelings of the community, would not be as effectually fostered by compelling colored and white children, to associate together in the same schools, may well be doubted.¹⁰

With the introduction of the bill in 1870, Sumner envisioned an act that would finally and fully enforce the equality commands of the Fourteenth Amendment and "secure equal rights in railroads, steamboats, public conveyances, hotels, licensed theaters, houses of public entertainment, common schools, and institutions of learning authorized by law, church institutions, and cemetery associations incorporated by national or State

⁵ PEGGY LAMSON, *THE GLORIOUS FAILURE: BLACK CONGRESSMAN ROBERT BROWN ELLIOT AND THE RECONSTRUCTION IN SOUTH CAROLINA* 175 (1973).

⁶ *See* CONG. GLOBE, 41st Cong., 2d Sess. 323 (1870).

⁷ *See* ANNE-MARIE TAYLOR, *YOUNG CHARLES SUMNER AND THE LEGACY OF THE AMERICAN ENLIGHTENMENT, 1811-1851*, at 195-96 (2001).

⁸ *See* *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 201 (1849).

⁹ *Id.* at 209.

¹⁰ *Roberts*, 59 Mass. (5 Cush.) at 209.

authorit[ies].”¹¹ The original text of the bill provided, in sum and substance, that no place of public accommodation or amusement, no stage coaches or railroads, and no public schools could deny admission to any person on account of race, color, or previous condition of servitude.¹²

Over the next two years, Sumner reintroduced the bill on at least three occasions and each time the bill failed—either in the Senate Judiciary Committee, where Committee Chairman Lyman Trumbull, a Democrat from Illinois, blocked the bill from reaching the full Senate,¹³ or on the Senate floor, where Democrats filibustered it.¹⁴ Meanwhile in the House, first in 1872 and again in 1874, Representatives William Frye, a Republican from Maine, and Benjamin F. Butler, a Republican from Massachusetts, introduced bills similar in language to Sumner’s.¹⁵ Both failed to make it to the House floor for a vote.¹⁶

Sumner died in March 1874, shortly after reintroducing his bill in January 1874 and before substantial debate could begin in either house.¹⁷ When Democrats won a majority in the House in the 1874 elections, effectively ending Reconstruction in the South,¹⁸ Republicans facing reelection in 1876 declined to continue their support for the bill, one reasoning: “I do not want to go down with my party quite so deep as the bill will sink it if it becomes the law.”¹⁹ However, Republicans managed to revise the bill in January 1875 by stripping from its language two provisions that had engendered the most vociferous opposition in both the House and the Senate: the prohibition against racial segregation in public schools and in cemeteries.²⁰ With that concession, the bill, now known as the Civil Rights Act of 1875, passed both houses and was finally signed into law by President Ulysses Grant,²¹ only to be invalidated a mere eight years later when the Supreme Court ruled in the *Civil Rights Cases*²² that Congress lacked authority under the Fourteenth Amendment to prohibit racial discrimination by private individuals.²³

But, back in February 1874, when Representative Elliot rose to defend the bill, the first postslavery class of African American congressmen still

¹¹ CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870) (statement of Sen. Sumner).

¹² *Id.*

¹³ *See id.* at 5314; CONG. GLOBE, 41st Cong., 3d Sess. 1263 (1871).

¹⁴ *See* CONG. GLOBE, 42d Cong., 2d Sess. 3730-31 (1872).

¹⁵ *Id.* at 1116; 2 CONG. REC. 452 (1874).

¹⁶ *See* CONG. GLOBE, 42d Cong., 2d Sess. 2440-41 (1872).

¹⁷ *See* Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 1069 (1995).

¹⁸ *See generally* WILLIAM GILLETTE, *RETREAT FROM RECONSTRUCTION 1869-1879* (1979).

¹⁹ 3 CONG. REC. 982 (1875) (statement of Rep. Simeon Chittenden).

²⁰ *See id.* at 938-39 (statement of Rep. Benjamin Butler).

²¹ 18 Stat. 335 (1875).

²² 109 U.S. 3 (1883).

²³ *Id.* at 25.

held hope that its passage would “determine the civil status, not only of the negro, but of any other class of citizens who may feel themselves discriminated against.”²⁴ After the bill’s introduction, arguments against it fell into two main categories: one constitutional, the other social. As a constitutional matter, opponents of the bill argued that the Supreme Court decision in the *Slaughter-House Cases*²⁵ made it clear that Congress lacked the power to enact civil rights legislation under the enforcement clause of the Fourteenth Amendment to vindicate rights that accrued to persons by virtue of their state citizenship.²⁶ The social argument, in turn, maintained that the prohibition of all forms of racial discrimination under the Civil Rights Act would racially rewrite the country’s social mores and result in compulsory mixing of the races in social settings.²⁷

In pushing the constitutional argument, opponents of the bill had chosen as their champion Georgia Representative Alexander H. Stephens, the former vice president of the Confederacy during the Civil War.²⁸ Stephens’s reputation as one of the sober statesmen of the South had been cemented when he initially opposed Southern secession.²⁹ And indeed, the argument he offered against the bill contained little, if any, of the racial vitriol and personal attacks some of his other colleagues had offered on the floor of the House.³⁰ Instead, he maintained that, under the federalist scheme of the Constitution, ours was a government of limited federal power and that, in light of the *Slaughter-House Cases*, Congress would be overstepping its bounds if it enacted the bill.³¹

Elliot began by quickly disposing of the *Slaughter-House* argument. He pointed out that those who would now use the Supreme Court to justify their opposition to civil rights had previously shown little respect for the Court when its decisions did not mirror their personal prejudices: “[I]n the contests which have marked the progress of the cause of equal civil rights,

²⁴ 2 CONG. REC. 410 (1874).

²⁵ 83 U.S. 36 (1873).

²⁶ *See id.* at 81.

²⁷ 2 CONG. REC. 406 (1874).

²⁸ LAMSON, *supra* note 5, at 174-75.

²⁹ *Id.* at 175. Yet, for all of his efforts to save the Union, Stephens remained steadfast in his belief that blacks were fundamentally inferior to whites. He maintained that the central premise of the Declaration of Independence that “all men are created equal” was “fundamentally wrong.” As an alternative, Stephens argued that:

Our new Government [the Confederacy] is founded upon exactly the opposite ideas; its foundations are laid, its cornerstone rests, upon the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and moral condition. This, our new Government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.

Alexander H. Stephens, Cornerstone Address (March 21, 1861), *available at* <http://www.fordham.edu/halsall/mod/1861stephens.html>.

³⁰ 2 CONG. REC. 378-82 (1874).

³¹ *Id.* at 380-81.

our opponents have appealed sometimes to custom, sometimes to prejudice, more often to pride of race, but they have never sought to shield themselves behind the Supreme Court.”³² Then, addressing Stephens directly, Elliot stated plainly that he found it hard to accept a constitutional lesson, however soberly phrased, from a man who a few years previously had gone to war to destroy the Union:

I share in the feeling of high personal regard for that gentleman which pervades this House. His years, his ability, and his long experience in public affairs entitle him to the measure of consideration which has been accorded to him on this floor. But in this discussion I cannot and I will not forget that the welfare and rights of my whole race in this country are involved. When, therefore, the honorable gentleman from Georgia lends his voice and influence to defeat this measure, I do not shrink from saying that it is not from him that the American House of Representatives should take lessons in matters touching human rights or the joint relations of the State and national governments. . . . [N]or shall age or any other consideration restrain me from saying that he now offers this Government, which he has done his utmost to destroy, a very poor return for its magnanimous treatment, to come here and seek to continue, by the assertion of doctrines obnoxious to the true principles of our Government, the burdens and oppressions which rest upon five millions of his countrymen who never failed to lift their earnest prayers for the success of this Government when the gentleman was seeking to break up the Union of these States and to blot the American Republic from the galaxy of nations.³³

Turning to the social argument, Elliot, like many of his black peers in the House, addressed the fear, so often expressed during the five years of debate over the bill, that to outlaw private discrimination would mean that blacks and whites would not be social equals or, worse, that whites would now be legally obligated to invite blacks into the privacy and sanctity of their homes.³⁴ But, whereas many of his colleagues seemed to go out of their way to reassure opponents of the bill that its passage would in no way bring about the end of racial segregation in private life,³⁵ Elliot closed his remarks by insisting that the notion of two separate people sharing one land

³² *Id.* at 407.

³³ *Id.* at 409-10.

³⁴ *Id.*

³⁵ For example, during the December 1873 debate on the bill South Carolina Representative Joseph H. Rainey assured white members of the House:

[W]e are not seeking to be put on a footing of social equality. I prefer to choose my own associates, and all my colleagues here and the whole race I belong to prefer to make that choice. We do not ask the passage of any law forcing us upon anybody who does not want to receive us. But we do want a law enacted that we may be recognized like other men in the country.

Id. at 344. Representative Alonzo J. Rainsier, in somewhat more caustic terms, during a January 1874 debate in the House responded to the argument of social equality:

The bugbear of “social equality” is used by the enemies of political and civil equality for the colored man in place of argument. There is not an intelligent white man or black man who does not know that that is the sheerest nonsense; and I would have it distinctly understood that I would most certainly oppose the passage of the pending bill or any similar measure if I believed that its operation would be to force upon me the company of the member from Kentucky, for instance, or any one else.

Id. at 382.

was at its core immoral. He compared the relationship between whites and newly freed slaves to the Old Testament story of Naomi and Ruth.³⁶ In the Book of Ruth, Naomi, a Hebrew woman, moves with her husband and their two sons to the land of Moab in order to escape a famine in Israel.³⁷ In Moab, Naomi's two sons marry non-Hebrew Moabite women, Orpah and Ruth.³⁸ When Naomi's husband and her two sons die in quick succession, tragedy befalls the family.³⁹ Now poor and destitute, Naomi plans to return to Israel and advises her two daughters-in-law to leave her because, without a husband and sons, she has nothing to offer them.⁴⁰ Orpah leaves and returns to her family, but Ruth refuses to go.⁴¹ Instead, she insists that the two of them stay together and make a new way in the world because it is far too late for them to think of themselves as anything but one people, anything but family.⁴² In words that would in time become known as the Prayer of Ruth, and with which Representative Elliot closed his defense of the Civil Rights Act, Ruth tells Naomi:

Do not urge me to leave you, to turn back and not follow you. For wherever you go, I will go; wherever you lodge, I will lodge; your people shall be my people, and your God my God. Where you die, I will die, and there I will be buried. Thus and more may the Lord do to me if anything but death parts me from you.⁴³

Newspaper stories at the time said that “[n]o more dignified, skillful, exhaustive tearing down of the false theories raised by caste alone has ever been witnessed in the legislative halls” than with Elliot’s speech.⁴⁴ But even more extraordinary than its eloquence is the fact that Elliot’s reference to the Prayer of Ruth was an unapologetic articulation of a color-blind society in which whites and blacks would live as one people. While we now know that in time the U.S. Supreme Court, presumably reflecting popular will, would reject that vision in favor of separate but equal racial apartheid, the fact is that Elliot’s articulation was already doomed before he spoke it on the floor of the House. A decade earlier, even before the conclusion of the

³⁶ 2 CONG. REC. at 410.

³⁷ *Ruth* 1:1 (King James).

³⁸ *Id.* at 1:3-4.

³⁹ *See id.* at 1:5.

⁴⁰ *See id.* at 1:7-9.

⁴¹ *Id.* at 1:14-15.

⁴² *Id.* at 1:16.

⁴³ *Ruth* 1:16-17. The above version is a modern translation of the text. The actual version Elliot quoted in his speech reads:

Entreat me not to leave thee, or to return from following after thee; for whither thou goest, I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God; where thou diest, will I die, and there will I be buried; the Lord do so to me, and more also, if aught but death part thee and me.

2 CONG. REC. 410 (1874) (internal quotation marks omitted).

⁴⁴ LAMSON, *supra* note 5, at 182 (internal quotation marks omitted).

Civil War, at the first hint of emancipation, there had already been articulated a radically different version of color blindness, one that has remained remarkably consistent to this day and posited that any government measure that took race into account to ameliorate the plight of newly emancipated slaves would be tantamount to special rights for blacks, amount to a form of reverse discrimination against whites, foster racial hostility and resentment, and enshrine a permanent dependent class forever looking to the government to provide for their every need.

II. ONE GOVERNMENT FOR ONE RACE AND ANOTHER FOR ANOTHER: THE FREEDMEN’S BUREAU ACT

Between 1863 and 1868, Congress took up four major pieces of social welfare legislation to help ease the transition of

millions of men,—and not ordinary men, either, but black men emasculated by a peculiarly complete system of slavery, centuries old; and now, suddenly, violently, they come in a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.⁴⁵

The 1864 Freedmen’s Bureau Bill, introduced before the end of the Civil War, provided benefits to “persons of African descent” in the House version and to “such persons as have become free since the beginning of the present war” in the Senate version.⁴⁶ However, the bill never made it out of conference, in part because of a disagreement over whether the newly formed agency would fall within the jurisdiction of the Department of War or the Department of Treasury.⁴⁷ One year later, the 1865 Freedmen’s Bureau Act created inside the Department of War a “Bureau of Refugees, Freedmen and Abandoned Lands” that would operate one year after the end of the Civil War.⁴⁸ The bill passed with relatively little debate and was signed into law by President Abraham Lincoln.⁴⁹ At the expiration of the 1865 Act, Congress enacted the Freedmen’s Bureau Act of 1866, but President Andrew Johnson vetoed it.⁵⁰ That same July, Congress prepared and approved a second Freedmen’s bill but, again, President Johnson vetoed it. Congress then returned to the original bill, overrode the initial presidential

⁴⁵ W. E. Burghardt Du Bois, *The Freedmen’s Bureau*, ATLANTIC MONTHLY, Mar. 1901, at 354, 357, available at <http://www.theatlantic.com/past/docs/issues/01mar/dubois.htm>.

⁴⁶ CONG. GLOBE, 38th Cong., 1st Sess. 145 (1864); *id.* at 2798.

⁴⁷ *Id.* at 2799.

⁴⁸ CONG. GLOBE, 38th Cong., 2d Sess. 1182 (1865).

⁴⁹ Act of Mar. 3, 1865, ch. 90, 13 Stat. 507.

⁵⁰ Andrew Johnson, Veto Message, February 19, 1866, available at <http://www.presidency.ucsb.edu/ws/?pid=71977>.

veto, and enacted it into law as the 1866 Freedmen's Bureau Act.⁵¹ As the 1866 Act was set to expire in July 1868, General Oliver Howard—the only commissioner of the Freedmen's Bureau—informed Congress that the consequences of withdrawing Bureau agents from the Southern states 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.”⁵² Upon General Oliver Howard's recommendation, Congress renewed the Freedmen's Bureau for another year.⁵³

Each Freedmen's Bureau bill or act provided different federal services to freedmen. The 1865 bill, for example, authorized the Department of War to provide “provisions, clothing, and fuel” for “destitute and suffering refugees and freedmen,”⁵⁴ allowed the Bureau to sell a maximum of forty acres to refugees or freedmen,⁵⁵ and granted the Bureau authority with “the control of all subjects relating to refugees and freedmen.”⁵⁶ The 1866 bill, in turn, provided for “such issues of provisions, clothing, fuel, and other supplies; including medical stores and transportation, and afford such aid, medical or otherwise, as he may deem needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen, their wives and children.”⁵⁷ Additionally, the 1866 Act “reserve[d] from sale or from settlement . . . for the use of freedmen and lay refugees,” male or female, “unoccupied public lands in Florida, Mississippi, and Arkansas, not exceeding in all three millions of acres of good land.”⁵⁸

But perhaps the most significant provision of the various bills was Section 6 of the 1866 Freedmen's Bureau Act, authorizing the Bureau commissioner to erect “suitable buildings for schools” and asylums.⁵⁹ Commissioner Howard emphasized the importance of education to properly assimilate freedmen to the new society, reporting to Congress that:

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

⁵¹ Act of July 16, 1866, ch. 200, 14 Stat. 173.

⁵² CONG. GLOBE, 40th Cong., 2d Sess. 1817 (1868).

⁵³ *Id.*; In July 1868, Congress passed, over the president's veto, two new statutes continuing certain functions of the Freedmen's Bureau and discontinuing other functions. Act of July 25, 1868, ch. 245, 15 Stat. 193.

⁵⁴ Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, 508.

⁵⁵ *Id.* at 508-09.

⁵⁶ *Id.* at 507.

⁵⁷ CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866).

⁵⁸ *Id.* at 210.

⁵⁹ H.R. EXEC. DOC. NO. 39-11, at 28 (1866).

Christian people, are nevertheless visited, publically and privately, with undisguised marks of odium.⁶⁰

He believed “that with proper schooling the Negroes would be able to command and secure for themselves ‘both the privileges and rights that [the country] now have difficulty to guarantee.’”⁶¹ By the end of the 1867 fiscal year, educational activities accounted for \$208,445.82 of the Bureau’s \$284,117.39 in expenditures.⁶² From 1867 to 1870, the Bureau expended a total of \$407,752 (or \$7,294,534 today after adjusting for inflation) on black colleges compared to just \$3,000 (or \$53,669, adjusted) on white colleges.⁶³ By 1870, 150,000 children were in school.⁶⁴ Before its closure in 1872, the Freedmen’s Bureau would oversee “some 3,000 schools” for former slaves and would “establish[] a number of colleges and training schools for blacks, including Howard University and Hampton Institute.”⁶⁵ At the time, W. E. B. Du Bois observed that “[t]he greatest success of the Freedmen’s Bureau lay in the planting of the free school among Negroes, and the idea of free elementary education among all classes in the South.” But, in addition to its success, the Freedmen legislation is also significant for having inspired what may be called the “originalist” definition of color blindness.

When the 1864 bill was introduced in the House, congressional opposition leaders argued for an equitable distribution of benefits to both whites and blacks. One opponent argued in the House Select Committee on Emancipation that the 1864 Freedmen’s Bureau Bill would result in discriminatory and unfair treatment of whites by providing freedmen, but not whites, with these services: “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.”⁶⁶ Another House member objected to provisions of the 1864 Freedmen’s Bureau Bill on behalf of his “own race”:

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

⁶⁰ *Id.* at 33.

⁶¹ GEORGE R. BENTLEY, A HISTORY OF THE FREEDMEN’S BUREAU 169 (1955).

⁶² REPORT OF THE SECRETARY OF WAR, PT. 1, 2 H.R. EXEC. DOC. NO. 40-1, at 654 (1867). Today, education would account for \$3,372,512 of the \$4,596,838 budget after adjustments are made for inflation.

⁶³ BENTLEY, *supra* note 61, at 175.

⁶⁴ Du Bois, *supra* note 45.

⁶⁵ *Freedmen’s Bureau (1865 - 72)*, PBS.ORG, http://www.pbs.org/wnet/jimcrow/stories_events_freed.html (last visited Nov. 27, 2013).

⁶⁶ MINORITY OF THE SELECT COMM. ON EMANCIPATION, REPORT RELATIVE TO THE BILL TO ESTABLISH A BUREAU OF FREEDMEN’S AFFAIRS, H.R. REP. NO. 38-2, at 3 (1st Sess. 1864) [hereinafter MINORITY OF THE SELECT COMM. ON EMANCIPATION].

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 and . . . 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.⁶⁷

In the Senate, opposing senators complained about the preferential treatment for blacks, claiming that the 1864 Freedmen's Bureau Bill attempted "to make war for, to feed, to clothe, to protect and care for the negro, to give him advantages that the white race do not receive or claim."⁶⁸

While the 1865 bill passed with relatively little debate, by the time it came up for renewal, opponents had perfected the central points of the color blindness doctrine: that race consciousness was per se unconstitutional; that race-conscious remedies only served to confer benefits upon a special class of citizens; that benefits should be apportioned on the basis of social class rather than race; that race-conscious remedies would inevitably breed dependency in blacks and resentment in whites; that these remedies were in fact harmful to the newly freed slaves by creating the impression that they would be unable to succeed through their own hard work; and that these remedies, once created, would go on in perpetuity.

Specifically, as debates went on in 1866, legislators questioned its constitutionality on the grounds that it created a favored class of citizens:

Not only are the negroes of the South set free, by which the object and the aim of all the abolitionists in the land was accomplished as we supposed, but a bill is passed by Congress conferring upon them all civil rights enjoyed by white citizens of the country, and they are now selected out from among the people of the United States, the public Treasury put at their disposal, and the white people of the country taxed for their support. . . .

. . . I never believed that Congress had any right to establish any such bureau to take under its charge any particular portion of the people of the United States and to provide for them out of the public Treasury or out of the public lands.⁶⁹

One House member protested that "the present proposed legislation is solely and entirely for the freedmen, and to the exclusion of all other persons."⁷⁰ Others in the House maintained that the bill would create "one government for one race and another for another."⁷¹

In the Senate, some took up the claim that any amelioration of the effects of the war should be based on social class rather than race: "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

⁶⁷ CONG. GLOBE, 38th Cong., 1st Sess. app. 54 (1864).

⁶⁸ *Id.* at 2801.

⁶⁹ CONG. GLOBE, 39th Cong., 1st Sess. 3841 (1866).

⁷⁰ *Id.* at 544.

⁷¹ *Id.* at 627.

black.”⁷² Others phrased it differently, but still their argument centered on the notion that any consideration of race, even under the circumstances of the recent emancipation of the slaves, was *per se* unconstitutional:

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.⁷³

In time, President Andrew Johnson would take up the claim that race-conscious remedies are *per se* unconstitutional when he eventually vetoed the first version of the 1866 bill:

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 or one people more than another.⁷⁴

In addition to the constitutionality argument, opponents of the bill also pointed to its inherent unfairness, claiming that the bill, on the one hand, conferred special privileges upon blacks while, on the other hand, indicated to white men and white soldiers that “they may starve and die from want, and no wail will be raised in their behalf; 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.”⁷⁵ Or, as one senator put it:

This bill undertakes to make the negro in some respects their superior, as I have said, and gives them favors that the poor white boy in the North cannot get; gives them favors which were never offered to the Indian, whom I hold to be a nobler and far superior race. It makes us their voluntary guardians to see, in the first place, that they have the opportunity to work, and then their guardians to see that they get paid and then that they are taken care of, and then we are to take care of them ourselves. I never had anybody to do that for me, even when I was quite a young lad; and from that time until now it has been my office to protect myself; to earn what I could for my own support. This bill confers on the negro race favors that have not been extended to many men on this floor within my personal knowledge.⁷⁶

Another explained it in more personal terms:

[W]hen 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 that now a man may be very happy if he can get a “negro’s chance.” Here are four school-houses taken possession of, and unless they mix white children with black, the

⁷² *Id.* at 297.

⁷³ *Id.* at 372.

⁷⁴ Johnson, *supra* note 50.

⁷⁵ CONG. GLOBE, 39th Cong., 1st Sess. 629 (1866).

⁷⁶ *Id.* at 401.

white children can have no chance in these schools for instructions. And so it is wherever this Freedmen's Bureau operates.⁷⁷

In his veto message, President Johnson reiterated the unfairness argument:

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.* Pending the war many refugees and freedmen received support from the Government, but it was never intended that they should thenceforth be fed, clothed, educated, and sheltered by the United States.⁷⁸

But, lest it be said that opponents of the 1866 bill were concerned merely about the effects of its provisions on white citizens, some wondered whether the bill would create dependency among freedmen and the government,⁷⁹ would provoke a resentment among whites and destroy any chance of creating a harmonious relationship between the two races,⁸⁰ or would create the impression that newly freed slaves were unable to succeed on their own merits. As one senator reasoned: the Freedmen's Bureau "will enable it to depress the whites, to favor and hold up the blacks, to flatter the vanity and excite the insolence of the latter, to mortify and irritate the former, and perpetuate between them enmity and strife."⁸¹ But perhaps President Johnson best articulated the fear that race-conscious remedies would both breed dependency in blacks and create the impression in whites that blacks were unable to succeed on their own merits:

The idea on which the slaves were assisted to freedom was that on becoming free they would be a self-sustaining population. Any legislation that shall imply that they are not expected to attain a self-sustaining condition must have a tendency injurious alike to their character and their prospects. . . .

. . . It is no more than justice to them to believe that as they have received their freedom with moderation and forbearance, so they will distinguish themselves by their industry and thrift, and soon show the world that in a condition of freedom they are self-sustaining, capable of selecting their own employment and their own places of abode, of insisting for themselves on a proper remuneration, and of establishing and maintaining their own asylums and schools. It is earnestly hoped that instead of wasting away they will by their own efforts establish for themselves a condition of respectability and prosperity. It is certain that they can attain to that condition only through their own merits and exertions.⁸²

⁷⁷ *Id.* at app. 71.

⁷⁸ Johnson, *supra* note 50 (emphasis added).

⁷⁹ CONG. GLOBE, 39th Cong., 1st Sess. at 401.

⁸⁰ *See id.*

⁸¹ *Id.* at 935.

⁸² Johnson, *supra* note 50.

And lastly, as early as 1866, opponents worried about whether these special benefits would ever come to an end: “Will the white people who have to support the Government ever get done paying taxes to support the negroes?”⁸³

In the end, by the time the 1866 Act came up for renewal in 1868, the definition of color blindness had already been set in stone. Little remained to be said other than to rehearse the same points that had been so starkly made barely a year after the end of the Civil War and that, in many ways, have remained virtually unchanged to this day. For example, one senator, echoing the 1866 debates, stated that the Bureau was for placing freedmen “in supremacy and in power over the white race.”⁸⁴ One House member disagreed with “taxing white men” for the aid of blacks.⁸⁵ Still another objected to the renewals that granted the Freedmen’s Bureau the “authority to feed, clothe, educate, and support one class of people to the exclusion of others equally as destitute and much more deserving.”⁸⁶ In January 1874, Representative Elliot’s eloquence in evoking the Prayer of Ruth that your people shall be my people may have carried the day for a short while, but it was already far too late for his vision of color blindness to have had any lasting popular resonance, and certainly far too late for it to have gained any constitutional purchase in the courts.

III. BORNE BACK CEASELESSLY INTO THE PAST: *FISHER V. UNIVERSITY OF TEXAS*

So then, over a century later we come to *Grutter v. Bollinger*⁸⁷ and *Fisher v. University of Texas at Austin*, and the question is still now what it was back in 1866 when the debate raged on over the constitutionality of race-conscious remedies to achieve equal educational opportunities for African Americans. Certainly the tenor of the debate has become a bit more polite, but little of its substance has changed significantly. Then, as now, the terms of the debate remained whether race consciousness is per se unconstitutional; whether race-conscious remedies only serve to confer benefits upon a special class of citizens; whether benefits should be apportioned on the basis of social class rather than race; whether race-conscious remedies will inevitably breed dependency in blacks and resentment in whites; whether these remedies are in fact harmful by creating the impression that blacks are unable to succeed through their own hard work; and whether these remedies, once created, will go on in perpetuity.

⁸³ CONG. GLOBE, 39th Cong., 1st Sess. at 635.

⁸⁴ CONG. GLOBE, 40th Cong., 2d Sess. 3054 (1868).

⁸⁵ *Id.* at 1452.

⁸⁶ *Id.* at app. 292.

⁸⁷ 539 U.S. 306 (2003).

Fisher is not the last word on the question of the constitutionality of race-conscious affirmative action in higher education. The opinion is remarkable only in the sense that it said so little in terms of substance that it merely postponed for another day when the entire debate will be renewed in the courts.⁸⁸ Indeed, as of this writing, the Court has already granted certiorari in *Schuette v. Coalition to Defend Affirmative Action*,⁸⁹ a case that will consider the question of whether a state violates the Equal Protection Clause by amending its constitution to prohibit race- and sex-based discrimination or preferential treatment in public university admissions decisions. Though that question does not squarely raise the one presented in *Fisher*, inasmuch as it does generally concern the issue of race and education, the decision, whenever it comes, will likely discuss the doctrine of color blindness, even if only indirectly. But whatever form that discussion takes, and whenever the next *Fisher* decision comes, the one sure thing is that the general narrative about affirmative action will be framed in terms that have remained essentially fixed since the days when slaves “c[a]me into a new birthright, at a time of war and passion, in the midst of the stricken, embittered population of their former masters.”⁹⁰

Perhaps the fact that the “originalist” definition of color blindness was conceived so early in the history of the Republic and has endured for so long is an indelible mark of its virtue and convincing evidence of its soundness. It has, as they say, stood the test of time. And so, perhaps Chief Justice Roberts is on to something profound when he achieves an almost haiku-like simplicity with the declaration that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁹¹ And perhaps too Justice Thomas has earned his righteous anger when he insists that in matters of race, color blindness should stand as the one inviolable constitutional principle because “the worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.”⁹²

But, in spite of its ancient provenance, it remains difficult to accept the wisdom of a doctrine that is always offered as the answer to the so-called race question no matter the time, no matter the circumstances, and no matter the facts. It is moreover difficult to believe in the good faith of the objection that, even in the midst of the Civil War, passage of the 1864 Freedmen’s Bureau Act would amount to “this vast domain, paid for by the blood of white men, . . . set apart for the sole benefit of the freedmen of African

⁸⁸ See Scott Warner, Pete Land & Kendra Berner, *The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn’t Tell Us) About the Consideration of Race in College and University Admissions and Other Contexts*, FED. LAW., Aug. 2013, at 48, 55-56.

⁸⁹ 133 S. Ct. 1633 (mem.).

⁹⁰ Du Bois, *supra* note 45.

⁹¹ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

⁹² *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2429 (2013) (Thomas, J., concurring).

descent, to the exclusion of all others.”⁹³ It is still further difficult to understand as anything other than pure demagoguery the claim that, with the passage of the 1866 Freedmen’s Bureau Act, “not only are the negroes of the South set free, . . . but . . . they are now selected out from among the people of the United States, the public Treasury put at their disposal, and the white people of the country taxed for their support.”⁹⁴ And it is finally difficult to interpret as anything but sheer nonsense the notion advanced a mere three years after a barbarous war finally freed a race of people that for centuries had been treated as no more than “ordinary article[s] of merchandise”⁹⁵ that the 1868 extensions of the Act served to place freedmen “in supremacy and in power over the white race.”⁹⁶ So, yes, perhaps Justice O’Connor is correct to “expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest” of educational diversity (if not equal educational opportunity) in higher education.⁹⁷ But then again, many in Congress thought themselves no less correct when they wondered in 1866 “will the white people who have to support the Government ever get done paying taxes to support the negroes?”⁹⁸

The originalist definition of color blindness emerged even before the end of the Civil War as a means of opposing any attempt to provide for the education and welfare of newly emancipated slaves. As such, no matter the current evidence that may be marshaled in its defense today, the doctrine was always more of an *idée fixe* than a defensible moral philosophy. Given its origins, it would seem to be so irredeemably tainted as to be accorded little respect and even less credibility. And yet, the doctrine, conceived in the fires of the Civil War, born out the ashes of Reconstruction, impervious to historical evidence, and used time and time again to excuse all manner of racial apartheid, violence, and inequality, has remained, through all these years, the one abiding judicial shibboleth—not to say constitutional principle—upon which we rely to answer every race question.

“So we beat on, boats against the current, borne back ceaselessly into the past.”⁹⁹

⁹³ MINORITY OF THE SELECT COMM. ON EMANCIPATION, *supra* note 66, at 3.

⁹⁴ CONG. GLOBE, 39th Cong., 1st Sess. 3841 (1866).

⁹⁵ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁹⁶ CONG. GLOBE, 40th Cong., 2d Sess. 3054 (1868).

⁹⁷ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁹⁸ CONG. GLOBE, 39th Cong., 1st Sess., at 635.

⁹⁹ F. SCOTT FITZGERALD, *THE GREAT GATSBY* 189 (Scribner Paperback Fiction 1991) (1925).