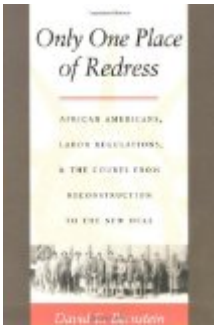
H-Net Reviews
in the Humanities & Social Sciences

Dave E. Bernstein. *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal.* Constitutional Conflicts Series. Durham and London: Duke University Press, 2001. xiii + 191 pp. $39.95 (paper), ISBN 978-0-8223-2583-3.



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Published on H-Law (March, 2002)

What Place of Redress?

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Dave E. Bernstein's *Only One Place of Redress* is touted by Duke University Press as a bold and controversial new book. It is that. But it is also less than that. Bernstein, an associate professor of law at George Mason University School of Law, attempts in this book to promote free markets economics and to defend the *Lochner* era of jurisprudence. In 1905, in *Lochner v. New York*, the United States Supreme Court held that a state regulation prohibiting bakers from having to work more than 60 hours a week was a violation of the right of contract. The *Lochnerian* era dated from 1905 to 1937. Bernstein's thesis is that African Americans would have benefited more from such an approach by the Supreme Court after 1937 instead of the one they followed, which favored the regulatory state. One who applauds free market economics will find this an eloquent and well researched book, because Bernstein is an eloquent writer and an accomplished legal historian. But if one does not believe that free market economics works fairly and equitably, as this reviewer does not, there will be much in this book with which to disagree.

One Place of Redress is a brief book covering more than 100 years of labor history, using case studies to make the author's jurisprudential point. The first chapter is a fascinating exploration of emigrant labor agents in the post-Reconstruction South. Although Bernstein briefly touches on the Black codes during Presidential Reconstruction, his chief focus is on the legislative attempts in the post-Reconstruction South to prevent labor agents from enticing African American workers to move west to Mississippi and Arkansas out of the Carolinas and Georgia. The most interesting character in the book is the chief subject of this chapter. He is Peg Leg Williams, a labor agent who had lost his leg while serving under Confederate General Nathan Bedford Forrest in the Civil War. Williams challenged the legislative efforts at regulating his activities by refusing to pay a $500 tax in Georgia. He was convicted and his conviction was upheld by the Georgia Supreme Court, and ultimately by the U.S. Supreme Court in 1900. Emigrant agent laws were soon passed in five additional southern states. Bernstein admits that the emigrant labor agent laws did not prevent hundreds of thousands of African Americans from migrating. He does conclude that such laws were a major obstacle to the labor agents, and that while such laws were certainly not "the worst example of southern oppression" such laws "were an important strand" in the oppression of southern African Americans by limiting their freedom to contract (p. 27). Given that many African Americans moved to Mississippi and Arkansas during this period and that Africa Americans have remained the poorest people in Mississippi and Arkansas since the Civil War, it is difficult to perceive how their freedom of contract benefited them economically.

In his second chapter Bernstein examines the adverse impact of licensing laws on African Americans in plumbing, barbering, and medicine. These impacts are well documented, but the cause of the impacts varies and is not

necessarily the direct result of the licensing laws. For example, Bernstein cites the dramatic decline in the number of licensed African American barbers after 1900, continuing until the 1970s. He reports that a study in the 1970s found only six licensed black barbers in eight southern states. This study seems suspect to this reviewer.[1] And, Bernstein concedes that there were many more African American barbers operating in these states who simply were not licensed. Such barbers were permitted to engage in their trade so long as they only served the African American community. Was this a result of licensing practices or simply bigotry? One 1980 study cited by Bernstein found that African Americans still were being denied cosmetology licenses at a higher percentage than whites, despite their success on practical examinations, because they were failing the written tests that "only tangentially related to their jobs." This is a refrain that is being echoed in relation to all standardized tests today. The effect of licensing laws on plumbers were found by Bernstein to be similar. Bernstein's revelations here are startling. How uncomfortable it is to be reminded of how recent the exclusion of African Americans from participation in the American economy was. Bernstein makes this point vividly by pointing out that there was only one licensed plumber in Charlotte, N.C. in 1968 and there was still only one African American licensed plumber in Montgomery, Alabama as late as 1972. However, as again the question has to be asked if the licensing laws were the cause of the problem or if it was caused by racism.

In this same chapter, Bernstein examines the licensing of physicians. Bernstein believes that the licensing of medical doctors was imposed with good motives but unintentionally hurt African Americans. He demonstrates his point dramatically by pointing out that, at the turn of the twentieth century, the American Medical Association's rating system for medical schools resulted in more stringent licensing procedures in various states. To Bernstein, these stringent licensing requirements forced the closing of five of the seven predominantly African American medical school in the U.S. Bernstein suggests that the American Medical Association could have ameliorated the effects of stringent licensing requirements by pressuring white medical schools to admit African American students or to establish separate programs for blacks. Of course, the all-white organization did neither, a course of action that Bernstein attributes to racism and the fear by southern doctors of black competition.

One area that Bernstein does not explore but bears comparison is the legal profession. For example, did bar examinations or American Bar Association accreditation cause the sharp decline of African Americans being admitted to the bar? My own research in one southern state suggests that the decline in the number of African American lawyers was caused by the lack of federal enforcement of civil rights and the acquiescence to Jim Crow by white America. Late nineteenth-century South Carolina was unusual in that its public university produced black lawyers and two black colleges with law schools. Between 1868 and 1900, 77 African Americans were admitted to the state's bar. The written bar exam was introduced in the state in 1887 and fully one-third of these black lawyers were admitted in this 13-year period after the introduction of the written exam.[2] However, after 1900 the drop in the admissions of African Americans was so dramatic to be mind-boggling. No more than six African Americans were admitted between 1900 and 1950. ABA accreditation did not reach South Carolina until 1925,[3] and the requirement of ABA accreditation for admission to the bar did not come until 1958.[4] The works of John Oldfield on South Carolina and that of J. Clay Smith on the entire country demonstrate that the decline of the African American legal profession is attributable to racism and the resulting failure of black lawyers to be able to attract clients.[5] The only work that might support Bernstein's hypothesis is that of Judith Kilpatrick on African American lawyers in Arkansas. Kilpatrick found that when comparing periods between 1865 and 1950 that there was a drop of over 50 percent in black bar admissions in Arkansas after the imposition of the written bar examination in 1917. She also attributes the decline to the out migration of African Americans from the state. Kilpatrick noted throughout her study the difficulty these black lawyers faced in attracting clients–which of course would have diminished the numbers of those who wished to practice law.[6]

In chapters three and four, Bernstein makes a strong case that racism played a major role in the passage of railroad labor regulation legislation and the prevailing wage law in the 1920s and early 1930s. For those who are ill-educated or naive about the history of labor unions, these chapters should serve as an eye-opener. As these unions grew more powerful, they persuaded Congress and others to enact legislation or regulation that favored them. And if such unions benefited by the monopolies granted them, disenfranchised African Americans, who were no one's constituents, became losers. The most odious example cited by Bernstein is the Davis-Bacon act. This act required contractors on government jobs to pay the local prevailing wage; consequently southern contractors using low paid black workers were prevented from work-

ing on government jobs in the major metropolitan areas of the North. As Bernstein makes clear, the chief lobbying for this legislation came from the American Federation of Labor and the local construction trades unions in the major northern cities. Bernstein makes a compelling case that African Americans have been harmed by Davis-Bacon and that its discriminatory effects have continued.

In his final chapter Bernstein attacks the New Deal. His first point is that New Deal caused serious harm to African Americans. But he begins this chapter by disingenuously labeling the Davis-Bacon Act as New Deal-era legislation, even though it was passed in 1931 and its named sponsors were both northern Republicans. Neither Davis nor Bacon was a New Dealer, and Franklin D. Roosevelt was not elected until 1932 and did not take office until March 4, 1933. It is true that one can find racist unions supporting labor regulation during the New Deal and that the National Mediation Board had a dismal record on civil rights, and Bernstein correctly points out that the good intentions of the New Dealers sometimes blinded them to the racism of their allies in the labor movement and Congress. He asserts that the New Deal is to blame for the ever increasing unemployment of African Americans from the 1930s to the 1980s. In fact, he cites statistics that supposedly demonstrate that black unemployment was less than that of whites in 1930 and has increased ever since. These statistics do raise troubling questions. But like other conclusions that Bernstein makes, there is the issue of interpretation. He asserts that one of the chief causes of this unemployment is the minimum wage. In furtherance of his point, he cites that employment of African American teenagers dropped from 60 percent in 1956 to 30 percent in 1977 "in part because of minimum wage laws and coverage." (p. 104). He supposedly proves his point by pointing out that white teenage unemployment did not drop in this period. One has to query why the market would behave in such a racist fashion. The minimum wage laws do not favor one race over another and unions do not have members who make minimum wage. So the only culpable actor in his example is the employer. If employers were not racist, why would black teenagers suffer disproportionate unemployment?

The second point of his chapter on the New Deal leads to a serious question about Bernstein's analysis. He condemns unions for their racism. While many if not most unions could be considered racist during the period, this racism would have had little impact on African Americans. There were few unions in the South where the vast majority of African Americans lived during this period. Between 1930 and 1960 at most 30 percent of African Americans lived outside the South and even today the majority of African Americans still live in the South.[7] Another weakness of Bernstein's thesis is his blatant disregard of the racism of corporations and management. At best, he makes a few passing references to this problem. An excellent recent study of one of the few unionized industries in the South clearly established the longstanding racism of the paper corporations and their management.[8] Bernstein gives some credit to the CIO for being less racist than the AFL, but he does little to explore the fact that some Southern labor unionists were not racists. There were integrated southern unions and union leaders in the South who advocated civil rights. In the 1930s H. L. Mitchell and the Southern Tenant Farmers' Union is one of the best known stories of the courageous efforts to organize an integrated union. The STFU lasted from 1932 TO 1940.[9] A less-known story is that of Claude Ramsey, the president of the AFL-CIO in Mississippi during the late 1950s and in the 1960s. Ramsey supported civil rights in the face of threats and intimidation and was reelected president of the state organization in 1964.[10] Bernstein ignores such examples of non-racist union activities in the South as these.

Although Bernstein gives strong anecdotal evidence that labor regulation caused harm to African Americans, he does not demonstrate that the invisible hand of the free market would have treated them any differently. One cannot ignore that the African American community had the "Invisible Empire" to fear all across America in the first half of the twentieth century. From the beginning of Jim Crow in the late 1800s until the modern civil rights movement gained strength in the 1960s, African Americans suffered from racism in all institutions and in all segments of society. It is simply impossible to imagine that this situation would have changed, had not free market economics been displaced by the hand of government regulation. In fact, it was the strong hand of the federal government that ultimately led to the end of Jim Crow and de jure segregation in all public places, institutions, trades, and professions. Bernstein strongly disagrees with those scholars who have argued that the New Deal led to the judicial mindset that resulted in *Brown v. Board of Education* and the Civil Rights statutes that followed. Despite his vigorous advocay, he has not persuaded this reviewer to abandon the position that African Americans, other minority groups and women have all benefited from the "Caring Society" that was the New Deal. [11]

Bernstein should be credited with trying to open eyes

to the racism of the labor movement in America, and in all fairness, he has written a provocative book that should be read by all those interested in issues of race, labor, and economics. He should also be credited with writing a conclusion that honestly assesses the issue of the economic subjugation of African Americans as a complex one. He acknowledges that culture, violence, and social mores must be considered in the equation ALONG with economic theory and that *Lochner* should not be revived. Certainly, HE has made an important contribution to the literature and this debate. However, Bernstein's book suffers from the central flaw of its thesis–the faulty assumption that free market economics works in an irrational world. The America of which Bernstein writes has been permeated with racism since its founding. African Americans have suffered discrimination in all spheres of life in America. To posit that *Lochnerian* jurisprudence would have had any appreciable effect on that racism is a claim that defeats itself.

Notes

[1]. This reviewer personally knew six African American barbers just in one county in South Carolina in 1970. Although they had mostly a black customer base, they did have white customers, and my memory is that they had licenses on the walls of their shops.

[2]. Act No. 272, *Acts & Joint Resolutions of the State of South Carolina* (Columbia, S.C.: Charles A. Calvo, Jr., State Printer: 1887); and *see also* the Roll of Attorneys of the Supreme Court of South Carolina.

[3]. The University of South Carolina was accredited by the ABA on May 1, 1925. See certificate of accreditation at USC School of Law, Columbia, S.C.

[4]. See Rule 6, Rules for the Examination and Admission of Persons to Practice Law in South Carolina, *Code of Laws of South Carolina* (1952, as amended March 1, 1958). Even this rule allowed admission to those who graduated from the University of South Carolina and the Law School of South Carolina State College.

[5]. See John Oldfield, "The African American Bar in South Carolina, 1877-1915," in J. L. Underwood and W. L. Burke, eds., *At Freedom's Door* (Columbia: University of South Carolina Press, 2000), 117; also see Oldfield Burke Appendix in *At Freedom's Door* at 127-129; J. Clay Smith, *Emancipation; The Making of the Black Lawyer 1844-1944* (Philadelphia: University of Pennsylvania Press, 1993).

[6]. Judith Kilpatrick, "Extra Ordinary Men: African-American Lawyers and Civil Rights in Arkansas before 1950," Arkansas Law Review 53 (2000): 299, 309, 347, 381-382.

[7]. See *Datapedia of the United States 1790-2000* (Lanham, Maryland: Bernan Press, 1994), 18-27; and *Statistical Abstract of the United States: 2001* (Washington, D.C.: U.S. Department of Commerce 2001), 24.

[8]. See Timothy Minchin, *The Color of Work* (Chapel Hill and London: University of North Carolina Press, 2001).

[9]. F. Ray Marshall, *Labor in the South* (Cambridge: Harvard University Press, 1967), 158-164.

[10]. Meryl E. Reed, Leslie S. Hough, and Gary M. Fink, eds., *Southern Workers and their Unions, 1880-1975* (Westport and London: Greenwood Press, 1981), 110-142.

[11]. See Irving Bernstein, *A Caring Society: The New Deal, the Worker and the Great Depression* (Boston, Mass: Houghton Mifflin Co., 1985).

Citation: W. Lewis Burke. Review of Bernstein, Dave E., *Only One Place of Redress: African Americans, Labor Regulations, and the Courts from Reconstruction to the New Deal.* H-Law, H-Net Reviews. March, 2002.

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