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Republicanism: How Can Blacks Revive a Constitutional Dream?

RONALD C. GRIFFIN*

INTRODUCTION

Black Americans have not fared well under republicanism.¹ History supports the claim. Blacks were classified as property;² denied political participation in the country's affairs;³ subjected to physical and economic servitude;⁴ confined to segregated housing and second rate educational systems.⁵

The social fallout left behind by these events has haunted generations of Black Americans. Legislation alone will not blow away this fallout or erase its residual human effects. Social legislation, restructuring our economy, and a new political vision inspired by the Constitution are needed to give people a chance to grasp the good life.

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1. THE FEDERALIST No. 39, at 280 (J. Madison) (B. Wright ed. 1961); ELY, DEMOCRACY AND DISTRUST 79 (1980). [hereinafter ELY] see also Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 550-562 (1986). [hereinafter Sherry]. Afro-Americans derived no benefits from republicanism. They played no recorded role nor derived any benefits from the decision to abandon republicanism for Lockean and Hobbsean ideas about government. Sherry at 560-562; KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 53-54 (1964); BLAUSTEIN AND ZANGRANDO, CIVIL RIGHTS and THE BLACK AMERICAN: A DOCUMENTARY HISTORY 41-42 (1970). Many of the schemes discussed in this essay will not help the Black under-class. Leamann, *Ghettos: What Has to be Done*, The Wash. Post Nat'l Wkly. ed., Sept. 22, 1986, at 29, col. 1. Education, transaction payments to cover the cost of searching for work, provided over many generations, are the only things likely to help. Leamann at 29, col. 3.

2. See *Somerest v. Stewart*, 98 Eng. Rep. 499 (1772); *Smith v. Brown and Cooper*, 91 Eng. Rep. 566 (1702). Blackstone wrote an interesting commentary on the subject. Chitty's Blackstone, Bk. 1, Chap. XIV 423-5 (1908).

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

4. *Buchanan v. Warley*, 245 U.S. 60 (1917); *Shelly v. Kreamer*, 334 U.S. 1 (1948); *Jones v. Mayer*, 392 U.S. 409, 444-469 (1967) (Douglas, J., concurring).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Republicanism

Republicanism is our constitutional inheritance.⁶ It is a regime of peers: people with stable sources of income, e.g., farmers and businessmen, salesmen and clerks, participating in public affairs.⁷ Friendship, good faith and justice are the subject matter of republican discourse.⁸ Other subjects are added to republican discourse by outside events.

Deep recessions, for example, can change the content of republican discussions. If a recession destabilized a peer's source of income or wiped him out, the peer might appeal to others for help. When denial of a plea creates destitute people who en masse attack government, this plea for help is transformed into a right: farmers get their price supports; displaced workers get their unemployment insurance; lower middle income Americans get their tax relief.

Republicanism works as long as the economy is healthy. When the economy is unhealthy, republicanism is put in jeopardy. In 1987, America's economy is unhealthy: trade deficits⁹ and foreign debt¹⁰ have crippled what republicans can do for peers. Big business however, has taken matters into its own hands. It has relocated plants abroad;¹¹ hired foreign workers;¹² invested capitol in industries em-

6. U.S. CONST. art. IV § 4. See *supra* note 1, ELY at 118-9, 122-3; Sherry *supra* note 1 at 554, 550-62, 592-613; Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists and the Constitution*, 96 HARV. L. REV. 340 (1982). Kenyon, *Republicanism and Radicalism in the American Revolution: An Old Fashion Interpretation*, 19 WM. AND M.Q. 153 (1963).

7. See Ely *supra* note 1 at 79; KOCH, JEFFERSON and MADISON: THE GREAT COLLABORATION 43-44 (1964).

8. Frank Michaelman, Professor of Law, Harvard University discussed the virtues admired by John Adams, Samuel Adams and Thomas Jefferson. Among the virtues listed were friendliness, good faith, and justice. Lectures on Republicanism, presented by Frank Michaelmann, Professor of Law, Harvard University, at the University of Western Ontario, London, Ontario, Canada, June 2, 3, and 5, 1986. [hereinafter Michaelmann]. Part of the list was presented to me in a conversation with the professor on June 4, 1986. The professor cited another virtue, justice, in an article written by Hanna Pitkin. Pitkin, "Justice: On Relating Private and Public," 9 POL. THEORY 327, 339 (1981).

9. THURLOW, ZERO SUM SOLUTION 35-36 (1985). [hereinafter THURLOW].

10. *Id.* at 35, n.9. What has happened to the United States is not unique. European countries have dealt with comparable economic reversals and tendered solutions like the ones contemporary Americans advocate. See NORD, PARIS SHOPKEEPERS AND THE POLITICS OF RESENTMENT (1986). Joan Palevsky, Professor of Modern European History, University of California at Los Angeles, wrote a review on this book. Palevsky, *Business and Bigotry (Book Review)*, THE NEW REP., Sept. 8, 1986 at 27.

11. BLUMBERG, INEQUALITY IN AN AGE OF DECLINE 152 (1980). [hereinafter BLUMBERG].

ploying cheap labor;¹³ replaced American workers with machines;¹⁴ extracted wage concessions from unions;¹⁵ and broken union contracts.¹⁶ These events have driven up Black unemployment rates;¹⁷ driven Black women into the work force;¹⁸ disrupted Black family life;¹⁹ driven Black children into poverty;²⁰ forced Black wage earners to shoulder a heavier tax burden;²¹ and limited the number of Black people who can participate in public life.

12. See M. HARRINGTON, *THE NEW AMERICAN POVERTY*, 140 (1984). [hereinafter HARRINGTON]. BLUMBERG *supra* note 11, at 154-6.

13. See BLUMBERG, *supra* note 11, at 155-6.

14. HARRINGTON, *supra* note 12, at 11.

15. See HARRINGTON, *supra* note 12, at 47-8.

16. *E.g.*, Shopman's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1976); In Re Bildisco, 682 F.2d 72 (3rd Cir. 1982), *cert. granted*, 459 U.S. 1145 (1983). See Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981); Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor's Collective Bargaining Agreements*, 80 MICH. L. REV. 134 (1981).

17. HARRINGTON *supra* note 12 at 49, 125, 126, 139. Black and white working classes and their middle class counterparts have endured the same privations. Women in these classes have responded to privation with work. *Id.* at 49, 129 and 139. But poor Black men and women, who arrived in urban labor markets long after economic restructuring was underway, LODGE, *NEW AMERICAN IDEOLOGY* 145 (1975), and HARRINGTON, *supra* note 12 at 129, 133, lost a chance to do anything for themselves. *Id.* at 133. They lost social mobility. *Id.*

18. This observation is derived from Michael Harrington's and George Lodge's accounts of Black poverty discussed *supra* note 17. Leamann and Kans have written about the pathology of the poor and the ineffectiveness of government cures. Leamann, *The Origin of the Under Class*, *THE ATLANTIC*, 31, (June 1986). Kans, *The Work Ethic State*, *THE NEW REPUBLIC* (July 7, 1986). See also Rich, *Blacks at the Bottom: For An Underclass Of Alienated, Life Is Going To Get Worse*, *The Wash. Post Nat'l Wkly.*, Feb. 3, 1986, at 10, col. 1 [hereinafter Rich]. See HARRINGTON, *supra* note 12, at 49, 124, 139.

19. This observation is derived from Michael Harrington's account of poverty, HARRINGTON, *supra* note 12. See also the appalling statistics on Black poverty, *Black Family Income up Five Percent in 1985*, the *Kans. City Times*, Aug. 27, 1986, A3, col. 3. [hereinafter *Black Family Income*]. See Rich *supra* note 18; HARRINGTON, *supra* note 12, at 124. In 1984, a family of four was classified as poor if it had a cash income below \$10,608. The overall Black poverty rate was 33.8 percent. Of the 2.1 million Black families below the poverty line, 1.5 million were headed by women. *THE WORLD ALMANAC AND BOOK OF FACTS* 34 (1986). In 1985, the federal definition of poverty amounted to an annual income below \$5,469 for a single person; an annual income below \$22,083 for a family of nine or more; an annual income below \$10,989 for a family of four. *Black Family Income*, at A3, col. 4. The Black poverty rate was 33.1 percent. *Id.* at A3, col. 3. Most of the poor were members of families headed by Black women that had seen better times. Ehrenreich, *Book Review*, 257 *THE ATLANTIC*, 125-6, (April 1986).

20. See *Mending Broken Families*, *THE NEW REP.*, (Mar. 17, 1986); S. Res. 330—Establishing a Special Committee on Families, Youth and Children, 99th Cong., Sess., 132 Cong. Rec. 859 (1986). See HARRINGTON, *supra* note 12 at 124. Long-Range Planning Committee to The Board of Directors, NAACP Defense Fund, Inc., Rprt., p. 2, (Aug. 1985).

21. Income taxes pay for public services. If 33.1 percent of the population is unable to pay taxes because of distitution, *Black Family Income*, *supra* note 19, at A3, col. 3, 66.9 percent is paying its own share and the distitutes share of taxes.

Economic Solutions

American wages should be structured so that a portion of them, i.e., the bonus, is free of the payroll tax.²² Wages should be the sum of a bonus and an amount dictated by a pay schedule adopted by the employer. The frequency of the bonus would be dictated by the profits of the employer. The amount of the bonus would be dictated by an employee's diligence, proficiency and efficiency at his assigned task.

An employer's contribution to the unemployment insurance fund should be taxed at a flat rate. An employer would not be taxed when its business was flagging and its profits were erratic. Healthy employers would be taxed up to an amount that is needed to reimburse the fund.

Elected officials should amend the Tax Code to permit people to take advantage of employee stock option plans.²³ When shares of stock are placed into the hands of a trustee, until a payout date or employee retirement, purchasing stock in one's company should be treated like employee pensions under the Code. Everytime an employee purchases stock the employer should get a tax credit.

The Tax Code should be amended to neutralize inflation's affect upon income taxes.²⁴ Exemptions, deductions and credits should be indexed by the government. Taxpayers could be given the authority to index their net income before computing their tax. The government could make annual adjustments (confining indexation to a portion of the inflationary spiral, e.g., eighty percent of the year's inflation rate). The government could index the Code when the rate of inflation exceeds a stated level, or tax people on their inflated income and restore what inflation took away with a tax cut.

These schemes build up domestic investment capital; lower interest rates; provide American businesses with an alternative to borrowing money from foreign concerns. They create opportunities for businesses to invest in their plants and save; create opportunities for

22. THUROW, *supra* note 9, at 160-3. The bonus would provide workers with an incentive to be diligent and proficient at work. It would lower an employer's turnover rate; allow the employer to fix the cost of labor by contract; promote employee efficiency and opportunities for the employer to win back customers lost to foreign competition.

23. For a discussion of the Internal Revenue Service regulation implementing employee stock option plans read 8 Fed. Taxes (P-H) ¶ 34,984 and 34,985.30 (1986). For a general discussion of the law on the subject read 5 Fed. Taxes (P-H) ¶ 19,327 and 19,328 (1986).

24. TANZI, INFLATION, AND THE PERSONAL INCOME TAX: AN INTERNATIONAL PERSPECTIVE 1-2 (1980). See Griffin, Book Review, 15 INT'L LAW. 748 (1982).

wage earners to buy consumer goods or save; reward workers for diligence, proficiency and efficiency at work. They help people predict their income. They create opportunities for business to win back customers lost to foreign competitors.

Social Legislation

Good faith and justice are subjects of republican discourse.²⁵ Occasionally, outside events force Republicans to discuss other subjects. When legislation is the outcome of these discussions the final product should bear the features of justice, e.g., intelligible statements about how people ought to behave;²⁶ statements containing a ratio for the distribution of social goods;²⁷ statements supplying people with things, e.g., training, improving their station in life;²⁸ statements which bring people closer to a "pure legal existence."²⁹

In the case of distressed farmers and income taxes, elected officials should allow them to "income average" in years they experience dramatic swings in income; to use "loss carryback" figures to recover money given to the federal government in taxes; to use "loss carryforward" figures to limit their tax liability in future years.

In the case of displaced workers, States should administer the Job Training and Partnership Act under performance based contracts. When a business promises to retain a displaced worker (teach him a marketable skill, test his proficiency, place him in a job), the right to payment accrues when the worker is taught, tested and placed.

The government should establish a voucher system for unemployed, semi-skilled and displaced workers.³⁰ All the workers would get a twelve-thousand dollar voucher. The vouchers would be used by the workers to pay for training in skills certified by the government as "needed training" in growth industries. When a phase of training was

25. Michaelmann, *supra* note 8.

26. Ernest Weinrib, Professor of Law, University of Toronto, discussed the features of justice in a series of lectures delivered at the University of Western Ontario in 1986 Lectures, *The Philosophy of Private Law*, presented by Ernest Weinrib, Professor of Law, University of Western Ontario, London, Ontario, Canada, June 1, 3, and 5, 1986 [hereinafter Weinrib]. His observations about justice were discussed in considerable detail in the lectures presented on June 1 and 3, 1986. The lectures covered both Aristotle and Aquinas's observations about justice.

27. *Id.*

28. RAWLS, A THEORY OF JUSTICE 302 (1976).

29. Smith, *In Memoriam: Professor Frank D. Reeves*, 18 *How. L. J.* 1, 5 (1973).

30. THURLOW, *supra* note 12, at 205-6.

completed, the government could make partial payment to the trainer. At the end of four years full payment would accrue provided: the voucher was presented for acceptance; all phases of training were completed; the trainee was employed by the trainer or shown to be employable.

These schemes simultaneously provide a business with an incentive to train displaced workers and provide displaced workers with proper training. They supply farmers with cash to fund the transition from one regime of property (unstable) to another (stable). They cushion a farmer's fall from grace in bad times. They buy a farmer time to assess the feasibility of continuing in farming. They bring people close to a pure legal existence, a source of income, a sense of stability, community membership and participation in a republican state.

Domestic Relations

Families should be redefined as customary relationships protected by the ninth amendment.³¹ When exigencies disrupt family life the government would have the right to make a contract with the parents to care for children, or take a child from its parents and contract with foster parents to provide care. The arrangement between the parties would be a third-party beneficiary contract. The parents would be government agents charged with a duty to provide a youngster with food and clothing, shelter and education.³² Damages would accrue to

31. The ninth amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. That means that people retain rights which deserve the respect accorded enumerated rights in the first eight amendments: e.g., English civil traditions adopted by the colonialists between 1776 and 1787; neutral principles extracted from domestic relations cases decided by the Supreme Court; principles deduced from moral reasoning. See 5 WRITINGS OF JAMES MADISON 271-272 (Hunt ed. 1904); 1 Annals of Cong. 435-9 (1789); 3 J. STOREY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 1861 (1833); Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Cf. ELY, *supra* note 1, at 35-6, 54-5, 56-60, 60-3.

32. A contract comes into existence when the government retains foster parents to provide child care. *Mayberry v. Pryor*, 374 N.W.2d 683, 685-6 (Mich. 1985). The government can make a contract with the parents provided: (a) it promises forbearance, i.e., abandons at right to take custody of a neglected child; (b) it solicits a promise from the parents, i.e., to do what they are instructed to do by the government; (c) the parents promise to comply with government instructions. The promise and the forbearance are consideration. Restatement (Second) of Contracts § 71. The parent's promise differs from a pre-existing duty. Cf. *Watkins and Son v. Carrig*, 21 A.2d 591 (N.H. 1941), in which the court discussed a type of performance to overcome the pre-existing rule. See also *Richards Constr. Co. v. Air Conditioning Co. of Hawaii*, 318 F.2d 410 (9th Cir. 1963); Restatement (Second) of Contracts § 73. A contract could come into existence

children when parents breached the agreement. The children would get all the damages the parents could foresee at the time of contract formation.

This scheme ties family relationships to the Constitution. It outlines parental and community obligations to children. It provides prospective adults and children with an opportunity to get the nutrition and education they need to secure jobs, income and time to participate in public affairs.

CONCLUSION

Black Americans built the South. They were the last group to take advantage of the industrial revolution. The social profile of Blacks resembles recent immigrants. Their pleas for help are the same: e.g., access to community membership; government protection against those who would use mob violence to dissuade them from exercising community rights; access to training which leads to jobs, income and time to participate in public life.

The tax schemes, proposals to restructure the family and the wage and contracts to administer social programs are Republican responses to a desperate people's plea for help. Thus Republicanism is a way for people, who prize virtue, pursue friendship, good faith and justice.

when the government suspects the parents of child abuse or child neglect; the government proves that the parents are guilty of one of these offenses with clear and convincing evidence; the parents are accorded procedural due process. See *Santosky v. Kramer*, 455 U.S. 745 (1982).

