New Century Freedom for the Freedmen

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   A. RACE IS A LEGITIMATE FACTOR IN CONSIDERING SOCIAL

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INTRODUCTION

The Bureau of Refugees, Freedmen, and Abandoned Lands ("Freedmen’s Bureau" or "Bureau") was tasked with providing a pathway for former slaves to achieve equality and coexist in the United States with their former owners. The Bureau would provide and in some cases ensure educational opportunities, equal treatment and protection under the law, freedom from harassment, payment for labor, and the distribution of land to accomplish the goal of Negro equality. The Bureau was by every estimation underfunded, under-staffed, and dismantled before its work was completed. One hundred fifty years later, the Negro problem still persists.

For African Americans, the badges of equality remain elusive. African Americans are recipients of inferior educational opportunities, victims of discrimination under facially neutral laws, targets of hate crimes and stereotyping, and receive lower wages for equal work. They have poorer health, shorter life expectancy, and less access to land and other measures of wealth. Since the dismantling of the Bureau, the South has lagged behind the United States in terms of African American equality.

In this Article, I suggest that a revived Freedmen’s Bureau is
necessary to guide America toward Negro equality in order for each
citizen to be a stakeholder in society. Part I examines the creation,
successes, and failures of the Bureau of Refugees, Freedmen, and
Abandoned Lands. Part II explores the state of African Americans in
the United States and the racial inequality gap. Part III presents the
threshold question of whether the racial inequality gap is relevant. Part
IV provides a framework for confronting and closing the racial
inequality gap.

I. THE BUREAU OF REFUGEES, FREEDMEN AND ABANDONED
LANDS

The United States Civil War resulted in the liberation of nearly 4
million slaves.\textsuperscript{3} Recognizing the vulnerability of the newly
emancipated slaves, Congress and President Lincoln, over opposition
from congressional democrats, enacted The Bureau of Refugees,
Freedmen, and Abandoned Lands on March 3, 1865.\textsuperscript{4} The 1865 Act
contained three substantive goals: to furnish “provisions, clothing, and
fuel” for “destitute and suffering refugees and freedmen;” to oversee

\begin{quote}
3. Abraham Lincoln’s Emancipation Proclamation did not free approximately
800,000 slaves who were not in the “rebelling states” but in border states. See John
Hope Franklin & Alfred A. Moss, Jr., From Slavery to Freedom: A History of

4. Cong. Globe, 38th Cong., 1st Sess. 2798 (1864) (Senate version of the
bill). The initial legislation addressing the needs of the Freedmen was introduced in
of a new agency to provide special assistance and protection for Negroes by ensuring
the equitable enforcement of all laws regarding Freedmen, aiding the Freedmen in
creating and enforcing leases and labor contracts, participating in litigation as next
friends of the Freedmen, and renting to the Freedmen “abandoned Confederate real
estate that came into the possession of the United States.” Cong. Globe, 38th Cong.,
1st Sess. 2798 (1864) (Senate version of the bill). Opponents of the bill expressed
concern that the legislation favored Negroes and feared that enactment of the bill
would lead to a comprehensive social welfare scheme. The opposition “contended that
such social legislation was traditionally the exclusive concern of the states and
therefore should be left to them.” Proponents stressed the importance of the bill,
explaining that the legislation was needed to overcome the effects of past mistreatment
of Negroes. The bill passed both Houses of Congress but was allowed to languish in
conference committee. During the next session of Congress, the House passed the
measure but the Senate rejected it as being a new bill all together. Ultimately, because
the need for federal aid was urgent, a limited bill was passed in 1863 creating the
Bureau of Refugees, Freedmen and Abandoned Lands. Eric Schnapper, Affirmative
Action and the Legislative History of the Fourteenth Amendment, 71 Va. L. Rev. 753,
756-60 (1985).
\end{quote}
and administer lands abandoned in favor of the freedmen, and "the control of all subjects relating to refugees and freedmen." The legislation, while not very specific in terms of goals or methods, clearly stated that the Bureau would be under the Department of War and would only last one year after the end of the War.  

General Otis Howard, appointed Commissioner of the Bureau on May 19, 1865, issued circulars establishing the broad principles of his administration. The circulars stated, "The ex-slaves must be secure in their freedom, . . . but on no account, if able to work should [they] harbor the thought that the Government will support [them] in idleness." The Bureau focused on several areas to secure the freedom of the Negro in the South—providing food, shelter, and medical care were of primary importance. The other goals of the Bureau included providing educational opportunities, a pathway to land ownership, employment, and protection under the law.


6. PAUL A. CIMBALA, THE FREEDMEN’S BUREAU: RECONSTRUCTING THE AMERICAN SOUTH AFTER THE CIVIL WAR 8 (2005). The Bill establishing the Freedmen’s Bureau specifically called for the termination of the agency one year after the war. The war ended on April 7, 1865 without a legal announcement marking the end. Some proponents of the Bureau suggested that the Bureau’s work should legally continue without further legislation for one year after such declaration by the President or Congress. PEIRCE, supra note 5, at 55.

7. CIMBALA, supra note 6, at 11.

8. Proposals to relocate the Freedmen to the North were widely discouraged. HERMAN BELZ, A NEW BIRTH OF FREEDOM: THE REPUBLICAN PARTY AND FREEDMEN’S RIGHTS, 1861 TO 1866, at 83 (Fordham Univ. Press 2000) (1976).
A. Urgent Assistance to the Negro

The Bureau was tasked with providing temporary relief and aid to the Freedmen and refugees. The Freedmen and refugees were often placed in military encampments and had no food or money to acquire provisions. One of the Bureau’s main concerns was alleviating the Freedmen’s destitute living conditions. Bureau assistance attempted to meet the basic needs of the destitute, Freedmen and refugees alike, by providing food rations, clothing, shelter, and medical care.

The Freedmen’s Bureau assumed operation of military hospitals established during the war to alleviate the physical suffering of the Freedmen. The health conditions of the Freedmen after the War could

9. Commissioner Howard recognized the temporary life of the Bureau and insisted that local governments and philanthropy organizations step in and provide needed relief aid to those destitute. The Bureau adopted a policy of “only doing what was necessary and no more.” John A. Carpenter, Sword and Olive Branch: Oliver Otis Howard 104 (1999).

10. Immediately following the war and emancipation, Freedmen were herded into military contraband camps where the living conditions were dire and atrocious. W. E. B. DuBois, The Freedmen’s Bureau, 87 ATLANTIC MONTHLY 354, 354-65 (1901). The initial Freedmen’s Act of 1865 provided no funding for relief work, but the subsequent enactment of 1866 granted appropriations to the Bureau to assist the Freedmen and refugees. Specifically the Bureau was appropriated a $4.7 million for relief supplies and medical aid and $1.3 million for transportation of Freedmen and whites, in addition to education and overhead expenses. Id. The Bureau’s budget would have been equivalent to $97.9 million, per the consumer price index, in 2008. See Samuel H. Williamson, Seven Ways to Compute the Relative Value of a US Dollar Amount, 1774 to Present, MEASURING WORTH (April 2010), www.measuringworth.com/uscompare/.

11. It is estimated that the Bureau provided between 15 and 20 million rations. A ration was defined as enough corn meal, flour, and sugar sufficient to feed a person for one week. William Troost, The Freedmen’s Bureau, EH.NET ENCYCLOPEDIA (June 5, 2008), http://eh.net/encyclopedia/article/troost.Freedmens.bureau. The aid given to refugees is not to be minimized. Often, the federal government gave a majority of the rations to white refugees:

To prevent widespread starvation and destitution in Arkansas and Missouri, the Freedmen’s Bureau issued some 1,705,055 rations to both blacks and whites from June 1865 to September 1866. In May 1865, prior to the Bureau’s relief efforts in the Arkansas district, the Federal Government had issued 75,097 rations to refugees and 46,845 to destitute freedmen.


13. Eric Foner, Reconstruction: America’s Unfinished Revolution 1863–
only be described as atrocious. Acknowledging that Freedmen lacked the financial resources to avail themselves of private health care, the Bureau set up medical dispensaries in the South to provide basic medical care and combat diseases from ravaging Freedmen communities. Additionally, Commissioner Howard insisted that local authorities and governments provide necessary medical care to the Freedmen and other citizens in need; including the insane, blind, deaf and dumb.

The Bureau transported white refugees, displaced by the War, and the Freedmen, gathered in cities where the labor supply outweighed demand, to cities where labor was needed. This effort helped the Freedmen become self-supporting and reduced starvation and destitute living conditions. Transporting Freedmen to locations where the demand for labor was high provided lucrative opportunities for the employing landowners and decreased the demands on the Bureau for relief aid. However, Commissioner Howard expressed concern for the Freedmen’s safety in relocating them to places where the Bureau’s presence was insufficient or absent.

The Bureau encouraged a free labor system for the Freedmen by establishing labor policy, disseminating form contracts, and providing a judicial forum for enforcement of the contracts. The policies specifically stated, “Negros must be free to choose their own employers and be paid for their labor.” Commissioner Howard reported, “in a single state not less than fifty thousand, such (labor) contracts were drawn in duplicate and filed with the names of the parties.” The total for all the states must have reached several hundred.

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14. Troost, supra note 11.
15. Id. These diseases included smallpox, yellow fever, and cholera. Foner, supra note 13, at 151.
16. Foner, supra note 13, at 151.
17. Peirce, supra note 5, at 100.
20. Peirce, supra note 5, at 137.
thousand.” Considering the circumstances, the Bureau was not perfect but achieved more than imaginable while acting as a vast department of labor.22

**B. Negro Education Under the Bureau**

The Bureau made strides toward Negro education in spite of the initial absence of congressional appropriations.23 Commissioner Howard recognized the importance of supporting and encouraging efforts of private charities to educate the Freedmen. In an annual report, Commissioner Howard indicated that the Bureau was able to give material aid to those engaged in educational work. The Commissioner emphasized to his assistants the importance of supporting and aiding organizations in their efforts to educate the Freedmen and observed that “education is absolutely essential to the freedmen to fit them for their new duties and responsibilities.”24 Additionally, the Bureau transformed government buildings that were no longer needed for military purposes into school houses, provided transportation to teachers, and provided books and school furniture.25

The Freedmen’s Bureau Act of 1866 gave the Bureau its final form and enlarged the Bureau’s educational powers.26 Commissioner

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21. *Id.* at 142.
23. See Cimbala, *supra* note 6, at 77-86.
26. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. After consulting at length with Commissioner Howard, Senator Lyman Trumbull, Republican from Illinois, introduced a new Freedmen’s Bureau Bill S.60 as a companion to the Civil Rights Act of 1866 that expanded operations of the Bureau. S.60, 39th Cong. (1966). Bill S.60 proposed to continue the operations of the Bureau until otherwise provided by law and to extend the Bureau’s jurisdiction to refugees and Freedmen in all parts of the United States. Cong. Globe, 39th Cong., 1st Sess. 209 (1866). Other particulars of the bill included setting up an extensive administrative apparatus, authorizing Congress to appropriate funds for the purchase of school buildings and empowering the President to reserve up to three million acres of good public land to be rented and ultimately sold to Freedmen and refugees in parcels not exceeding forty acres. *Id.* at 209-10. The bill also prohibited discrimination against Freedmen and refugees in the administration of criminal or civil law. *Id.* Opponents in the Senate and the House of Representatives voiced their objections to a bill that exclusively provided for Blacks and omitted whites from being allowed to receive assistance. The bill was “denounced as a piece of class legislation, unconstitutional, unnecessary, expensive, [and] fatal to republican government.” Pierce, *supra* note 6, at 61. Supporters of the bill emphasized the special
Howard gave several recommendations as to how the work of the Bureau should cease. First, when the Bureau is terminated, the work of Negro education should be continued. Second, the educational work and the funds should be transferred to the Department of Education, or another United States Agency with ample power to extend the school system. Third, that title to school buildings owned by the U.S. government be transferred to the learning institutions housed in those buildings.27

From 1866 to 1870, the Bureau used additional congressional funding and resources from private charities to educate approximately 100,000 students each year.28 In November 1867, General Howard stated that Bureau schools had reached “the remotest counties of each of the confederate states.”29 According to W. E. B. DuBois, “The greatest success of the Bureau lay in the planting of the free school among Negroes, and the idea of free elementary education among all classes in the South.”30 During the short life of the Bureau it

needs of Blacks pointing out that, “assistance to this disadvantaged minority would to be in the best interest of the country as whole.” Schnapper, supra note 4, at 767. The bill passed both the House of Representatives and the Senate. President Johnson vetoed the Bill and voiced his objections. He questioned the necessity of the bill and the wisdom of creating a permanent institution. He preferred that the states be left to address the problems that might exist. Schnapper, supra note 4, at 769. H.R. Bill 613 was introduced in the House of Representatives by the House Committee on Freedmen. H.R. 613, 39th Cong. (1866). This bill was limited in scope and lacked objectionable provisions of Bill S.60 including the indefinite extension of the Bureau, increasing the size of the Bureau, and allocating land for the Freedmen. The Senate and House of Representatives were able to secure the necessary two-thirds votes to enact the legislation, despite a Presidential veto. H.R. Bill 613 was known as the Freedmen’s Bureau Act of 1866. CONG. GLOBE, 39TH CONG., 1ST SESS. 2743 (1866).

27. PEIRCE, supra note 5, at 69.


29. PEIRCE, supra note 5, at 77-78. This includes Howard University, which is named after Commissioner Howard and was incorporated March 2, 1867. Howard, among other colleges and universities, still remains today and showcases efforts of the Bureau and other philanthropic organizations in educating the Freedmen. Id. at 78-79.

30. “The opposition to Negro education was bitter in the South, for the South believed an educated Negro to be a dangerous Negro.” DuBois, supra note 10. As a result of these bitter attitudes, some states made no effort to educate Freedmen, and provisions were inadequate for states where education efforts were made. PEIRCE, supra note 6, at 83. Other violent instances of educational oppression of the Freedmen included whites disturbing school sessions, harassing teachers and students, burning down schoolhouses, and chasing away Yankee teachers. CIMBALA, supra note 6, at 89.
established or supported 4,300 schools to educate Blacks.\textsuperscript{31}

C. Other Bureau Efforts

The success of the Bureau was limited in many of its efforts that went beyond providing food, hospitals, education, and labor contracts. These limitations resulted from efforts of recalcitrant Southerners, the work of President Johnson, and limited training and expertise within the Bureau.

1. Land Ownership

The Bureau was least successful in increasing Negro land ownership. The initial Freedmen's Bureau Act authorized the Bureau to take control of abandoned or confiscated Confederate property and allot it to the refugees and Freedmen as homesteads.\textsuperscript{32} On July 18, 1865, Commissioner Howard issued his Circular No. 13, ordering the selection and setting apart of such confiscated and abandoned lands and property as may be deemed necessary for the immediate use of refugees and Freedmen.\textsuperscript{33} However, a dissatisfied President Johnson ordered Howard to retract Circular No. 13. On September 12, 1865, Commissioner Howard issued Circular No. 15, per President Johnson, defining the actual meaning of “confiscated property as legally condemned property.”\textsuperscript{34} Property not identified as legally condemned was to be returned to its original owners whom President Johnson pardoned.\textsuperscript{35} This clarification defeated the intention of the Act’s land provision measure and radically changed the character of the Bureau.\textsuperscript{36}


\textsuperscript{32} Pierce, supra note 5, at 129. Specifically the Act stated, “That the commissioner, under the direction of the President, shall have authority to set apart, for the use of loyal refugees and Freedmen, such tracts of land within the insurrectionary states as shall have been abandoned, or to which the United States shall have acquired title by confiscation or sale, or otherwise, and to every male citizen, whether refugee or Freedmen, as aforesaid, there shall be assigned not more than forty acres of such land.” Freedmen’s Bureau Act of 1865, ch. 90 § 4, 13 Stat. 507, 508.

\textsuperscript{33} Cimbal, supra note 6, at 53.

\textsuperscript{34} The Freedmen’s Bureau and Reconstruction: Considerations (Paul A. Cimbal & Randall M. Miller eds., 1999).

\textsuperscript{35} Id. The Presidential pardons had a devastating effect on the Bureau’s efforts to provide land to the Freedmen. Many Freedmen were evicted from lands they had occupied and improved. Troost, supra note 11.

\textsuperscript{36} The statute authorized the commissioner to set aside lands for lease to the
2. Legal Matters

Another important role of the Bureau was to provide legal protection for the Freedmen. These protections theoretically guaranteed Negroes equal rights and safety from white violence. The South resisted the Bureau's efforts through affirmative state action and by failing to enforce seemingly applicable laws that would ensure fairness for the Freedmen. The widespread state adoption of laws targeted at controlling Freedmen and returning them to their former status, known as Black Codes, disrupted Bureau efforts. These regulations were designed to replicate the oppressive social and economic systems of the plantation society. Essentially, any distasteful or bold act of a Negro could be categorized as a misdemeanor or felony and carry fines which could lead to imprisonment if unpaid. States’ inaction was just as harmful to the Freedmen. Many states were unwilling to enforce laws designed to protect Freedmen, whether those laws came from Congress or any other government entity.

Acknowledging the states’ unwillingness to treat Freedmen fairly,
the Bureau worked to protect and maintain the complete civil liberty of the Freedmen. The Bureau sought to protect Freedmen by exercising jurisdiction and adjudicating minor civil and criminal claims brought by and against the Freedmen. Commissioner Howard authorized his agents to, “handle cases involving freedpeople where there was an interruption of civil law, or in which local courts, by reason of old codes, violated the freedom guaranteed by the proclamation of the President and laws of Congress . . . .” Bureau agents handled cases in which testimony was denied to Freedmen in state courts by either adjudicating cases themselves, or by sending the cases to military tribunals or the United States Federal Courts.

The Bureau lacked an organized plan of judicial authority in its efforts to adjudicate claims of Freedmen. As a result, most Bureau adjudications lacked procedural sophistication. The inability to acquire judges and magistrates to preside over these claims left the Bureau agents deciding the cases with their own notions of equity and justice. In most cases, the Bureau agents favored the Negro litigants, which led to injustice and Southern insult. The Bureau began to withdraw from direct involvement in exercising judicial functions as states began to pass laws that appeared to give Freedmen equal access to the judicial system. The assumption that Freedmen would receive fair treatment in state courts was inaccurate.

D. The Freedmen’s Bureau’s End

In March of 1867, Congress passed the Military Reconstruction Act ("Act"), which divided the rebel states into military districts. This Act was the beginning of the end for the Freedmen’s Bureau. According to the Act, Congress would grant restoration as soon as a state’s convention drafted a constitution that enfranchised Negroes. A majority of registered voters ratified the new constitution, and the state ratified the Fourteenth Amendment. The Bureau agents welcomed the

41. Peirce, supra note 5, at 143.
42. Cimbala, supra note 6, at 94.
43. Nieman, supra note 37, at 9.
44. DuBois, supra note 10.
45. Cimbala, supra note 6, at 94.
46. Tennessee was one of eleven Confederate states that was not divided since it had already ratified the Fourteenth Amendment. Foner, supra note 13, at 276.
47. Nieman, supra note 37, at 199; Carpenter, supra note 9, at 139.
military presence because it helped put force behind their efforts to protect the Freedmen. While occupying the Southern states during the reconstruction efforts, military commanders intervened to secure and protect the rights of the Freedmen. This intervention included providing the Bureau with authority to seize property in contract disputes, secure the Freedmen’s unpaid wages, and force civil authorities to expand the jury selection lists to include Freedmen.\footnote{Cimbala, supra note 6, at 103.}

However, the military presence in the South was temporary and these efforts had limited success.

Once the rebel states gained restoration, military authority in the South would cease and Negroes would have to protect themselves with the ballot.\footnote{Niemann, supra note 37, at 199.} With restoration of state governments and sovereignty in the South, the Bureau’s role in offering Freedmen protection ended, although obstacles to equality, violence, and injustice continued.\footnote{Cimbala & Miller, supra note 34, at 23.}

The Freedmen’s Bureau was officially abolished on June 30, 1872.\footnote{Congress abolished the Bureau by discontinuing funds. 17 Stat.366; Robert Westley, Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?, 40 B.C. L. Rev. 429, 459 n.118 (1998). The military as a whole retreated from the South completely as a result of the Compromise of 1877. The South conceded the presidential election to Rutherford B. Hayes in exchange Hayes adopted a new “Southern Policy” effectively ending Congressional Reconstruction. Foner, supra note 13, at 581.}

The Freedmen used their talents and resources to engage in Southern political life, create communities, and begin their journey toward literacy and equality. The period of reconstruction was a dynamic period in United States history. The relationship between the federal government and states changed through constitutional amendments; and the relationship between the races also changed through new-found freedom and rights, including the right to vote. This period of progress ended almost as quickly as it had started.\footnote{See Patrick Riddleberger, The Radicals’ Abandonment of the Negro During Reconstruction, 45 J. Negro Hist. 88, 93 (1960); See also Booker T. Washington, Frederick Douglass 230-232 (1907).}
II. THE STATE OF BLACK AMERICA

A. General

For this much all men know: despite compromise, war, and struggle, the Negro is not free. In the backwoods of the Gulf states, for miles and miles, he may not leave the plantation of his birth; in well-nigh the whole rural South the black farmers are peons, bound by law and custom to an economic slavery, from which the only escape is death or the penitentiary.\(^{53}\)

An examination of African American progress—from slavery to the present—is not as would be expected given that 150 years has passed. Startling inequalities exist between Blacks and whites in numerous areas, including but not limited to, academic achievement, access to healthcare, health, educational attainment, wealth, and engagement with the legal system.

These inequalities compound over time and erode the fabric of the United States’ society, making attainment of the American dream impossible for African Americans. The problems facing African Americans are overwhelming, and growing.

B. Education

1. History

The history of Black education in the United States has dubious roots. Educating slaves was illegal; blocking access to education was a key component in keeping Blacks in a state of oppression.\(^{54}\) By 1865,

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54. In one of his autobiographies, Frederick Douglass described the “philosophy of the slave system” regarding education of slaves through the words of his former master:

If [a slave] learns to read the Bible it will forever unfit him to be a slave. He should know nothing but the will of his master, and learn to obey it. As to himself, learning will do him no good, but a great deal of harm, making him disconsolate and unhappy.

FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 97 (1882). DuBois echoed this philosophy: “The opposition to Negro education in the South was at first bitter, and showed itself in ashes, insult, and blood; for the South believed an educated Negro to be a dangerous Negro.” W.E.B. DUBoIS, THE SOULS OF BLACK
the United States’ Negro population was in desperate need of education: 95% of Negroes were illiterate, and newly emancipated slaves had no communities, property, or capital. Given this starting point, Negros would logically need significantly more aid than whites to achieve equality through education. However, this aid was not forthcoming. After the Civil War, Black educational institutions were starkly unequal at best, and used as vehicles of oppression at worst.

Blacks have struggled to obtain higher education at American colleges and universities. A limited number of Blacks have been able to succeed at historically Black colleges like Fisk, Howard, and Wilberforce. However, since the Morrill Act of 1862, higher education in the United States has been largely impacted by the rise of public, land-grant universities. The Morrill Acts, which granted federal land or funds to states to establish universities, created a vehicle through which generations of United States students have reached professional goals. The Morrill Act of 1890, unlike its 1862 predecessor, granted funds to former confederate states, and prohibited racial discrimination in admissions to these land-grant universities unless the state chose to create a separate, equally funded school for Blacks. Despite the condition of equal financing Black public universities were severely underfunded. Although Black schools were entitled to a proportion of the Morrill-Nelson funds, the majority of funding for land-grant institutions came from state appropriations. However, state legislatures were unwilling adequately to fund Black institutions. The anemic state funding for Black public institutions coupled with the short supply of Black professors ensured that the vast majority of Black graduates were not trained as professionals or academics, but as skilled laborers.

The separate and unequal theme that characterizes the history of Black public higher education also dominates the history of Black elementary and secondary education before 1954—the year the

FOLK: ESSAYS AND SKETCHES 32 (3rd ed. 1903).
60. Id. at 48.
Supreme Court decided Brown v. Board of Education. Before Brown, states were free to segregate Blacks in “separate but equal” public facilities including schools. Although Brown is celebrated for its message of equality, the Supreme Court left implementation open. In fact, very little changes in school integration followed in the decade after Brown. State legislatures could still demarcate school districts, restrictive racial covenants on homes in all-white neighborhoods were still legal, and school officials still had discretion to expel students for minor infractions.

In 1976, the National Urban League decried the anti-busing sentiment in the United States, the drop in appropriations to the Elementary and Secondary Education Act, and the lack of Black professionals in the United States. In 1983 and 1986, the National Urban League called for better schools that prepared Blacks for higher education, and ultimately, high-skilled careers. The failure of the

63. The Court allowed district courts to adjudicate disputes over Brown’s implementation; the standard was that school districts had to integrate schools with “all deliberate speed.” Brown v. Bd. of Educ. (Brown II), 349 U.S. 294 (1955).
64. See Michael J. Klarman, Brown, Racial Change, and the Civil Rights Movement, 80 Va. L. Rev. 7, 10 (1994). For instance, less than 2% of Black schoolchildren in Virginia and North Carolina attended integrated schools before the Civil Rights Act of 1964 reinforced the Brown decision. Id.
65. In an effort to counter de facto segregation after Brown, plaintiffs argued for busing programs that transported Black students from urban neighborhoods to predominately white schools; the Court initially approved these programs. See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 29-30 (1971) (unanimous decision) (opinion of the Court by Burger, C.J.). However, the Court limited Swann by not allowing busing across district lines unless actual evidence shows that multiple districts had engaged in segregation. Milliken v. Bradley, 418 U.S. 717 (1974) (5-4 decision) (opinion of the Court by Burger, C.J.).
68. In 1983, the National Urban League noted that the unemployment rate hovers around 20% and the “want ads are full of jobs for machine installers and repairmen, computer programmers and engineers.” James D. McGhee, The Changing Demographics in Black America, in National Urban League, The State of Black America 15 (1983). In 1986, the National Urban League concluded that Blacks needed to demand schools that offered several new programs including: advanced curricula like computer literacy; internships, apprenticeships, and networking opportunities; and availability of entrepreneurship opportunities. See Charles D. Moody Sr., Equity and
United States’ public school system to respond to this problem continues to impede the ability of Blacks to achieve their goals through quality education.

2. Current State

Individual educational attainment is the best indicator of future employment. Urban schools are notoriously overcrowded, underfunded, and violent. A study of graduation rates in 2002 and 2003 found that 14 urban school districts had timely graduation rates of less than 50%, compared to 70% nationally. In general, urban schools have less experienced teachers and underprepared students. This results in lower college enrollment for African Americans who recently graduated from high school. Additionally, African Americans enrolled as freshmen in NCAA Division I schools are 20% less likely than whites to graduate within six years.

A rising high school drop-out rate followed by a larger unemployment rate will only deepen the problems in the urban areas. Furthermore, lower numbers of African Americans with college

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72. In 2008, only 35.9% of Blacks were enrolled in college, as opposed to 55% of whites. Id. at 25.

73. Id. at 23.
degrees exacerbates the unemployment problem.

C. Healthcare

1. History

The history of Black health in the United States shows a clear disparity that has, at times, been endorsed by the government. Before emancipation, slave owners provided healthcare to slaves as an economic investment. Although some slaves received treatment from physicians and some even had retirement benefits, the system was in place to serve the interests of the master. Free Negroes were in a worse position because they were stranded in the marketplace to provide for their own healthcare—suffering a mortality rate that almost doubled that of Whites. When slavery ended so did the healthcare benefits, and newly freed Negroes received whatever healthcare they could afford. By 1900, the average life expectancy at birth of Negroes was 30 to 35 years. Even when Negroes could afford treatment, they encountered racism in hospitals. A survey conducted in 1956 found that only 5.8% of hospitals in the South were integrated. When Blacks were admitted to hospitals, they were often used as training aides for interns and residents. Government programs like Social Security, Medicare, and Medicaid offered modest victories for equality in healthcare, but unequal treatment persisted.

2. Current State

Today, African Americans still suffer disproportionately from poorer health and earlier death than whites. African American mortality rates are significantly higher in seven of the ten leading causes of death. African Americans also suffer disproportionately from heart disease, stroke, cancer, and diabetes. A partial explanation

75. Id.
76. Id.
77. Id. at 752.
78. Id. at 757-58.
79. Id. at 758.
80. Id. at 741.
for the dismal state of African American health is the lack of quality healthcare received by Blacks. African Americans are almost twice as likely as whites to be without health insurance. A smaller percentage of the African American population is covered by private insurance as compared to with the white population, and 27.3% of African Americans under the age of 65 are covered by Medicaid, compared to only 8.5% of whites. African Americans also have less access to primary care physicians. Doctors and medical students eschew practicing in poverty-stricken areas because of the lack of disposable income and the prevalence of Medicare, which yields lower payments and requires high administrative costs. As a result, African Americans receive less preventative care and counseling and fewer early diagnoses.

Several studies demonstrate doctor bias: doctors are more likely to refer whites for cardiac catheterization, African Americans also receive less surgery during early stages of lung cancer, and African American women are less likely to undergo genetic testing for increased risk of breast and ovarian cancer. Socio-economic factors and genetic differences also contribute to the disparity, but studies show that these factors fail to fully quantify the problem. The natural conclusion is that African Americans do not receive the same healthcare treatment as whites.

82. Id. at 22.
83. Id.
84. See Karen Pallarito, Health Care Reform: Is There a Doctor in the House?, BLOOMBERG BUSINESSWEEK (Sep. 8, 2010), available at http://www.businessweek.com/lifestyle/content/healthday/642163.html. Primary care physicians, or doctors who practice “family medicine,” provide general and preventative health care to patients. The United States is experiencing a shortage in this area of medicine: PCPs only make up 35% of the total physician workforce and less than 20% of medical students are choosing to practice family medicine. Id.
87. Id. at 685.
88. Id.
D. Wealth

1. History

The struggle of Blacks obtaining wealth in the United States begins in the days of slavery, when the vast majority of Blacks were forbidden to own property. The family home has been one of the most effective tools in keeping Blacks in a state of poverty and segregated from society by restricting access to select neighborhoods through zoning, racially restrictive covenants and other forms of discrimination. Since World War II, Black homeownership has hovered around the 43% mark, while white homeownership is usually over 20% higher. In 1976, the National Urban League stated that the recession of 1975 virtually wiped out gains in Black homeownership in the 1960s. The report also cites a 1975 report by the U.S. Commission on Civil Rights, which criticizes the federal government’s abandonment of housing programs and characterizes racial discrimination in the housing market as a “fundamental operating principle.”

2. Current State

In 2002, the median net worth of African Americans was more than $80,000 less than that of whites. Taking away top income

89. For purposes of this section, wealth is defined as an individual’s income, net worth, savings, and status as a homeowner.
90. See John O. Calmore, National Housing Policies and Black America: Trends, Issues, and Implications, in NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 115 (1986) (“The disadvantageous distinction of being [B]lack in America probably presents its most diverse, complex, and intractable problems in our attempts to secure viable property rights and housing opportunities”) (internal quotation omitted).
91. See Lance Freeman, Black Homeownership: A Dream No Longer Deferred?, NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 63-64 (2006); NAT’L URBAN LEAGUE, THE STATE OF BLACK AMERICA 7-8 (1976) (Black homeownership rose during the ’60s from 38% to 42%); NAT’L URBAN LEAGUE, 2010, supra note 69, at 19 (In 2008, the Black homeownership rate was 47% and the white homeownership rate was 75%).
94. ALFRED O. GOTTSHALCK, U.S. CENSUS BUREAU, NET WORTH AND ASSET
earners, the gap in net worth between middle class African Americans and whites is still stark. African American households in the second and third quintiles of monthly income have a median net worth of $4,348 and $13,026 respectively. White households in the same quintiles have a median net worth of $55,892 and $67,392. In 2008, less than half of African Americans were homeowners, compared to a 75% homeownership rate for whites. When African Americans do own homes, the average equity in those homes is half of the white average.

Discrimination in the housing market persists. A report by the NAACP indicated that mortgage lenders discriminate against African American applicants who have income and credit risk equal to that of white applicants. African Americans are more likely than whites to receive higher interest rates and prepayment penalties on their mortgages. The report also alleges that mortgage companies regularly gave Blacks subprime mortgages even though they qualified for lower-cost prime loans.


95. A quintile represents 20% of all households; The U.S. Census Bureau tiers households by monthly incomes in 5 quintiles. The upper-limits of the second quintile monthly income is $2,555, and the third quintile is $4,040. Gottschalck, supra note 92, at 14.
96. Id.
97. Id.
99. Id. at 20.
101. Id.
102. Id. at 2.
E. Incarceration

1. History

The United States has distinguished itself from all other nations as the leading incarcerator of its population. The harsh consequences of this trend of mass imprisonment disproportionately impacts Black communities. A 1997 report by the U.S. Department of Justice states that 28.5% of Black males will go to prison at some point in their lives, as compared to 4.4% of white males and 5.1% of the total population. This is mainly attributable to the War on Drugs campaign, which championed aggressive enforcement of drug laws and longer mandatory sentences. The effects of these sentences continue to disproportionately impact Blacks today even though a majority of drug users are white.

2. Current State

California passed a $7.4 billion spending bill in 2007, which created 53,000 new beds in the state correctional system. In 2008, the African American male incarceration rate (prisoners per 100,000 people) was 3,161, while the white male incarceration rate was 487. Statistics regarding the United States death row population and execution are troubling as they reflect a disproportionate impact on African Americans who are only 12% of the population. As of January 1, 2009, there were a total of 3,297 death row inmates in United States prisons—42% of these inmates were African American, 41% were white, and 11% were Latino. Since reinstatement of the death penalty


105. Roberts, supra note 103, at 1275.


108. The African American female incarceration rate was three times higher than the white female incarceration rate. *Id.*

penalty in 1976, state and federal governments have executed 1,136 inmates; 35% of which were African American, 48% were white, and 7% were Latino.\footnote{110} Defendant-victim racial combinations further illuminate racial disparities in the system. Since 1976, 236 executions involved an African American defendant and a white victim, while 15 involved a white defendant and an African American victim.\footnote{111}

As state legislatures allocate billions to build new prisons, the causes of high African American male imprisonment and the struggle of the parolee are largely ignored. African American children become more likely to grow up without a second parent in the home, which may leave them unsupervised or misguided. Furthermore, African American parolees are less likely to obtain gainful employment, and are forced into idleness or crime to support their families.

W.E.B. DuBois’ description of the status and the future of the Negro is as true today as it was when originally penned in 1901. Perhaps if writing in 2011, DuBois would have said: All men know despite civil rights, patriotism, and hard work, African Americans are not equal in society. All men can observe that African Americans are concentrated in ghettos and the urban centers. Nationwide African Americans are peons—bound by the law and custom of Blacks and Whites—to an educational, economic, and mental slavery, from which the most prevalent escape is premature death or incarceration.

III. MAKING THE NEGRO PROBLEM MATTER

While statistics about racial inequality in the United States and around the world can be assembled and discussed, these figures do not amount to a call to action. Assuming the statistical data accurately


\footnote{111} \textit{Id.} In McCleskey v. Kemp, 481 U.S. 279 (1987), the Court addressed a constitutional attack on racial disparities in capital sentencing. The principle evidence was a study by Professor David Baldus (the Baldus study) that examined 2,000 murder cases in Georgia during the 1970’s. \textit{Id.} at 286. The study found that defendants charged with killing a white victim received the death sentence in 11% of cases, while defendants charged with killing a Black victim received the death sentence in 1% of cases. \textit{Id.} Further, Georgia imposed the death sentence in 22% of cases involving a Black defendant and white victim, while only 3% of cases involving white defendants and Black victims had capital sentences. \textit{Id.} Homicide statistics during the period of the Baldus study show that only 9.2% of homicides involved Black defendants and white victims, and 60.7% of all homicides had Black victims. \textit{Id.} at 327 (Brennan, J., dissenting).
reflects a pervasive and negative racial inequality gap, a compelling case for the eradication of this gap must be made to convince scholars and policy makers to take action. These actors must be given the answer to the rather simple question: Why should we care about racial inequality?

The discussion about racial inequality is not to be conceptualized in terms of group equality. The goal is not to make the groups equal, rather the goal is to eradicate obstacles in terms of race, which prevent group members from expressing their desires, working to their full potential, and being presented with opportunities as they experience life. There are moral, ethical, social justice, economic, and historical arguments favoring the eradication of racial inequality.

A. Race is a Legitimate Factor in Considering Social Justice and Fairness

Racial inequality is a "problem because of the hurt, pain, anger, and suffering it causes to individual human beings." The United States is known for its abundance of economic opportunity, but achieving success is not easy. To be a motivated, successful individual requires a sense of self-respect. If a person—especially of low economic status—has self-respect, then she has the belief that she can achieve a higher status, and that she deserves a higher status. The social science is well-settled that institutions such as segregation create internal conflicts for Black people that harm their ability to achieve equal status. Although segregation is no longer sanctioned by law, inequality and discrimination persist today. Social justice and notions of fairness should compel action to erase these racial inequalities.

In concluding that segregation was harmful to Blacks in Brown,
the Supreme Court cited the work of Dr. Kenneth Clark. Dr. Clark studied the effects of discrimination on the self-image and development of children. The studies gauged the children’s concept of race by having them choose dolls of different races or by having them color a picture with a crayon of their preference. The studies concluded that Black children, by the age of five, were aware that dark skin color is a mark of inferior status in American society. As a result, Black children develop feelings of self-hatred, confusion about self-worth, and a general sense of inferiority. Although Brown concluded that segregation was unconstitutional, its implementation was slow and de facto segregation continued through other means. The legacy of slavery and segregation continues to stigmatize Blacks, and that stigma is a factor in the present inequality of Blacks and whites.

The anxiety and self-conflict created by a societal mark of inferiority is supported by studies on the caste system in India. The caste system is a historical practice that places individuals in a permanent social status. The caste system is similar to segregation and slavery because both involve stark historical deprivation and current discrimination. Also, although both systems are illegal, they continue to stigmatize new generations. A study on the caste system revealed that members of a lower caste performed equally with

118. Id.
119. Id. at 350.
120. Appendix to Appellant’s Briefs at 4, Brown, 347 U.S. 483 (No. 1).
121. See supra text accompanying note 64.
122. See discussion supra Part II.
124. The caste system is only followed in rural India (about 27% of the population), and the Indian Constitution outlaws discrimination based on an individual’s caste.
members of a higher caste on a series of puzzles. However, when the caste affiliations of the group members were announced prior to the puzzle exercise, members of the lower caste underperformed by 23%. The study hypothesizes that the drop in performance could be attributed to expectations of discrimination. A society with pervasive unequal treatment primes its lower members to have little or no expectation to be rewarded for hard work. Therefore, discrimination hampers motivation to employ the diligence and dedication needed for success.

Another explanation for underperformance of a stigmatized group is the effect of stereotyping. Studies show that members of a stigmatized group experience great anxiety when they are at risk of being judged or stereotyped in accordance with that group. A study of Black Stanford University students revealed lower test scores when told that they were being tested on their personal ability. Accordingly, the scores were higher when their own abilities were not being evaluated. The study showed no similar disparity in white students’ test scores. This shows that historical prejudices have negative effects on performance, and even those who have achieved success are not immune. The anxiety felt by Blacks of being judged harshly for a slight misstep could be applicable to the workplace or public arena.

127. Id. at 3.
128. Id. at 17.
130. Id. at 407.
131. Id. at 403.
132. Id.
B. Society Benefits from Diversity in Terms of Education and Economics

The utility of diversity in the classroom and in business settings has been publically debated and, to a large extent, accepted. Justice Sandra Day O’Connor aptly stated that “the greatest possible variety of backgrounds” leads to “livelier, more spirited, and simply more enlightening and interesting” discussions. Inclusion of diverse peoples into society can begin to breakdown racial stereotypes and promote understanding among and between peoples.

Leaders in both the private and public workforce have expressed the need for greater diversity within the business communities. Sixty-five leading United States businesses highlighted this point in their amicus curiae brief to the Supreme Court in Grutter v. Bollinger. Among other things, the businesses stated that diversity was “essential” for competing in today’s global marketplace and in an increasingly diverse nation. Specifically, the economy benefits from diversity because employees at every level must have the ability and the understanding to work effectively with all peoples, including those who are different from themselves.

Diversity also results in greater creativity, which often presents more unique and effective solutions to the new problems that arise in a quickly growing marketplace. People who have different life experiences often have different approaches, perspectives, and insights which, if used in collaborative environments, could be valuable. Diverse individuals are better able to work with business partners, employees, and clientele of diverse backgrounds. Erasing racial inequality would allow the United States to utilize all of its human capital in the marketplace in lieu of importing trained and trainable...

134. Id.
135. See Id. at 334 (upholding the University of Michigan Law School’s affirmative action program, which included diversity as one of many factors in admission; the Court found that diversity was a valuable asset to both law schools and employers).
137. See id.
138. See id.
139. See id.
140. See id.
workers from abroad.

C. Greater Equality Can Enhance National Well Being

Racial inequality is viewed by some as an affliction which impacts the well-being of all citizens, not just African Americans or other minorities. Inequality has been tied to decreased life expectancy and health, and increased pathological and social problems across the population. More equality makes happier and healthier people, irrespective of economic class. Income inequalities are associated with poor health for all members of a society, not just the poor or minorities, being used as a proxy for poor people. Social scientists and medical researchers studying the health of populations report that it is not the richest countries which have the best health, but those with the smallest inequalities between the rich and the poor. Even within a country, such as the United States, people living in states with lower levels of income inequality are healthier than those in states with higher levels of income inequality. And it is not simply the poor who have poorer health when income disparities are pronounced. In less equal societies the middle class is less healthy than the middle class in more equal societies. In a society with high levels of


143. See Steve Bachmann, Lawyers, Law, and Social Change—Update Year 2010, 34 N.Y.U. REV. L. & SOC. CHANGE 499 (2010); see also Tony Judt, Ill Fares the Land 5 (2010) ("Inequality, then, is not just unattractive in itself; it clearly corresponds to pathological social problems that we cannot hope to address unless we attend to their underlying cause.").


145. See generally Wilkinson, Unhealthy Societies, supra note 141, at 78-79; Wilkinson, Social Determinants, supra note 144, at 256, 258-59.

146. See Norman Daniels et al., Justice Is Good for Our Health, in Is
disparities, all members experience social, psychological, and economic stress.

Once scholars and policy makers accept that racial inequality matters because of the harm to African Americans, the economy, and general society, the next step is to agree on a way to eradicate the racial inequality gap. This is the harder question, where many voices are silenced and thinkers leave the room. Caring about racial inequality requires the work necessary to eradicate it even if such eradication has a negative impact on others.

IV. REFORMING THE BUREAU AND MAKING IT WORK

Closing the racial inequality gap will require a departure from a free market system of society where members are told to work hard and they will reap the reward. This societal *laissez-faire* attitude has not worked.¹⁴⁷ Without intervention, race-based discrimination will likely continue unabated. As with all systems, the present is inextricably linked to the past. The moral imperative should be to decouple slave ancestry and oppression in the form of resources, opportunity, and freedom. A new Freedmen’s Bureau can accomplish this goal.

This new agency would be organized as a commission with a term of 80 years and funding in the amount of $2.188 trillion excluding administration costs for staff, office space, and supplies.¹⁴⁸ The New

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¹⁴⁷ Prior attempts to close the racial inequality gap have been unsuccessful. Over the years the United States has had the civil right movements, integration, busing, minority set-asides, head start programs, model communities, mixed income housing developments, charter schools, and affirmative action plans. A government agency committed to erasing the racial inequality gap is an imperative.

¹⁴⁸ This number can be debated and refined. This figure is the number of Freedmen and slaves at the time of the emancipation, 4.8 million, multiplied by $378 the average annual wage for unskilled labor according to the 1870 census on manufacturing, equals $18.144 billion and then the figure is converted to 2009 dollars, resulting in a total of $2.188 trillion. The principal of the Commission can be funded by $313 billion for seven years and would be regarded on the President’s budget submission as a mandatory spending item as would the administrative costs of the Commission itself. Reductions in 2009 Department of Defense funding on excesses can be directed to this line item. This amount is less then on half of the line budget item for defense for 2009. See Gerald K. Moore, *The 1860 Census of Manufacturing*, U.S. GENEALOGY NETWORK, INC. (2002), http://www.tngenweb.org/wayne/1860mfgcensus.htm http://www.nber.org/books/long60-1; Williamson, supra note 10. This is distinct from
Century Freedmen’s Commission (“NCFC”) would be led by nine Presidential appointed Commissioners from varying political parties. The NCFC would be organized into 13 geographic regions similar to the Federal Court system.149

The mission of the NCFC would be to eradicate the racial inequality gaps that persist for American descendants of United States slaves, American descendants of slaves from U.S. held territories or protectorates, and other Blacks who claim citizenship through their parents who are United States citizens by birth.150

The NCFC must be tasked with serving the target population as it finds it. In some instances this would mean conducting trainings in prisons, at churches, or at community centers. The NCFC will be divided into the following six divisions: the Division of Education; the Division of Health and Wellness; the Division of Labor and Job Readiness; the Division of the General Counsel and Legal Aid; the Division of Community Unification, Building, and Reclamation; and the Division of Policy, Research, and Development. Each division would handle a different programmatic thrust and each led by experts in the field.

During the first year the NCFC would hire staff and supervisors, conduct trainings, and design and provide a needs assessment of the target population. The assessment panel will be staffed with leading experts from appropriate fields chosen by the commissioners. All panels and committees of the NCFC should seek to have broad and diverse participation from scholars, as well as practitioners, such as

a reparations argument as compensation for past labor, pain, suffering and bondage. The argument is more closely tied to inequality gap not essential to a reparation argument.


150. This mission omits other minorities, including Caribbean and African peoples, who also suffer racism. This mission attempts to eradicate racial inequality gaps which might exist as a result or as a part of a continuum of historical oppression and slavery. The mission acknowledges that the history and present condition of Blacks in America are unique. No other racial or ethnic group has suffered chattel slavery, bondage, and Jim Crow.
community leaders and thinkers.\textsuperscript{151}

The NCFC Divisions would operate through regional offices, and would eradicate the racial inequality gap by using methodologies and delivery mechanisms that are to be developed.

**CONCLUSION**

For too long African Americans have been told to compete in a race while being weighed down by slavery, oppression, poverty, Black Codes, and Jim Crow laws. The U.S. has allowed these disadvantages to persist since emancipation, and has failed to take steps to “level” the playing field. The establishment and funding of a commission to eradicate the racial inequality gap is an institution that is long overdue. The health and economy of the nation lie in the balance.

\textsuperscript{151} A sample of candidates include: Vice Admiral Regina Benjamin (current Surgeon General of the United States), Carol Moseley Braun (former United States Senator from Illinois), Geoffrey Canada (President and CEO of the Harlem Children’s Zone), U.S. Representative André D. Carson (of Indiana), Mos Def (rapper and actor), Dr. Michael Eric Dyson (Professor of Sociology at Georgetown University), Dr. Joycelyn Elders (15th Surgeon General of the United States), U.S. Representative Marcia Fudge (of Ohio), Professor Lani Guinier (first African-American woman tenured professor at Harvard Law School), John H. Jackson (Schott Foundation for Public Education President and CEO), U.S. Representative John R. Lewis (of Georgia), Kweisi Mfume (former congressman from Maryland and former President and CEO of the NAACP), Dr. Alvin Poussaint (Professor of Psychiatry at Harvard Medical School), Dr. David Satcher (16th Surgeon General of the United States), Tavis Smiley (television host, advocate and philanthropist), Dr. Cornel West (Princeton professor, author and civil rights activist), and U.S. Representative Frederica Wilson (of Florida).