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Destined for Servitude.

Juan F. Perea
Loyola University Chicago, jperea@luc.edu

Speeches

Destined for Servitude

By JUAN F. PEREA*

Introduction

I AM HONORED TO PRESENT this lecture in honor of Jack Pemberton, a tireless warrior for civil rights and justice.[1] My lecture is titled "Destined for Servitude." I will explore some of the present vestiges of constitutional evil in the pro-slavery provisions contained in the U.S. Constitution.[2] As I will demonstrate, the desire to protect slavery casts a long shadow into the present.

The original Constitution of 1787 contains several provisions that protect slavery. These include: Article I, section 2, clause 3—the infamous "three-fifths" provision—which increased the representation of

* Professor Perea is the Cone, Wagner, Nugent, Johnson, Hazouri & Roth Professor of Law at the University of Florida, Levin College of Law, where he teaches and writes in the areas of race and race relations, constitutional law, employment law, and professional responsibility. Professor Perea has been a visiting professor at Harvard Law School, Boston College Law School, and University of Colorado School of Law. He received his J.D., *magna cum laude,* from Boston College in 1986, where he served on the Law Review. From 1986–1987, he clerked for the Honorable Bruce M. Selya of the United States Court of Appeals for the First Circuit. He is the author of LATINOS AND THE LAW (West 2008) (with Richard Delgado and Jean Stefancic), and RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2d. ed. West 2007) (with Richard Delgado, Angela Harris, Jean Stefancic and Stephanie Wildman). He is editor of and contributor to IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (NYU Press 1997). He is the author of many articles and book chapters on racial inequality, immigration history, and on the civil rights of Latinos in the United States. His articles have appeared in Harvard Law Review, California Law Review, NYU Law Review, UCLA Law Review, and Minnesota Law Review, among others. He is a member of the American Law Institute.

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2. I'd like to acknowledge Professor Mark A. Graber for his insightful book, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006), to whom I owe the phrase "constitutional evil" and some of my understanding of its ramifications.

southern states in Congress by adding three-fifths the number of slaves held as property to the number of free persons residing in each state; Article I, section 9, which uniquely limited Congress' commerce power, forbidding its exercise to limit the slave trade until 1808; Article IV, section 2, clause 3—the Fugitive Slave Clause—which guaranteed to slave owners the right to reclaim escaped slaves; and finally, Article V, which prohibited amending Article I, section 9 for a period of twenty years. Paul Finkelman has identified several other provisions of the Constitution that either directly or indirectly protected slavery and slave ownership.[3]

A series of antebellum enactments and cases further supported these constitutional provisions and the institution of slavery. A federal fugitive slave law was enacted in 1793, and later modified in 1853, despite its dubious constitutionality.[4] Despite antebellum priority of state interests over federal, the U.S. Supreme Court, in *Prigg v. Pennsylvania*,[5] found that federal fugitive slave legislation was constitutional and that state laws adding more requirements than the federal law, like Pennsylvania's, were not. Lastly, the Supreme Court in *Dred Scott v. Sandford*,[6] relying in part on framers' intent, held that blacks were never intended to have federal citizenship, and therefore Scott, lacking such citizenship, was not entitled to invoke the federal court's diversity jurisdiction. While the *Dred Scott* decision is almost uniformly condemned in constitutional law textbooks and commentaries, it can persuasively be argued that it was legally correct given the Court's reasoning and the premises of the time.[7] While one might consider *Dred Scott* morally wrong today, it was almost certainly correct in its basic assertions about framers' intent. In short, the *Dred Scott* case is condemnable only because the framers' Constitution sanctioned the evil supported by the case.

Given the text of the Constitution and its legislative and decisional progeny, it is a fairly straightforward conclusion to understand

3. PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 6–10 (2d ed. 2001).

4. *See* Paul Finkelman, *Fugitive Slaves, in* OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 319–20 (Kermit L. Hall et. al eds., 1992). The constitutionality of the federal legislation was dubious because, despite the existence of the Fugitive Slave Clause, Congress had been given no explicit enumerated power under Article I, section 8, to enact legislation to enforce the clause. Justice Harlan makes this point in his dissenting opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883).

5. 41 U.S. (16 Pet.) 539 (1842).

6. 60 U.S. (19 How.) 393 (1857).

7. *See* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL 15–16, 28–30, 46–48 (2006).

the antebellum Constitution as a pro-slavery document. Indeed, in 1788, just after its drafting, General Charles Pinckney, delegate to the constitutional convention from South Carolina and primary advocate for its pro-slavery provisions, commented: "In short considering all circumstances, we have made the best terms for the security of this species of property [slaves] it was in our power to make. We would have made better if we could; but on the whole, I do not think them bad."[8] While it is certainly true that not every delegate to the convention approved of slavery or the pro-slavery compromises, the text of the Constitution speaks for itself.

The Constitution—our organic law—explicitly sanctioned and supported a system of slave labor[9] mostly used for southern agriculture. I will argue that slavery as a labor system, and near-slavery after Reconstruction, have been deeply entrenched in our social structure since the founding and still persist today. To a significant degree, our national union depended on acquiescence in the slave labor system.

But to what extent has the production of a slave labor class, defined by race, persisted beyond the Constitution's origins? One could argue that the radical transformation wrought by the Reconstruction amendments altered the national consensus regarding slavery. Yet while the Thirteenth Amendment abolished slavery, and the Fourteenth Amendment required equal protection, the command of these amendments was largely ignored at the end of radical Reconstruction.[10] The price of reconciliation between North and South was the North's withdrawal of federal troops from the South, which allowed southerners essentially to re-enslave nominally free blacks through abusive sharecropping and tenant farmer systems, black codes, and white mob violence—an intricate system of quasi-slavery.[11] Thus, it is possible to recognize, at the end of radical Reconstruction, the outlines of the original Constitutional bargain, a consensus to preserve racially defined slave labor as an important feature of our national union.

I. The New Deal Era

It is also possible to recognize the outlines of this Constitutional bargain in the enactment of New Deal labor and welfare legislation.

8. FINKELMAN, *supra* note 3, at 10.

9. When I refer to slavery as a labor system, I mean the promotion and production of a permanent, exploited class of manual laborers, defined by race, destined for servitude.

10. GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 457–64 (5th ed. 2005).

11. WILLIAM GILLETTE, RETREAT FROM RECONSTRUCTION, 1869–1879, at 346–48 (1979).

Several major federal statutes were proposed and enacted during Franklin D. Roosevelt's presidency, including the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act. In order to win the votes of Southern Democrats, which he needed to pass the legislation, Roosevelt agreed to a series of measures and limitations that would exclude most black employees from most of the benefits offered by these federal labor and welfare statutes.

The Social Security Act ("SSA"), for example, was first intended by Roosevelt to cover all employees.[12] However, the prospect of cash benefits paid to black agricultural and domestic workers proved too inclusive for Southern Democrats:

> The Old-Age Insurance provisions of the Social Security Act were founded on racial exclusion. In order to make a national program of old-age benefits palatable to powerful southern congressional barons, the Roosevelt administration acceded to a southern amendment excluding agricultural and domestic employees from OAI coverage. This provision alone eliminated more than half the African Americans in the labor force and over three-fifths of black southern workers. The systematic exclusion of blacks through occupational classifications was crucial to the passage of the act.[13]

By denying old-age insurance benefits and other benefits under the SSA to most black employees, Southern Democrats guaranteed that most blacks, and especially southern blacks, would remain an impoverished and dependent underclass still subject to the whims of the white masters of the segregated South.[14]

Like the original version of the SSA, the original version of the National Labor Relations Act ("NLRA") included agricultural workers.[15] However, agricultural and domestic workers were later excluded from the Act in an amendment by the Senate Committee on Education and Labor.[16] This exclusion remained unchanged in all subsequent versions, including the version finally enacted. There was apparently no debate on the explicitly racial effects of the exclusion of agricultural and domestic employees, leading some commentators to

12. *See, e.g.*, IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 43 (2005).

13. Robert C. Lieberman, *Race, Institutions, and the Administration of Social Policy*, 19 SOC. SCI. HIST. 511, 514–15 (1995).

14. Some commentators have understood this exclusion as a result of administrative difficulties in accounting for these types of employees. *See, e.g.*, Gareth Davies & Martha Derthick, *Race and Social Welfare Policy: The Social Security Act of 1935*, 112 POL. SCI. Q. 217, 224–26 (1997). For a critique of their argument, see KATZNELSON, *supra* note 12, at 43–44 n.56.

15. KATZNELSON, *supra* note 12, at 57.

16. *Id.* at 57–58.

understand the exclusion as more racially neutral than other contemporary statutes.[17] However, some collateral support for the view that racism was a motivation behind the NLRA can be found in Congress' failure to enact non-discrimination provisions applicable to unions. Unions were left free to discriminate against blacks seeking to join. The benefits of collective bargaining, then, were disproportionately available only to industrialized and unionized white workers.

It is more persuasive to view the exclusion of agricultural and domestic workers in the NLRA as consistent in intent with contemporaneously passed statutes rather than being viewed as an isolated exception. In the preceding SSA, legislators had crafted a formula—exclusion of agricultural and domestic workers—to satisfy Southern Democrats by denying federal benefits to most black employees. Having found a formula that would secure passage of the legislation, it seems natural that Congress would adopt the same formula in subsequent legislation that would have otherwise conferred substantial federal rights on black employees. The exclusion of black employees kept them in a subservient position, dependent on the whims of white landowners and employers, and preserved the racial caste system of the segregated South. It strains credulity to think that southern white landowners and employers would support a federal right to bargain collectively for agricultural and domestic workers, which would strengthen their bargaining position and create the possibility of federal interference in the racial caste system. Why would southerners support a right so potentially disruptive of the structure of their society?

Southern Democratic concerns about excluding blacks from federal benefits and the threat of federal tampering with southern racial prerogatives were key features of the debate on the subsequent Fair Labor Standards Act ("FLSA"). The prospects of a minimum wage, equalized wages between whites and blacks, and centralized federal administration of such a program raised strong objections among southern congressmen. For example, Representative J. Mark Wilcox of Florida stated:

> [T]here is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. . . . You cannot put the Negro and the white man on the same basis and get

17. *See id.* at 57; *see also* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1336 n.12 (1987) (commenting that the NLRA was a possible exception to the rule of racism structuring the other New Deal enactments).

> away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge.[18]

Once again, the prescribed solution was to exclude agricultural and domestic workers from the coverage of the Act. It was well understood that this exclusion would harm black farm and domestic workers.

Three major pieces of New Deal legislation—the Social Security Act, the National Labor Relations Act, and the Fair Labor Standards Act—all excluded agricultural and domestic workers from their protections. The motive, in each case, was to secure necessary southern support for passage of the legislation by keeping black workers in an impoverished, dependent state in which neither they nor the federal government posed any threat to the racist regime of segregation in the South.

Like the original constitutional bargain to protect slavery, the New Deal congresses passed legislation that replicated a slavery-style labor system in which the most vulnerable and exploited participants, black agricultural and domestic workers, were excluded from labor protections. In enacting the Constitution, slavery was protected in order to assure southern support for the Constitution and the national union. One hundred and fifty years later, New Deal era legislators again protected racist southern prerogatives in exchange for the passing of novel federal labor legislation.

II. The Present

Most of the exclusionary provisions described before have been modified, creating greater racial fairness in the Social Security System and the FLSA.[19] One provision in the FLSA continues to exclude agricultural and domestic workers.[20] This exclusion means that these workers, unlike most others, have no protection against being forced to work unreasonable numbers of hours and entitlement to overtime pay.[21]

18. 82 CONG. REC. 1404 (1937).

19. *See, e.g.*, Linder, *supra* note 17, at 1388–93 (tabular data and descriptions of repealed exclusions from FLSA coverage).

20. *See* 29 U.S.C. §§ 207(b), 213(a)–(b) (2006).

21. According to Marc Linder: "Farm workers employed on large farms remain today, as they were in 1938, the only numerically significant group of adult minimum-wage workers wholly excluded from the maximum hours provision of the FLSA on the basis of a criterion unrelated to the size of the employer." Linder, *supra* note 17, at 1389.

Remarkably, the exclusion for agricultural and domestic workers still exists, unaltered, in the NLRA.[22] Today, agricultural and domestic workers have absolutely no federally protected right to organize and bargain collectively. Consider the damage this exclusion does: absent protective state legislation, farm owners, or labor contractors, can fire farm workers with impunity for acting collectively or seeking to unionize, therefore contributing to their exploitation and vulnerability at the bottom rungs of the economy.

Though the people affected have changed, the operation of the agricultural and domestic worker exclusions have not. The huge majority of agricultural laborers and domestic workers today, approximately eighty-three percent, are Latino immigrants and citizens.[23] Statutorily sanctioned exploitation and oppression intended to keep Blacks subservient now keep Latino farm workers subservient. This exploitation of brown Latino employees is no more justifiable than was the earlier exploitation of Blacks. This exclusion continues to function as historically intended by guaranteeing the profitability and permanence of plantation-style, quasi-slave labor that deprives these employees of minimum standards of labor protection. One can only imagine the benefit these workers could reap from competent union representation.

The preservation and continuing operation of this debilitating exception in our primary labor law can teach us powerful lessons. First, laws designed to preserve racial inequality and caste have been remarkably effective and, in this case, long-lived. Second, racially targeted inequality has been accomplished through the carefully calculated use of racially neutral language. Third, the failure to examine closely the origins of oppressive statutory language leads to an easy acceptance of ostensibly race-neutral language as somehow "natural" or "necessary," rather than as a racist structure that should be challenged as such. This is how structural racism occurs—when we lose the collective memory of the very precise reasons why oppressive legislation was enacted in the first place.

Lastly, there is a prescription here for advocates of the undocumented and of farm and domestic laborers. Immigration reform pro-

22. *See* 29 U.S.C. § 152(3) (2006) ("The term 'employee' shall include any employee . . . *but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home* . . . .") (emphasis added).

23. DANIEL CARROLL, RUTH M. SAMARDICK, SCOTT BERNARD, SUSAN GABBARD & TRISH HERNANDEZ, U.S. DEP'T OF LABOR, REPORT NO. 9, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY 2001–2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARM WORKERS 4 (2005).

posals continue to make the news. The principal feature of these proposals is a path to citizenship and legal status in the country. Surely that is a necessary and important step.

However, my analysis suggests that citizenship alone is not enough. Without meaningful reform of the labor laws, citizenship alone for the undocumented will simply guarantee a more-or-less permanent class of exploited citizens still toiling on today's equivalent of the plantation. Blacks were, and remain, such a class of exploited citizens, indicating that immigration reform alone is not enough. It must be coupled with the repeal of labor laws intended to oppress.

It is past time to amend the labor laws and to purge one more vestige of our antebellum evil from that which we respect as law.