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Derrick Bell

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Is American Racism Economics by Another Name?

Derrick Bell

For many Americans 1984 began with a fascination for comparing today's society with George Orwell's predictions in his 1944 novel; for the media it became a fixation. However, media fixations are short lived as they are shallow, and Orwell's predictions, which turned out to be more form than substance, were quickly forgotten.

Those of us involved in American race relations have not been as fortunate. The 1984 civil rights commemoration may not be so quickly reviewed and summarily dismissed. The year 1984 was the 30th anniversary of the Supreme Court's desegregation decision in *Brown v. Board of Education* (1954) and the 20th anniversary of the enactment of the Civil Rights Act 1964. Although there has been dozens of conferences and other gatherings commemorating these events, I doubt that any of them have been scenes of unbridled celebration.

The joyous cries that greeted the news of the Supreme Court's action one Monday morning in May, three decades ago, have been replaced with equally fervent cries of distress today.

Appreciation for civil rights legislation was once overshadowed by the blatant racism of Jim Crow signs, the overt exclusion from the franchise, and the coerced monopoly on all the lowliest jobs. But in 1984, these actions exemplify only a minor theme rather than a major scenario of American life. Whites today, whether police or

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citizens, less frequently visit summary punishment on non-Whites perceived to need “putting in their place.” Yet who will claim that any of these racial evils has disappeared entirely from our more enlightened societal landscape? Ghetto and *barrio* residents of this country remain distrustful of those in uniform because even in 1984, the poor are as likely to be the victims as the beneficiaries of police force.

Today, Americans of color have more laws on the books protecting them from discrimination than at any other time in the country’s history. But let us be honest. Consider what percentage of those groups once excluded by color signs are now barred by dollar signs from restaurants, hotels, and other places of public accommodation where you live. Unless your area differs greatly from most other areas, costs exclude all but a few of the people once excluded on the basis of color. It is the same with our public schools. I am certain you can identify some middle-class schools or special programs in which the degree of integration is admirable. But you can also identify schools that are *uniracial* in fact as they once were in compliance with law and custom. Sadly, with some notable exceptions, the quality of education in these all-minority schools serving our poorest children is little better than it was 30 years ago. The facilities may not be as woeful as the old “separate but equal” schools, but the achievement disparities between schools for poor minority children and schools for middle-class children are almost as bad.

Although segregation signs have been lowered at many job sites, the qualification for even menial jobs have been raised. The consequence for many Black and other minority workers is the same – no work. This result is reflected in the discouraging disparity between income and unemployment statistics for Whites and

non-Whites. There are almost more broken homes, female-headed households, and out-of-wedlock births because of the lack of work, as well as increased rates of crime, alcoholism, drug dependency, and suicide – all hallmarks of human subjugation and despair.

I do not ignore the growing utilization of the ballot by people of color, the limited political gains made thus far, or the greater potential possible in the future. Whatever your party preference, you must recognize the tremendous momentum Jesse Jackson's candidacy generated. Given his late start and the bare minimum of financing and organization available to him, Jackson gained more votes and likely won more attention than any other presidential candidate in the history of American politics. As importantly, he unabashedly championed the cause of the underclass, White as well as Black and Hispanic.

And yet, if he had run for the Republican nomination, it is hard to imagine that Jackson would have received less serious attention to his goals and constituencies in the convention held in Dallas than he, in fact, received in San Francisco. It is a sad and I hope inaccurate commentary, but I believe that the Rainbow Coalition will gain more strength in the likely hostile climate the poor of all races will experience under the second term of President Reagan than they would have gained under the benign and predictably inadequate steps taken on their behalf by the Democratic party had it regained the White House.

For these and other reasons, there is no cause for the great and growing numbers of minority people in the underclass to remember, much less to celebrate, the civil rights anniversaries of 1964, and consequently neither do we. Moreover, even

those of us who have been more subtle but still severe discrimination we continue to encounter and to observe.

Those who teach Constitutional law are aware that the nation is preparing for another anniversary in 1987 – the bicentennial of the ratification of the U.S. Constitution. Already foundations are funding studies, institutions are scheduling conferences and symposia, and the media are commissioning programs to ensure that we have more history dripped in patriotism in 1967 than even true-blue Americans can tolerate.

I do not wish to jump the gun on the predictable paeans of praise for the founding fathers whose wisdom and idealism, graced of course by God's blessing, provided us with a document that we hope will live for the ages. But I do want to examine the origins of the Constitution from a perspective likely to receive little attention during the coming celebratory activities. The critical question lies in the motivation of the drafters of the Constitution regarding the treatment of property. How can a people who at the nation's beginning had nothing, who in fact were treated as property, gain citizenship and rights over two hundred years of struggle and perseverance and yet still in a comparative sense have nothing?

Everyone knows that the Constitutional Convention that met in Philadelphia in 1787 was far more than an exercise in political philosophy. It was a last desperate effort to save a fledgling nation that had come together to win a war against one of the world's superpowers of that day, but seemed unable to maintain in peace the economic cooperation necessary for survival.

The revolutionary war left the United States in a severe depression. Trade with Great Britain and the West Indies was foreclosed, and the war had devastated both the

New England fishing industry and the southern agricultural industry. In most states, bitter financial battles occurred between the small farmers, debtors, and craftsmen who supported reliance on paper money and those who favored hard-money policies, including creditors, merchants, and large planers.

The divisive debate threatened to escalate into all-out warfare as it did in Shay's Rebellion in 1786. Several hundred Massachusetts farmers forced the state Supreme Court to adjourn. The farmers were protesting the legislature's failure to issue paper money and reform debtor laws. The group attacked the federal arsenal at Springfield and when repulsed, fled to Vermont. The Massachusetts legislature later enacted laws easing the economic plight of debtors.

Under the Articles of Confederation, the national government was virtually powerless to address economic reform. Each state retained its sovereignty as well as every power and right not expressly delegated to the national government by Congress. Representatives to Congress were, of course, selected by the states, recalled by state action, and paid out of the state treasuries. The legislative powers of Congress were indeed limited. It could regulate neither foreign nor domestic commerce and was not empowered to raise money by taxing citizens, having instead to rely on contributions from the state treasuries. Congress was empowered to coin money, but the states retained the power to issue paper money, which some did with abandon.

In addition to making a bad economic situation worse by attempting to paper over the troubles with a printing press, the states negotiated trade agreements with each other and erected trade barriers as if each were a sovereign nation. By 1786, the country was drifting toward anarchy and commercial warfare. A convention in that year,

proposed by the General Assembly of Virginia, and held at Annapolis, Maryland, surveyed the sorry scene and recommended a plenipotentiary convention for amending the Confederation.

Thus, Congress authorized a convention the very next year “for the sole express purpose of revising the Articles of Confederation.” The convention that labored in Philadelphia drafted a new constitution which the members realized exceeded their congressional authorization. It is obvious that these patriotic men were willing to risk much to save the dream of a nation, the first to be created around the idea of individual worth. They had not forgotten the historic words of the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.

It is less obvious why this commitment to individual worth was laid aside when it came to the issue of slavery. Surely there was much sentiment in the North, both humanitarian and commercial, for ending slavery. Yet in the South, it was believed that maintenance of the “peculiar institution” was essential to the growth and prosperity of that region. After a month of passionate debate, a compromise was reached that seemed to give the South everything it wanted.

On the issue of representation, the convention agreed that the states would be represented equally in the senate, whereas representation in the House would be proportionate to the sum of the “whole number of free persons” and “three-fifths of all other persons” in each (U.S. Constitution, Art. I, Sec. 2, Cl. 3, 1787). In addition, the new government was barred from any action intended to end the importation of slaves

for 20 years (Art. I, Sec. 9, Cl. 1), and provision in federal law was to be made to ensure return of escaped slaves to their masters (Art. IV, Sec. 2, Cl. 3).

It is said that we cannot judge the actions of the founding fathers by standards of morality gained with great difficulty by our modern age. But a contemporary of the time, Luther Martin, observed that a revolution “grounded upon the preservation of *those rights* to which God and nature had entitled *us, not in particular*, but in common with all the rest of *mankind*... ended up by making a constitution that was an *insult* to that God...who views with equal eye the poor *African slave* and his *American master*” (Lynd, 1968, pp. 119, 128).

Many other quotations also support the conclusion that the evils of slavery and the contradiction inherent in recognizing and protecting its existence within the new government were well understood. But the framers faced a dilemma that they were unable to resolve or – given their unwillingness even to use the word “slave” in the Constitution – to acknowledge. As Gouverneur Morris, one of the convention’s most outspoken opponents of slavery, said during debates, “Life and liberty were generally said to be of more value, than property...[but] an accurate view of the matter would nevertheless prove that property was the main object of Society” (Lynd, 1968).

Another abolitionist delegate, Charles Cotesworth Pinckney, put the matter succinctly, “Property in slaves should not be exposed to danger under a Government instituted for the protection of property” (Lynd, 1968, p. 131). In other words, as Professor Staughton Lynd has point out, “The belief that private property was the indispensable foundation for personal freedom made it more difficult for Northerners to confront the fact of slavery squarely” (1968, p. 131).

Most historians would agree with Professor Lynd's assessment of the private property versus personal freedom dilemma that baffled the founding fathers. Fewer join him, however, in his further conclusion that their difficulty was heightened by the fact that even the most liberal among them could not imagine a society in which Whites and Blacks would live together as fellow citizens. Benjamin Franklin viewed America as the place where the world's White people, all too few in number in his view, would provide a model society. Honor and intellectual consistency drove the fathers to favor abolition; personal distaste, to fear it. On this subject, Thomas Jefferson later wrote, "Nothing is more certainly written in the book of fate, than that these people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government" (Lynd, 1968, p. 129).

At this point, some may doubt the relevance of this unhappy aspect of Constitutional history on the nation's current racial problems and my assertion of an economic basis of those problems. But bear with me as we dig a bit further into the components of the founding fathers' dilemma. We have noted that they were faced with an unsolvable predicament: How can one create a new government to protect property and recognize the worth of all human beings if recognition would destroy property in slaves?

The beliefs in White superiority held by the framers were certainly contributive to the decision that all property, even that held in slaves, must be protected. Even in the light of two centuries of learning about the fallaciousness of racial differences, policymakers today have difficulty accepting remedies for racial discrimination that will

undermine the property rights of those who are not personally liable for intentional acts of discrimination resulting in harm to the victim(s).

A far broader basis for the founding fathers' actions is suggested in the work of Charles Beard, an early 20th century historian whose works have become classic (if not controversial) additions to constitutional law literature (1965). Beard asserted that the Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are more important than government and morally beyond the reach of popular majorities.

After the debilitating experience with the Articles of Confederation, the framers realized that they needed protection from government abuse to pursue their economic interests. They also recognized the value of government support and subsidies to succeed in economic pursuits. They wanted a national government strong enough to provide both protection and support, but not so strong as to threaten their vested property holdings. Most feared the masses as much as they feared a powerful government. If you read the Constitution, you will see that the framers provided protection against both fears.

So why did the small farmers, workers, and craftsmen let the framers get away with an arrangement so obviously not in their interest? As Beard's critics point out, these groups generally supported the Constitution. Here, the answer is both complex and unconvincing. Given the chaotic state of affairs, any new arrangement promising a degree of stability would have received a certain measure of support. Moreover then as now, every worker seemed to visualize himself as a manager and every farmer, a large

plantation owner. The ability of the working class to identify with the ruling class, among other things, has confounded for generations organizing efforts on the political Left.

An important though little-recognized catalyst in this cross-class identification process is the presence in the society of a scapegoat class: Blacks and other peoples of color whose presence poses just enough threat to serve to bind the upper and lower classes together as protectors of property against “them”.

By the time the Constitution was drafted, this societal arrangement was already more than a century old. It had taken root in the early days of the Virginia colonies when large landowners, threatened by revolts of overworked Black and White workers, consoled the Whites by exploiting racist beliefs and fear of slave revolts to permanently enslave the Blacks. As Professor Edmund Morgan has documented in his 1975 work, *American Slavery, American Freedom*, poll taxes and other voting restrictions were relaxed for poor Whites who then joined forces with the rich landowners to protest royal officials and tax collectors.

Wealthy Whites retained all their former prerogatives, but the creation of a Black subclass enabled poor Whites to identify with and support the policies of the upper class. With the safe economic advantage provided by their slaves, large landowners were willing to grant poor Whites a larger role in the political process. Paradoxically, slavery for Blacks led to greater freedom for poor Whites.

In explaining this paradox, Professor Morgan observed:

Aristocrats could more safely preach equality in a slave society than in a free one. Slaves did not become leveling mobs, because their owners would see to it that they had no chance to. The apostrophes to equality were not addressed to them. And because Virginia’s labor force was composed mainly of slaves, who had been isolated by race and removed from the political equation, the remaining free laborers and tenant farmers were too few in number to constitute a serious

threat to the superiority of the men who assured them of their equality (1975, pp. 380-381).

Professor Morgan also asserted that a belief in republican equality did not necessarily depend on slavery, “but only that in Virginia (and probably in other southern colonies) it did. The most ardent American republicans were Virginians, and their ardor was not unrelated to their power over the men and women they held in bondage” (1975, pp. 380-381).

Slavery ended, but the subordination of Blacks, and thus poor Whites, remained in place. It is not a surprise that periodic efforts throughout history by poor Blacks and Whites to unite in opposition to the economic oppression that burdens them both is usually met by one form or another of the divide and pacify formula. Poor Whites are told that “we” (meaning Whites of every level) must unite to defend against “them.” Such arguments, for example, scuttled the Populist movement of the late 19th century.

Professor John Hope Franklin wrote, “The poor, ignorant White farmers reverted to their old habits of thinking and acting, comforted in their poverty by Conservative assurances that Negro rule must be avoided at any cost” (1974, p. 272). A Populist leader, Tom Watson, who later became an arch racist, best explained the impact on poor Whites in 1892:

You are kept apart that you may be separately fleeced of your earnings. You are made to hate each other because upon that hatred is rested the keystone of the arch of financial despotism which enslaves you both. You are deceived and blinded that you may not see how this race antagonism perpetuates a monetary system which beggars both (1967, p. 68).

The truth in Watson’s statement is verifiable by comparing two of the most oppressive Supreme Court decisions in American history: *Dred Scott v. Sandford* (1858) and *Lochner v. New York* (1905). The *Dred Scott* case is known to all. The majority of

the Court held that Blacks, whether free or slave, were not citizens within the meaning of the Constitution for purposes of suing in federal court under the diversity rules, and in fact had no rights that Whites were bound to respect. All Blacks were reduced to nonpersons in a desperate effort to secure an economic system based on protection of property.

Lochner so typified the big-business oriented philosophy of the Court during the period from the late 1800s until the late 1930s that we now refer to that time as the “Lochner Era.” The Court held a state’s effort to limit the employment of bakery employees to 10 hours a day and 60 hours a week unconstitutional because the limitation interfered with the right of contract between the employer and the employees. This liberty of contract was deemed protected by the Fourteenth Amendment, the provision enacted (but up to that time little used) to protect the citizenship rights of the former slaves. The *Lochner* court, which coldly claimed that the Constitution gave an equality of rights in the job market to employers vis-à-vis employees, placed all workers at the mercy of the growing corporate enterprise, which could be as hard and as heartless as any Simon Legree slave master.

Both decisions were based on economic theory seen as essential to the nation’s functioning. Both majority opinions cited structural rather than textual interpretations of the Constitution, that is, the history and organization of the document, as much as the words in contained. Relying on these readings, both decisions gave short shrift to the pleas for justice by the economic underdogs. Indeed, it would be difficult to argue that the Court in *Dred Scott* was less sensitive to the adverse impact of its decision that Blacks had no rights vis-à-vis Whites, than was the *Lochner* Court which coldly claimed

that the Constitution gave an equality of rights in the job market to employers vis-à-vis employees.

Clearly, the hardpressed bakers in *Lochner* were better off than slaves, but a close examination of their work and life options enables one to conclude that the differences were far less than one would imagine. Of course, the bakers would likely be the last to identify their plight with that of slaves or, unless they were among the minority of White workers in that era, with the plight of any Blacks. The then fledgling labor union movement, with few exceptions, was deeply racist and resisted any effort to join ranks with Black workers. In turn the Blacks completed the exploitative cycle by being used as scab labor by companies when the Whites went out on strike, a hiring policy that served both to blunt the effect of the strike and to deepen the racial enmity between the two groups.

Reform of a Constitution that in form spoke of equality but in substance protected property and spawned inequality has usually required deep national trauma. Slavery was ended, and Blacks became citizens as a concomitant of the bloodiest war in the nation's history. Even then, motivation for the rights granted Blacks came in substantial part from the Republicans' desire to maintain the advantage in government supports for their economic enterprise gained while the Democrats were in rebellion. When, following the hotly contested Hayes-Tilden election of 1876, a compromise was needed to maintain order and perhaps avert a second civil war, the rights of the newly freed and enfranchised Blacks were sacrificed with little thought and less regret.

The deep depression of the 1930s marked the end of the *Lochner* Era, a 50-year period when the Supreme Court and much of the country espoused substantive due

process and, often enough, summary invalidity for any government measure intended to aid the poor or alleviate the worst abuses of big business. It required the perspective provided by the country's economic troubles for the realization to sink in that the right of contract and the protection of property rights would be meaningless under anarchy.

Even without the pressure of President Roosevelt's Court-packing scheme, the Supreme Court finally realized that free enterprise would benefit if its chief practitioners were regulated as well as subsidized by government. A consensus was formed around the conclusion that workers should be protected as well as exploited by a system where equality is an idealistic symbol but economic class-based privilege is a Constitutionally protected fact.

We who call ourselves liberals have fostered and furthered the equal opportunity belief through an array of social programs installed over the strong opposition of conservative property owners. We have espoused these programs even though we recognize that social security, aid to education, public housing, medicare, job training programs, and legal services were, at best, facsimiles of equality and justice. What we seldom acknowledged was that whatever relief these programs brought to the needy, they served far more the needs of the upper classes for stability, regularity, and acceptance of the status quo by the poor.

The current administration is trying with more than a little success to resurrect the Lochner Era. Their success in gaining the support of large segments of the working class as they experiment in the late 20th century with early 19th century economic theories, reveals how much what we called social reform was basically a more effective means of maintaining the socioeconomic status quo.

We liberals must concede, even as we try to retain a semblance of the once broad-based programs, that they protect upper-class privilege, and too often give the poor food without nutrition, job training without employment opportunity, and (though we lawyers don't like to admit it) minimal legal services without real expectations of justice. We must also admit that our social programs, well-intended as they were, have quieted protest and revolt more than they have alleviated misery and want. They have assuaged middle-class guilt more than they have eliminated lower-class need. They have provided stepping stones for the most able and fortunate of the poor rather than opening a highway out of the ghettos of illiteracy, ill health, and ill will which flourish yet in this great land.

I suggest, without being able to provide in this limited space all the available proof, that the economic gap between those who have much and those who have far less – a gap that has grown greatly in the last four years – is accepted and acceptable to large percentages of the White working class. They, like their forebears in the Virginia colonies and the Populist movement, are drawn (particularly in harsh economic times) to join forces with wealthy Whites, each to protect what they have against those not part of the family. Caught in the racial pattern, working-class Whites resist social change advocated by Blacks and Hispanics even when they too would be major beneficiaries of reform. Politicians in the 20th century regularly gain office by playing on themes of White superiority that are more subtle but hardly less effective today than they were a century or more ago.

The magnet in the attraction is the deep need of most Whites obviously less well-off than the rich, to identify on some legitimate basis with those who have and to unite

against those who have less than they. Race provides that legitimation. Otherwise it makes no sense because even if there were once perceptible racial traits, intermixing has long since merged them. Thus though we know that probably few Blacks and far fewer Whites than care to acknowledge it are “purely” one race or the other, our society clings to racial classifications. Moreover, the Constitution provides a major structural barrier to equal economic equality, the only form of equality that could make a difference in a system committed to the protection of property 364 days a year and to the espousal of equality on the Fourth of July.

We must examine how even the Fourteenth Amendment, enacted to protect individual rights, has been interpreted to protect property. As Reconstruction ended, the Supreme Court in the 1883 Civil Rights Cases and in the 1896 *Plessy v. Ferguson* case, created the state action doctrine to justify refusing the amendment’s protection to Blacks against the forms of racial discrimination visited on them by nongovernmental entities. Today the state action concept with its public – private distinction is no longer a major barrier against relief for private, racial discrimination, but it has become the central ideological prop of regulated capitalism. Without the state action concept, the public – private distinction makes no sense. Large private enterprise makes the policy decisions of whether and when to open plants and when to close them, what products to market and what safeguard to provide the public.

These so – called “private” decisions affect our lives far more than do the “public” actions of government, supposedly closely scrutinized in the political process. Even public decisions are heavily influenced by private – sector interests whose representatives and campaign fund influences are seldom far from the political scene.

For its part, private industry accepts eagerly the benefits of government protection, tax credits, depreciation allowances, and subsidies made available in all their myriad forms. But any regulation of private industry in the public interest is decried as an untoward interference with free enterprise and a violation of the American way.

Even the liberal Warren Court was wary of broadening the Fourteenth Amendment's coverage into the realm of economic equality. In a few decisions, the Court seemed to be moving toward recognition of the importance of economic status to the enjoyment of even basic rights. The Court found that indigent defendants in criminal cases were entitled to a transcript on appeal (*Griffin v. Illinois*, 1956) and counsel on the appeal (*Douglas v. California*, 1963). The court also strengthened the right of the poor to travel by striking down welfare residency requirements (*Shapiro v. Thompson*, 1969).

But efforts to find that the poor had a fundamental interest recognizable by the Constitution in the basic necessities – food, shelter, schooling – were rejected in a series of decisions in the early 1970s. These decisions keep the faith with the concept of the Constitution as it was written almost 200 years ago. It hardly meets, however, the needs of a mature nation whose once unexplored lands and resources are now owned and occupied.

We no longer have the luxury of espousing equality and expecting that those who labor and prove themselves worthy will find it. Literally millions of jobs are being lost to technology and to foreign workers. The families who suffer are White as well as Black. Clearly, Americans identifiable by color are not the cause of this distress, and yet the pattern of blame is too well established for many Whites to cast aside in times of need. Reliance on the racial scapegoat will not rectify, but it continues to mollify. As we look

toward the 21st century, the patterns of the present suggest the prediction that we will have cause to observe, but hardly to enjoy, many more anniversaries of long – obsolete civil rights landmarks.

Is American racism economic protectionism by another name? I believe it is. The dilemma that confounded the founding fathers remains to challenge us in the present and to pose a threat to our future. A great civil war finally answered the question of how a nation created to protect property could destroy property as it existed in slaves We must seek a less bloody solution to the contemporary question of how a nation committed to the protection of property can limit that protection for some when it is necessary to ensure equal economic opportunity for all.

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