THE BLACK QUEST FOR ECONOMIC LIBERTY: LEGAL, HISTORICAL, AND RELATED CONSIDERATIONS

W. Sherman Rogers [FNa1]

Copyright (c) 2004 Howard University School of Law; W. Sherman Rogers

TABLE OF CONTENTS

Introduction and Overview........................................................................................................

I. The Black Economic Journey From the 1600s to the Civil War........................................
A. Role of Legal Principles in the Economic Journey of African Americans......................
B. First Black Entrepreneur and Other Pre-Civil War Entrepreneurs..................................
C. Conservative Estimate of the Wealth of the 500,000 Free Blacks Prior to 1860 Approximately $ Million is a More Realistic Figure..............................................................................................................................
D. Sources of Black Wealth Prior to the Civil War.................................................................
   1. Primarily Real Estate...........................................................................................
   2. Other Sources: Stocks, Bonds, and Annuities.........................................................
E. Business Pursuits of Free Blacks and Slaves Prior to the Civil War..............................
F. Why Black Entrepreneurial Activities Prior to the Civil War Are Utterly Amazing..........  
   1. The South's Preoccupation in Maintaining Slavery.................................................
   2. Many Whites Did Not Consider Blacks to Be Fully Human During This Era...............  

II. The Reconstruction Era (1867-1877).............................................................................
A. Overview.......................................................................................................................  
B. President Lincoln and President Johnson's Leniency With the Conquered South Caused Congress Reconstruction Legislation..................................................................................................................  
C. Although the Reorganized Southern States Ratified the Thirteenth Amendment, Their Enactments Showed That They Did Not Intend to Give Equal Rights to Blacks..............................................................................................................................
D. The Reconstruction Act of 1867, Like Other Legislation of This Era, Passed over the Veto of President Johnson.............................................................
E. The Four Supports upon Which the Economic Rights of Blacks Depended After the Civil War...
   1. South was Divided into Five Military Districts; Voters were to Elect State Convention to Frame the New States Had to Ratify the Fourteenth Amendment......................................................................................................................
   2. The Fourteenth Amendment...............................................................................  
   3. Because of the Recently Enacted Fifteenth Amendment, Blacks Had the Right to Vote on All Issues of Reorganization of the Southern States During the Period of Military Reconstruction......................................................................
   4. The Civil Rights Act of 1875.............................................................................
F. Benefits of Reconstruction.........................................................................................
   1. South Elected 22 Blacks to Congress; Mississippi Elected 2 Blacks to the U.S. Senate; Louisiana Senators but the Senate Refused to Seat Them; 794 Blacks Elected to State Legislatures, and Other Positions.................................................................
   2. Blacks and Whites Were Interacting with Each Other Socially and in Other Ways.........

---

Programs (OFCCP) within the Department of Labor to enforce and administer the Order. [FN660]

The standard contract clause requires that the contractor agree to comply with the provisions of the Order and all OFCCP rules, regulations, and orders. [FN661] The OFCCP may bring administrative enforcement proceedings to impose sanctions, including an order by the Secretary debarring a contractor from future government contracts. [FN662]

2. The Civil Rights Act of 1964

Title VII [FN663] of the 1964 Civil Rights Act, as amended, prohibits employment discrimination on the basis of race, color, religion, sex, national origin, and pregnancy. It is a part of the comprehensive Civil Rights Act of 1964, which also prohibits, among other things, race discrimination by private persons and entities in the provision of public accommodations, [FN664] and discrimination on the basis of race, national origin, and religion in federally assisted programs. [FN665]

3. 1965 Voting Rights Act

Congress' efforts to eradicate racial discrimination in the South during the Reconstruction era did not meet with much success. [FN666] Congress repealed most of these statutory provisions in 1894 instead of re-enacting them in modified form to satisfy court objections. [FN667] By then, the former Confederate states had already begun the process of disenfranchising black Americans. [FN668]

*83 The Southern states relied on violence, fraud, or hastily enacted voting restrictions to exclude blacks from the vote. [FN669] These states also enacted residency requirements, poll taxes, literacy tests, property tests, understanding and character clauses, and grandfather clauses as disenfranchisement tools to prevent black Americans from voting. [FN670] For example, all of the former Confederate states enacted a poll tax by 1904. [FN671]

Litigation under the Fifteenth Amendment was time-consuming and difficult. Moreover, even when courts ordered states or counties to eliminate a practice found discriminatory, they were able to devise some new scheme to perpetuate racial discrimination in voting. Congressionally enacted civil rights voting legislation passed in 1957, 1960, and 1964 proved ineffective. [FN672] In January 1965, for example, Selma, Alabama had allowed only two percent of voting age blacks to register when Dr. Martin Luther King, Jr., initiated demonstrations in Selma in support of a voter registration drive. [FN673] The city's vicious response, in which local whites killed two white civil rights activists from Massachusetts and Michigan, was well covered by the media and resulted in national and international shock and denunciation. [FN674] President Johnson urged new voting legislation in an emotional speech to the nation on March 15, 1965. Five months later, in August 1965, President Johnson signed the Voting Rights Act of 1965 into law. [FN675]

Congress' intent in enacting the 1965 Civil Rights Act was to eradicate racial discrimination in voting by suspending the practices utilized by Southern states to disenfranchise blacks for a period of five years. This approach made it unnecessary for litigants to challenge such practices on a case-by-case basis. [FN676] The Supreme Court upheld Congress' power to enact the statute in South Carolina v. Katzenbach. [FN677] The Court relied on Congress' broad remedial powers to combat documented past and prospective violations of the Fifteenth *84 Amendment pursuant to its power to enforce the Amendment through appropriate legislation. [FN678]


Title VIII of the Civil Rights Act of 1968 [FN679] generally bans discrimination on the basis of race, color, religion, national origin, sex, handicap, or familial status in the sale or rental of housing. [FN680] The Act prohibits owners and realtors from engaging in discriminatory preferences among prospective customers, prohibits discrimination in the financing of housing, prohibits discrimination in the provision of services and facilities, and prohibits discrimination in advertising concerning housing. [FN681]

5. Government Efforts to Assist Black Businesses in View of the Former Economic Caste System Legitimized by Plessy

a. Government Contracting and Set-Aside Programs

Federal minority contracting programs provide a major point of entry for socially and economically disadvantaged businesses to enter the American mainstream. [FN682] Both federal and state governments created minority business set-asides to encourage minority business ownership with the principal purpose of overcoming the continuing effects of past discrimination. [FN683]

In 1968, Congress enacted the Small Business Act, commonly known as the 8(a) program, [FN684] which requires any prime contractor *85 with a federal construction contract that exceeds $1 million to establish percentage goals for the utilization of both small businesses owned and controlled by socially and economically disadvantaged individuals. [FN685] The Act defined “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural