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A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED & UNNAMED

BY CHARLES L. BLACK, JR.

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I. INTRODUCTION

Charles L. Black, in a personal and engaging tone, expresses his theory for the basis of human-rights law in America in *A New Birth of Freedom.* In this book, the eighty-year-old Black states and supports his own "life's conclusions" about this topic. His fifty years as one of this country's foremost scholars of constitutional law entitles him to indulge in this heartfelt publication. Black, Sterling Professor Emeritus at Yale Law School and adjunct professor of law at Columbia Law School, is well-qualified to counsel the reader that "the foundations of American human-rights law are in bad shape. They creak, they groan for rebuilding."

The title, *A New Birth of Freedom*, is a phrase from Abraham Lincoln's well-known speech at Gettysburg in which he prophesied that "this nation, under God, shall enjoy a new birth of freedom." These words signified Lincoln's faith in human rights and his hope that this country, which was founded in order to secure human rights but had strayed from this ideal, would reestablish its commitment to freedom. Black dedicates *A New Birth of Freedom* to the sacred memory of Abraham Lincoln based upon Lincoln's recognition and commitment to the importance of human rights.

In the United States, human-rights law fits into our system of federalism, a governmental structure in which the national and state governments must coexist. Consequently, civil and human-rights law are largely left to the domain of state legislation. Though most state constitutions protect human rights, these constitutions are amendable by legislation, and are therefore at the mercy or whim of the states' legislators. As such, the human rights of our nation's citizens are vulnerable. Therefore, Black believes that a body of national human-rights law needs to be legitimized in order to protect citizens' human rights. He claims that the enumerated rights of the Bill of Rights and the post-Civil War Amendments to the Constitution, as interpreted by the Supreme Court, do not provide a comprehensive enough system for substantiating these rights. Instead, Black constructs what he calls "a better system of reason" for the grounding of constitutional human rights in this country.

II. BLACK'S THEORY ON HUMAN-RIGHTS LAW

A. *An Overview*

Black tirelessly explains his vision and its strength: the basis of human-rights law exists in three "commitments." The first of these three commitments is the opening paragraph of the Declaration of Independence, which states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are life, liberty and the Pursuit of Happiness — that to secure these rights, Governments are instituted among men . . . ." The second of these commitments is the Ninth Amendment to our Constitution, which states that the "enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The third of Black's commitments is the "citizenship" and "privileges and immunities" clauses of Section One of the Fourteenth Amendment, which asserts that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ." Black believes that these three commitments work in harmony to establish a reasonable body of national human-rights law. Black believes that the Supreme Court annihilated this reasonable scheme when it decided the *Slaughterhouse Cases* in 1873.[1] Black, however, proposes the re-application of these three commitments in order to set national civil rights law on a more solid footing.

As Black lays out his three commitments, however, he does not fully address the potential weaknesses of their application or the counter-arguments to his theory. This omission undermines the persuasiveness of his arguments. Consequently, *A New Birth of Freedom* explains an interesting analysis but lacks any real punch.

1. The Declaration of Independence, the Ninth Amendment, and the Privileges and Immunities Clause

Black discusses how his three commitments bind the fifty states. The Declaration of Independence speaks generally of the duty of "governments" to secure the rights to life, liberty, and the pursuit of happiness. Black claims that, because the Declaration of Independence embodies law in such a "full" sense, it applies equally to the national government and to state governments. It should apply because it is the root of all political authority among us, and of all legitimate exercises of power.

Black believes that the Ninth Amendment should be read on its face as denouncing the idea that constitutional rights must be enumerated in the Constitution. Since the enumeration of rights before the Ninth Amendment was relatively short, Black asserts that Congress could not have meant to protect only these few human rights for an indefinite future. Therefore, Black concludes that the Ninth Amendment must refer to the ideals of life, liberty, and the pursuit of

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[1] *See generally* 83 U.S. (16 Wall.) 36 (1871).

happiness announced in the Declaration of Independence when it speaks of rights *retained* by the people. He then asserts that the privileges and immunities protected by the Fourteenth Amendment also refer to the Declaration's ideals.

Black's theory for a national set of human-rights law, based on the privileges and immunities clause, is undermined by the *Slaughterhouse Cases*. In this case, the Louisiana legislature passed a statute to regulate the slaughtering business in New Orleans. The statute created a state-organized corporation to manage all slaughtering within a certain radius of New Orleans. The issue was whether this statute violated the privileges and immunities clause of the Fourteenth Amendment by abridging a United States citizen's right to slaughter animals for a living. The Court dissected the language of the Fourteenth Amendment and concluded that the privileges and immunities clause prohibited the states from abridging only the privileges and immunities of *citizens of the United States*, which are important but few in number. The Court in the *Slaughterhouse Cases* went on to narrowly define the national privileges and immunities, under Section One of the Fourteenth Amendment, by naming a few meager rights: the right to come to the seat of government to assert any claim one may have upon the government, to transact any business one may have with it, to seek its protection, to share its offices, and to engage in administering its functions. National rights also included the following: free access to the government's seaports, subtreasuries, land offices, and courts of justice in the several states; the right to demand the care and protection of the Federal government over one's life, liberty, and property when on the high seas or within the jurisdiction of a foreign country; the right to peaceably assemble and petition for redress of grievances; the privilege of the writ of habeas corpus; the right to use the navigable waters of the United States; all rights secured to our citizens by treaties with foreign nations; and all rights secured to U.S. citizens by national statute, the Constitution itself, and by such treaties.

From Black's perspective, this meager list signifies that the Court interpreted the privileges and immunities clause narrowly, thus limiting human-rights law, even though the clause initially appeared to be "a great resounding clause," ratified to provide a new birth of freedom for the United States. Because the *Slaughterhouse Cases* decision has never been overruled, it continues to limit the use of the privileges and immunities clause to develop a national human-rights law. Therefore, the "fundamental privileges of citizenship are those of state citizenship, bestowed by the [s]tates one by one on their own citizens, and changeable or destructible at the will of each [s]tate."

Black believes that the *Slaughterhouse Cases* could be easily overturned if challenged. This opinion is correct not only because this precedent is hardly ever relied upon, but also due to the fact that many legal scholars share Black's criticisms of this decision. Therefore, the possibility of the use of the "privileges and immunities" clause as a basis for creating a national human-rights law is the most plausible of Black's theories. This theory, however, assumes that the Declaration of Independence would have an impact on the "privileges and immunities" clause. Unfortunately, this assumption is unfounded.

2. Major Weaknesses of Black's Theory

Black's three commitments may create an attractive and plausible human-rights legal framework. However, the use of the Declaration's ideals of life, liberty, and the pursuit of happiness as governing law has no legal weight because the Supreme Court does not consider this document to be an extension of the Constitution. The Declaration is merely considered a statement of demand, made by our Founding Fathers to King George, with no governance power.

Black attempts to justify the use of the Declaration of Independence as a governing body of law by relying on *Corfield v. Coryell*, an 1825 case decided by the Supreme Court.[2] In that case, Justice Washington appeared to rely on the Declaration of Independence to explain the meaning of fundamental rights when interpreting the Fourth Amendment's privileges and immunities clause of the Constitution, as originally adopted. He concluded that fundamental rights include the ". . . enjoyment of life and liberty . . . and the right to pursue and obtain happiness and safety. . . ." Though this appeared to implicate the Declaration of Independence as a source of privileges and immunities held by citizens because of the use of the language "life, liberty, and the pursuit of happiness," the *Slaughterhouse Cases* implicitly rejected this premise. Therefore, it is far-fetched to think that the Supreme Court or Congress, after almost two hundred years, would abruptly rely on the Declaration as an appendix to the Constitution. Because Black's three commitment theory inappropriately relies on the Declaration of Independence as a governance document, the likelihood of its implementation based upon the Declaration is slim.

Black also fails to acknowledge practical problems, such as *stare decisis*, that would inhibit application of his proposal. In the beginning of *A New Birth of Freedom,* Black states that "we are a people . . . dedicated to the rule of law." In rationalizing his theory, however, Black fails to recognize the constraints under which law is made. Concluding that the Declaration should now be read as governing law would have serious implications on existing legal tenets that have developed over a long period of time and as a result of careful thought, independent of the Declaration's words, thus violating the principle of *stare decisis*. Therefore, though his theory intuitively makes sense and is appealing from a pro-human rights point of view, it fails to respect the framework within which law is created.

B. *The Current National Framework for Protecting Human Rights*

Black claims that, although the Constitution was created to protect human rights, it really protects only a limited number of these rights. Black's three commitments to human rights have essentially played no part in our national human-rights jurisprudence. Instead, a complex and confusing body of legal doctrine exists, protecting only specific, not general, human rights. The Constitution itself, in the bill of attainder and *ex post facto* provisions, gives itself authority

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[2] *See generally* 6 F. Cas. 546 (C.C.E.D. Pa. 1825) (No. 3,230).

to establish human rights. Additionally, Black states, the "imaginary 'substantive due process' clause of the Fourteenth Amendment has [been]. . . the flickering imputed source" of certain substantive rights including: 1) the right not to have one's property taken without fair compensation; 2) immunity from certain governmental activity impinging on economic practices; 3) the right to free speech; 4) freedom of the press; 5) the right to free exercise of religion; 6) the right to teach and to learn foreign languages; 7) the right of parents to send their children to private schools and the general right of parents to share in their children's training; 8) the right to practice contraception; and 9) the fundamental right to marry.

Black believes that the Due Process Clause carries "the load that would far more naturally have been assigned to the 'privileges and immunities' clause of the Fourteenth Amendment, jointly with the two 'citizenship' clauses of that Amendment." Black cites Supreme Court cases that illustrate the turbulent history of substantive due process under the Fourteenth Amendment. In 1937, in *Palko v. Connecticut,* the Court held that a state statute infringed the Due Process Clause of the Fourteenth Amendment because the enactment violated basic values "implicit in the concept of ordered liberty."[3] The Court then went on to abandon the idea of incorporation when it decided *Griswold v. Connecticut,* and found substantive rights in the "emanations" of the Bill of Rights, not merely in its explicit text[4]. Because of this changing standard indicative of substantive due process jurisprudence, Black determines that substantive due process is an intellectually hopeless and feeble "non-concept," and instead believes that the rights in the Declaration of Independence and the "privileges and immunities" clause provide a better foundation for human-rights law.

Black correctly recognizes substantive due process as a disjointed body of law. However, his three commitment theory is also disjointed. Abandoning one messy body of law for another is not sound. In fact, Black's unpersuasive reliance on the Declaration of Independence fatally diminishes the soundness of his theory. Therefore, though substantive due process is a hopeless "non-concept," use of the three commitment theory does not seem to provide a more sound foundation for human-rights law.

C. *Judicial Power to Protect Human Rights*

Black claims that, because the only security for national law is in the national judicial power to review state actions, only one corps of people have the job of policing human rights in the name of national political morality: federal judges. Under his analysis, if there were no national judicial review of state actions, there would be no security for any human rights to which this nation is committed. Black sees these federal judges, so organized to police human rights, as advantageous to the ideal of a comprehensive regime of human rights. Black's support of strong federal judicial power to protect human rights is objectionable,

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[3] *See generally* 302 U.S. 319 (1937).

[4] *See generally* 381 U.S. 479 (1965).

however, because it gives too much power to the judiciary. This ability to dictate the substance of human rights would amount to governing and would create an intolerable imbalance of power in favor of the judiciary.

D. *The Right to be Free from Poverty*

Black believes the government has an affirmative duty to protect certain human rights. Black's national human-rights law analysis, based on the three commitments, if implemented, would help fortify a constitutional right, based on the Declaration of Independence and its right to the pursuit of happiness, to be free from malnutrition, poverty, and hunger in our country. He claims that "sins against human rights are not only those of commission, but those of omission as well." Black would like the elimination of poverty to be envisioned not as a sentimental matter, but as a matter of constitutional right. He claims that the government has an affirmative constitutional duty to act to secure this constitutional "justice of livelihood" based on the Declaration of Independence. Black bases this claim in the Preamble to the Constitution, which states that the purpose of the Constitution is to "promote the general Welfare."

A poverty-free society would be ideal. Our government, under its current scheme, attempts to stamp out and remedy the perils of poverty in our nation. Admittedly, the welfare system and public services are severely lacking. Therefore, the empathy and hope behind Black's concept of a "constitutional justice of livelihood" is very appealing. His "justice of livelihood model" fits nicely into the textual framework of his three commitments and superficially illustrates the reasonableness of his theory. However, in addition to the flaws inherent in his theory, as mentioned previously, Black unfortunately does not effectively support the proposition that the government has an affirmative duty to ensure a decent livelihood for all. Our current scheme of government does not impose affirmative duties in too many instances. The implementation of such a duty creates a slippery slope problem that makes it difficult to determine where the government's duty would stop. Who would finance a society with countless imposed affirmative duties, and from a practical point of view, how would the poverty-free society function? Though Black does not effectively advance this model, his aspirations give food for thought and may inspire future legislation that would help fight the war on poverty.

III. BLACK'S THEORY CONCLUDED

Black lays the groundwork for the future use of his three commitments by commenting that, though there is little venerable authority supporting the use of the Declaration of Independence and the Ninth Amendment, there are also no daunting authorities against their use. Black points out that the law of human-rights can change, under his three commitments, with greater ease then other issues because these commitments are part of the text of the Constitution, unlike past changes that were derived from silences in the Constitution. He believes that a commitment to a comprehensive national human-rights law could be quite swift, especially since, as to the Declaration of Independence and the Ninth

Amendment, there is no "impressive decisional authority to 'overrule.' " Additionally, even the *Slaughterhouse Cases*, a mistake in Black's opinion, could be overruled with ease based on its antiquity and the fact that subsequent case law has not relied on its holding. Therefore, Black claims that nothing in history should make us "hesitate to move toward the righting of this hugely consequential mistake — the failure to use these precious utterances, 'in their spirit and in their entirety.' " Black counsels that, to start this change, all that is needed is a new professional and public opinion supporting his theory. Accepting the "right to the pursuit of happiness" as the foundation of a law of human rights, in Black's words, "would have a refreshing, clarifying effect on the feeling of legitimacy in most - if not all - constitutional human-rights material . . . ."

The most satisfying aspect of Black's three commitment theory for human-rights law is his reliance on the Declaration of Independence's inalienable rights: life, liberty, and the pursuit of happiness. It makes sense to rely on these words in the human-rights context because of their meaningful contribution to the creation of our freedom. Black states that the "organic connection" of the Declaration's words with the Ninth Amendment and the "citizenship" and "privileges and immunities" clause of the Fourteenth Amendment "is the underlying concern of [his] whole book." Unfortunately, Black's reliance on the Declaration of Independence is also his theory's fatal flaw because case law, established for over two hundred years, does not recognize this body of work as having any governing force. Therefore, *A New Birth of Freedom* proposes a novel framework for human-rights law that lacks any legal teeth.

Stacey Hiller