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After We're Gone: A Commentary

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Derrick Bell's *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch* reminds us in most provocative terms of the precarious social position of minority group members in this country. In a broader sense, it reminds us that throughout the history of civilization people have suffered oppression at the hands of those in positions of power, and that even our Constitution provides only limited protection from such oppression. Professor Bell has placed before us a basic question that must be dealt with by all who wish to resolve the difficulties inherent in governing a free society. That question is one with which the framers of our Constitution grappled and that baffles us still. How does a society effectively govern itself and at the same time guarantee equal liberty for all? More specifically, in the racial context presented by *The Chronicle of the Space Traders*, when may government act for the benefit of society in a manner that is detrimental to some of its citizens because of their race?

The framers of our Constitution struck a balance between the power of government and the liberty of individuals through the establishment of representative government and the exposition of several fundamental rights held by citizens. This structure was designed to provide security from the excesses of government and from the oppression of one segment of society by another. As James Madison put it in *The Federalist No. 51*,

> It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions . . . be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful.[1]

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1. THE FEDERALIST NO. 51, at 323-25 (J. Madison) (C. Rossiter ed. 1961).

The framers were concerned over what Madison called the dangers of a factious majority.[2] An arguably effective means for protecting against this evil was, as Madison described, the "comprehending in the society [of] so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable."[3] But it was understood that Madison's argument for the effectiveness of this approach only went so far as to suggest that unjust combinations would be improbable or impracticable. The institutional innovations catalogued by Alexander Hamilton were also considered to be essential to the protection of the minority from oppression by the majority.[4]

The framers and their contemporary commentators understood that the purposes of our written Constitution included placing certain fundamental values beyond the reach of the majority, and establishing a governmental structure that would ensure that absolute power is not concentrated in any branch of government, particularly that branch which most directly represents the people. As Thomas Jefferson said, "The tyranny of the legislatures is the most formidable dread at present, and will be for long years. . . ."[5]

But even at the time of the framing, the question whether the constitutional structure and the nation's expansion were sufficient to avoid the evil of majority tyranny was a subject of significant concern. In discussing the threatened tyranny of the majority, Alexis deTocqueville noted:

> It has been asserted that a people can never entirely outstep the boundaries of justice and of reason in those affairs which are more peculiarly its own, and that consequently full power may fearlessly be given to the majority by which it is represented. But this language is that of a slave.[6]

He went on, "If it be admitted that a man, possessing absolute power, may misuse that power by wronging his adversaries, why should a majority not be liable to the same reproach?"[7] In expressing his fears for the future of the American experiment, deTocqueville noted, "I am not so much alarmed at the excessive liberty which reigns in that country

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2. THE FEDERALIST No. 10, at 80 (J. Madison) (C. Rossiter ed. 1961).

3. THE FEDERALIST No. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).

4. Those innovations include the separation of powers among the branches of government, a system of checks and balances, and an independent judiciary. THE FEDERALIST No. 9, at 72 (A. Hamilton) (C. Rossiter ed. 1961).

5. Letter from Thomas Jefferson to James Madison (March 15, 1789), *reprinted in* THE PORTABLE THOMAS JEFFERSON 440 (M. Peterson ed. 1975).

6. 1 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 263 (H. Reeve trans. rev. ed. 1900).

7. *Id.*

as at the very inadequate securities which exist against tyranny."[8] Finally, the philosopher posited that, "If ever the free institutions of America are destroyed, that event may be attributed to the unlimited authority of the majority . . . ."[9]

DeTocqueville's concern was well-founded because it is now established that sufficiently important governmental interests can justify a limitation of even those basic liberties enumerated in the Constitution. One need only examine the Supreme Court's handling of constitutional challenges to governmental restrictions on individual liberty in first and fourth amendment contexts to understand how individual liberties may be routinely sacrificed to higher governmental needs. The very notion that we are a nation of laws compels a recognition that our individual liberties may be compromised for the general welfare. The understanding that laws are nothing more than a reflection of the contemporary will of the people, however, compels a recognition of the precarious state in which minority groups exist in this country.

A further complication surrounding the circumstances under which government may infringe upon the liberty of its citizens is the question regarding the circumstances that justify such infringement on a racial basis. It is indisputable that the framers of the Constitution did not have black people in mind when they developed the delicate balance that was intended to protect citizens from the tyranny of the majority. Despite this fact, however, it is clear that the fourteenth amendment was intended to afford blacks constitutional protection by guaranteeing to them equal protection of the law.[10] The problem is that no clear definition of the concept of equality exists in the Constitution or in its history.[11]

The concept of equality advanced by many who describe themselves as originalists can be summarized as neither requiring nor permitting anything more than absolute "colorblindness," and is drawn from Justice Harlan's dissent in *Plessy v. Ferguson*.[12] This approach takes the position that race may never be a legitimate consideration in governmental decision-making no matter what the justification. The prevailing view, however, asserts:

> [W]e cannot . . . let color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens . . . [t]he assertion of human equality is closely associated with the pro-

8. *Id.* at 265.
9. *Id.* at 273.
10. Loving v. Virginia, 388 U.S. 1 (1967); Strauder v. West Virginia, 100 U.S. 303 (1879); The Slaughter-House Cases, 83 U.S. 36 (1872).
11. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND PREFERENTIAL TREATMENT 84, 85 (M. Cohen, T. Nagel & T. Scanlon eds. 1977).
12. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

> position that differences in color . . . are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," summed up by the shorthand phrase "[o]ur Constitution is color-blind," has never been adopted by this Court as the proper meaning of the Equal Protection Clause.[13]

Under this approach, the concept of equality turns on the justification for the particular racial classification in question.

The Supreme Court's analysis of the legitimate uses of race in governmental decision-making has generally been in the context of race-conscious affirmative action programs intended to benefit members of minority groups. Such programs have frequently been challenged by members of majority groups who assert that their right to be treated as equals has been infringed upon. The Court has consistently concluded in this context that race-conscious action passes constitutional muster when it is narrowly tailored to achieve compelling governmental interests and intrudes minimally upon the rights of innocent others.[14] This approach to equal protection analysis is consistent with the Court's majority analysis of race-conscious negative action in *Plessy v. Ferguson.*[15] The significance of this approach is that it recognizes the reality that race is a factor that affects the nature of human interaction. In recognizing that fact, this approach allows race to be considered in governmental decision-making in those situations where race is significant.[16]

The Court, then, has determined that a compelling governmental interest can justify an infringement upon the interests of its citizens, and the fact that citizens who are benefited or burdened by the infringement are classifiable by racial characteristics does not render the classification violative of the concept of equal protection. Our constitutional solution to the difficulties inherent in harmonizing effective government with the concepts of liberty and equality is, in the final analy-

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13. Regents of University of California v. Bakke, 438 U.S. 265, 355 (1978).

14. In City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), the Supreme Court resolved the ongoing dispute over whether benign and invidious distinctions should be subjected to different degrees of constitutional scrutiny in its holding that all racial classifications were subject to strict scrutiny.

15. 163 U.S. 537 (1896). The major criticism of the analysis in *Plessy* is that the majority found sufficiently compelling the public good that would be served by the avoidance of civil disorder resulting from race mixing. The fact that this justification was grounded in racial prejudice and white supremacy, it is argued, rendered it inconsistent with the notion that all citizens are to be treated as equals. The *Croson* majority's decision to remove the distinction between benign and invidious racial classifications diminishes the legal significance of this criticism.

16. While such an approach allows for the "benign" use of race to achieve the compelling governmental purpose of remedying the effects of past discrimination, it also establishes a framework for the "invidious" use of race to achieve compelling governmental purposes.

sis, dependent upon a judicious balancing of interests.

Some may read *The Chronicle of the Space Traders* as a clever hypothetical like so many put forth in a law school class — one that raises interesting questions that will never in reality need to be addressed. *The Chronicle*, in fact, asks a very basic question that is sorely in need of an answer today — what happens when "We the People" decide, on a racial basis, to sacrifice the rights of some of us to a higher interest?

The first frightening reality to be recognized is that when the determination to sacrifice the rights of some for the benefit of the group is expressed through amendment of the Constitution, there is no recourse for the oppressed minority. Had the constitutional convention of the year 2000 passed an amendment declaring, "Every African-American citizen is subject at the call of Congress to selection for special service for periods necessary to protect domestic interests and international need," there would be no question regarding the constitutional legitimacy of the trade. The majority would have made the determination to eliminate all constitutional restraints on governmental power to allow for the conscription of blacks to this national service.

When those excesses are expressed through legislation, our constitutional system allows for judicial review and the possibility that courts will strike down such legislation. Our constitutional structure provides a mechanism for limiting some excesses of power. The more immediately threatening question that *The Chronicle* raises for me is whether our well-accepted balancing of interests approach to constitutional interpretation raises the possibility that governmental interests such as those satisfied by the Space Traders' offer may be found to justify, *even within existing constitutional constraints*, the ultimate infringement upon the most basic rights of blacks. Suppose that the constitutional amendment actually passed in *The Chronicle* was instead a piece of legislation passed by Congress.[17] Assuming that it was viewed as a legitimate exercise of legislative authority, the only question remaining would be whether the conscription of citizens on a racial basis would violate equal protection concepts. The history briefly recounted by Professor Bell reminds us of the numerous situations in which rights held sacred by our minority citizens have been sacrificed to some higher

17. Such legislation, calling citizens to service to protect domestic interests and international needs, may be viewed as exceeding already well-established congressional authority to compel military service under Art. I, § 8 of the Constitution. *See* Selective Service Draft Law Cases, 245 U.S. 366 (1918). On the other hand, it is not unthinkable that the security of the nation would be viewed as sufficiently threatened by the situation described in *The Chronicle* as to justify such congressional action. Professor Bell avoids this dispute by effectuating the need to call citizens to this type of service through constitutional amendment.

governmental purpose.[18] If the standard for justifying such distinctions is that they can be made in order to achieve a compelling governmental purpose, is there reason to believe that the ultimate solution proposed in *The Chronicle* could not be constitutionally justified?

The answer depends on the approach to equal protection analysis extant at the time of the crisis. Maintaining the pre-*Croson* distinction between invidious and benign racial classifications would do nothing to prevent a court from finding the invidious classification involved in the space trade capable of surviving strict scrutiny. Where the governmental purpose served by the classification is sufficiently compelling, the classification is permissible. The alternative approach to equal protection analysis proposed by the originalists — to prohibit any use of race in governmental decision-making — would render the space trade violative of equal protection, but it would preclude government from ever recognizing that race is a significant fact of life. Thus, the originalist approach may be viewed by many as too limiting on government's authority to act in compelling situations.

There is a compromise approach that would allow government the flexibility to act on a racial basis in some circumstances, but would restrict such activity in others. This approach would maintain the distinction between benign and invidious classifications, but would also raise the level of analysis so as to subject the benign to strict scrutiny. Invidious classifications would be subjected to some higher level of scrutiny or would be prohibited completely. This compromise, however, raises the very difficult question of whether a particular classification is benign or invidious.

The reality is that neither of these alternative approaches is current law. If we accept strict scrutiny as the standard for measuring the government action in question, one can easily see how a court could justify as constitutional the national response to the space trade offer. One can only speculate whether "we" would in fact accept the deal, but there seems little doubt that we could. Certainly the deal would eliminate our environmental, energy, and financial concerns, and perhaps more importantly for some, our "race problem." On the list of compelling interests, these must all be at the top. Accepting the offer is superficially a no-lose situation for the majority of Americans. On the other hand, sacrificing the fundamental liberty of a large segment of society is the antithesis of all that America stands for. Accepting the

18. Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 St. Louis U.L J. 393, 393-97 (1990). *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (holding that compulsory exclusion of people of Japanese ancestry from their homes on the West Coast during World War II was constitutional due to compelling governmental interests); Plessy v. Ferguson, 163 U.S. 537 (1896) (court upholding constitutionality of Louisiana statute requiring segregation of blacks making use of public trains).

trade would be an admission of the failure of the American dream — a confession that the American experiment was largely a failure. But such theoretical and idealistic arguments have little legal significance. The Constitution does not guarantee that the American dream will become reality for every member of society.

The only persuasive argument against acceptance of the deal, and those like it, is one couched in terms to which the majority can relate — an argument that appeals to the self-interest of the majority. The undeniable fact is, as Professor Bell notes, that people generally act in their own self-interest. The reality is that the majority must be made to understand that the denial of fundamental liberties to blacks today portends similar denials to others in the future. The majority must be asked, as Professor Bell does, with blacks gone, who among you would be next? How would Americans react when the next caravan of traders arrived offering even more benefits in return for all Americans over the age of ninety-five? All Americans who are physically disabled? All Jewish, Catholic, or Protestant Americans? All women not of childbearing age? All Americans who are unemployed or unemployable?

This commentary ends with the admonition that opens Professor Bell's *After We're Gone*. It is indeed time for us to " 'Get Real' about race and the persistence of racism in America." Under a system of government in which decisions about the treatment of people are made by a majority of the people there has always existed, and always will exist, the danger of a tyrannical majority. Under such a system, the minority's fate will necessarily be dependent upon the will of that majority. One can only hope that when given the opportunity to decide upon the fate of African-Americans, "We the People" will have the leadership to explain, and the foresight to understand and balance, all significant concerns.