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# Address

## “And Our Posterity”

Charles L. Black, Jr.<sup>†</sup>

I have always been haunted—both troubled and nourished in spirit—by certain words near the close of the Preamble to our Constitution: “and our Posterity.” These words start up the music of human time—the music of memory, and the vastly open-chorded music of hope. It is in that time—in its fleetingness and in its infinity—that our Constitution has its ordainment and establishment.

How much time are we talking about, thus far?

James Madison was born in 1751; he died in 1836. Benjamin Harrison was born in 1833, and died in 1901; he was thus a child of three when Madison died. Dwight Eisenhower, born in 1890, was eleven when Benjamin Harrison died. Eisenhower died in 1969, 218 years after the birth of Madison. I have started with Madison because of his indelible character as chief among the makers of the Constitution. The other two names were suggested by closeness of fit. Altogether, what is shown is that just three human lives, not phenomenally long, can comfortably cover 218 years. Measured backward from now, that count of years takes us back to 1773, before the Declaration of Independence, and fourteen years before the Constitution was sent out from the Philadelphia Convention.

I like to take the reach of my country’s time in more personal ways.

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<sup>†</sup> Sterling Professor Emeritus of Law, Yale Law School; Adjunct Professor of Law, Columbia University Law School. This address was presented before the Dinner Celebrating the Incoming Governing Board of the American Bar Association (November 14, 1991). These thoughts are dedicated to my two grandsons, David Michael Simins and Robert Matthew Black, both born in May, 1991.

Long, long ago, I had a strong friendship with a black man who had been raised to the age of fifteen as a slave. He was freed when the Union troops reached Texas. He had, then, been born about 1850, the year John C. Calhoun died. In Austin there were in my early days Confederate veterans in some number; I knew a good many. I used to play with the gold watch one of them carried. Virtually all of the older black people in Austin, when I was, say, ten, had personally been slaves; for that, they needed only to be a little over sixty.

Looking the other way in time, I've been teaching law, these years, to people in their early twenties; I've gotten to know many of them rather well, in quite recent days as well as in the longer past. On any conservative estimate, a good number of these people will live at least sixty years more, some a good deal more—very senior alumni and alumnae of the Yale and Columbia Law Schools, leaders in the mid-twenty-first century.

I won't squeeze these figures, for they can be only approximate; I hope all my students will reach 100. But the figures show that one person of my age can have talked about slavery with a man who had been a slave for fifteen years, and then can talk about the American future with young people supremely fitted to face that future for a long time. My reach in time—through voices I have heard and ears that have heard my voice—is something over 200 years, close enough to the entire span, up to now, of our nation's life under our Constitution.

Let me take my own mother. She was born in 1885. As a young woman, she saw the first automobiles to come to Hillsboro, Texas—though I believe an old buggy remained, until about the time of my own birth, the Hillsboro family's only means of transportation. She died in 1975, two months short of ninety—five or six years after she watched television coverage of the first landing on the moon.

Now people were born in 1816, and some of these lived to the same age my mother attained. As far as time is concerned, one of them, when about twenty, could have had a talk with the aged James Madison, who remained amenable to conversation until near the very end. This eager young interlocutor would have lived until 1905; by that time my mother, an alert young woman of twenty who had taken all the prizes in school, might have listened, eager in her turn, to such a person's reminiscences of that meeting with Madison. Then their talk might have turned to the new-fangled automobile.

Time is little understood, hard to measure in the mind. But the obvious calculations I have played with lead me to believe that our feelings about our problems of today, and about the bearing of the past upon these problems, are too much colored by an illusory projection of a very considerable antiquity.

I want to quicken in you the feeling that our country is very new, very young. We are on a trial run. Perhaps I ought better to say, changing the metaphor without changing the word, "*We are on trial.*" Such a feeling has no rigorous logical bearing on the rightness of any policy. But if the past is at all

to guide us, we need to form an appropriate feeling about the reach of our time as a nation. I will later suggest that even some particular problems of today may be seen differently in the light of the fact that I once had a very strong friendship with a person who had been a slave into his middle 'teens.

Let us keep these thoughts in mind as we go on to ask, "Who are, who will be, this posterity?"

Strictly biological descent will not do. The posterity of the 1787 "people of the United States" are "the people of the United States" after 1787. How is this "posterity" faring?

In times given to quick abandonment of one breathlessly told headline story after another, from a flood in Bangladesh to the latest shenanigans of some television evangelist, constant recurrence to perdurable truth can produce irritated yawns. But the unceasing truth is that the state of things among black people, the people formerly held in slavery and for a hundred years after that cast into a citizenship that was barely *de jure*, remains the best-fitted key, as it has been from the first, to answering the question, "How are the American people faring, materially and morally?" These black people were, in 1776, the ones whose plight most flagrantly contradicted our commitment to equality, and to securing for all the right to the pursuit of happiness. Their plight today is still the most flagrant denial of just that same commitment, which can never cease to bind us. Whatever might be said of good, evil is staunchly conservative. If we are still on trial, this plight is Exhibit A, just as it was when Dr. Johnson laughed at our Declaration's pretenses, as he saw them, of attachment to "liberty."

The expectable attempt to uncouple the present from a past with which it is visibly connected as if by laying on of hands has its earliest *locus classicus* in Justice Bradley's opinion in the *Civil Rights Cases* of 1883<sup>1</sup>, the year of my father's birth, just eighteen years after the end of the Civil War. Let me quote his very words, that you may enjoy their full, rich aroma—and remember, Bradley's fretful impatience bears the date 1883.

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .<sup>2</sup>

This disconnection of present from past (not, I think, formerly regarded as characteristic of "conservatism") cannot be made to seem successful today, any more than in 1883. American slavery lasted more than two centuries, not too far from twice the time since its abolition. Even abolition was not the end.

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1. 109 U.S. 3 (1883).

2. *Id.* at 25.

Quite soon after the Civil War, the national effort to remedy the situation of the newly free was as good as abandoned; in the places where most of them lived they were not even so much as allowed to vote in the only election that counted; *per capita* public expenditures in public schools for their children ran far below—sometimes by a factor of one to ten—expenditure in white schools. The paradox of “separate but equal,” improvised—like the white primary—with a broad knowing wink, not only imprisoned black children in these schools, but also cut off all black people, children and grown-ups, from any kind of equal participation in the common life of the community. The “state action” doctrine sealed all the cracks in the wall.

When we find this very same people today in painful distress—as to work, food, medical care, housing, as to police cruelty, as to the administration of the penalty of death, even as to respect—out of all proportion to their numbers, must it not show a lack of grace, a lack of a sense of humor (and these two lacks often go together) for us to publish a general Act of Oblivion? Against all such proclamations, we should give ear to the deathless words of Yogi Berra: “It ain’t over till it’s over.” Or, to put the point another way, just when was it that the fat lady was heard to sing?

But all this ought really to be beside the point, once the point is seen that the purpose of any and all positive steps taken now in regard to racism is a purpose that looks to the *future*. The purpose is not the hopeless one of “compensating” black people. There isn’t enough money in the world to “compensate” them for what has been done to them through those three terrible centuries. We don’t even have to look at the past to know that anti-black racism exists right now. The purpose has to be to get rid of as much of it as we can, as best and as quickly as we can.

The first Court to interpret the Fourteenth Amendment’s “Equal Protection” Clause said that that Clause, in the light of events then “too recent to be called history,” was to be applied only to redress wrongs done to black people.<sup>3</sup> Some analogic extension had to take place, as to other heavily oppressed people—Chinese, Spanish-speakers, Native Americans—somewhat comparable in their situations to black people. But to see in the Clause a banning—even a tainting—of all effective action to help black people *as such* is to generate a great paradox of history and meaning, and makes of that part of the Fourteenth Amendment a moral-suicide pact.

I have said above that we are still on trial. The issues of that trial were drawn in the first pleading we filed. The day we became independent we justified our power and right to take this step by reference to those goals of government to which we committed ourselves—the *securing*, by government, of the rights to life, liberty and the pursuit of happiness; I ought to add that, in the same instrument, it is irresistibly implied that it is the function and duty

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3. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 71 (1873).

of government not merely to make the enjoyment of happiness barely possible, as it is possible to win a lottery, but “to *effect* their safety and happiness”—the safety and the happiness of *all* the people—because *all* the people are created equal in right. In our Constitution, this phrase chimes wonderfully with the words “for the common defense *and* the general welfare”—functions assigned to government in the Preamble, and in the first Article.

I have said that strict biological descent will not do for identification of posterity—either of the American people of 1787 or of ourselves. But this is not to say that people do not feel, or ought not to feel, an especially tender solicitude for their own lineal descendants. There’s not the slightest trace of a conflict in this. Quite the opposite; I can testify, very strongly, that my own feelings for the future of all the children that are to come have been made more intense—really, perhaps, recreated at a quite new level of intensity—by thoughts of my own children and grandchildren, and of their lives in the long future. And of *their* children’s lives and so forward. It is better than merely harmless, then, to consider what we can do for our very, very own “posterity,” the actual “heirs of our bodies.”

When I started putting these thoughts together there was a threat of a tuberculosis epidemic in New York City, where I live. There was a monster fire in Oakland, California. Let these examples stand for an infinity of such things.

How can I go about protecting my actual descendants from such frightful shocks?

Well, I guess I could leave them a whole lot of money. This shift might work for several generations, though it is the next thing to certain that even that will not give permanent shelter; Dante’s Wheel of Fortune still turns. But neither I nor most of you command any such money. For us—for almost all of us—the one and only way to work toward the protection of our posterity against plague and fire is to work for the provision of conditions favorable to care of health, and to care in sickness—and for fire departments superb in equipment, training, and morale, and sufficient in numbers. Unless we draw a strictly arbitrary line, answering to no distinction in human deserving or in human need, the “common defense” and the “general welfare” are one.

I am once again reminded of the words of Mencius:

Extend the principle of “respect to the aged in my family” to the aged in other men’s families, and the principle of “tender care for those of tender years in my family” to those of tender years in other men’s families, and the Great Society may be “rolled in the palm of your hand.” . . . Thus it is that with the expansion of the scope of your mercy, it is sufficient to protect all within the Four Seas, with

the non-extension of its scope it is insufficient to protect your own wife and children. . . .<sup>4</sup>

I have spoken thus far only of physical evils—fire, pestilence and—by extension—such things as malnutrition, miserable housing, flood. There are moral evils too. Webster said that justice is the great interest of humans on earth. Our posterity will need to live—I hope they will know that they need to live—in what they can feel to be a just society. We are denied that blessing; may our posterity be blessed therein beyond us.

A few months ago, a brilliant and by me greatly valued former student of mine at Yale, Myles Kuwahara, came to see me. He told me he had left the law to become a teacher of fourth and fifth graders, in a New York City public elementary school.

We talked of many matters. Then he said, “I brought you a picture of my class.” He held it out to me, as I prepared my mind to say the good and right things.

Then I looked at the picture. I went silent, and was silent for a long interval, as my eye went over those faces.

Then I said, “But, Myles, they’re *beautiful!*”

They are the “posterity” of 1787.

“And *our* Posterity.”

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4. CHINESE PHILOSOPHY IN CLASSICAL TIMES 106 (E.R. Hughes ed. & trans., 1942) (quoting Mencius).