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Samuel J. Levine

Touro Law Center, slevine@tourolaw.edu

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Reflections on the Constitutional Scholarship of Charles Black: A Look Back and a Look Forward

Samuel J. Levine*

Charles L. Black Jr. has been one of the most important constitutional scholars in the United States for more than four decades.¹ Professor Black's writings have helped shape the debate in a wide variety of constitutional areas, from racial equality² and welfare rights³ to constitutional amendment,⁴ impeachment,⁵ and the death penalty.⁶

* Assistant Legal Writing Professor, St. John's University School of Law. B.A., Yeshiva University, 1990; J.D., Fordham University, 1994; Ordination, Yeshiva University, 1996; LL.M., Columbia University, 1996.

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¹ The comments of Black's colleagues attest to the importance of his scholarship. See JACK GREENBERG, *CRUSADERS IN THE COURTS* 520 (1994) ("Anyone in the law school world would rate Charles L. Black, Jr., . . . as among the greatest law teachers of our time"); Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 n.4 (1986) ("There are always legends of those who came first, who called things by their right names and thus founded the culture of meaning into which we latecomers are born. Charles Black has been such a legend, striding across the landscape of law naming things, speaking 'with authority.' And we who come after him are eternally grateful."); Harry H. Wellington, *Revisiting the People and the Court*, 95 YALE L.J. 1565, 1565 (1986) (Charles Black "is unquestionably among a handful whose scholarship occupies prominence in the library of the law's queen subject").

² See Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) [hereinafter Black, *State Action*]; Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960) [hereinafter Black, *Segregation Decisions*].

³ See Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) [hereinafter Black, *Further Reflections*]; Charles L. Black, Jr., *On Worrying About the Constitution*, 55 U. COLO. L. REV. 469, 473-75 (1984) [hereinafter Black, *Worrying*].

⁴ See Charles L. Black, Jr., *Amendment By National Constitutional Convention: A Letter to a Senator*, 32 OKLA. L. REV. 626 (1979); Charles L. Black, Jr., *On Article I, Section 7, Clause 3—and the Amendment of the Constitution*, 87 YALE L.J. 896 (1978); Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L.J. 189 (1972); Charles L. Black, Jr., *The Proposed Amendment of Article V: A Threatened Disaster*, 72 YALE L.J. 957 (1963).

Starting dramatically with *The Lawfulness of the Segregation Decisions*,⁷ his classic defense of *Brown v. Board of Education*,⁸ and continuing through his recent work on the importance of the Ninth Amendment,⁹ Black's scholarship has influenced generations of constitutional theorists.¹⁰ Leading and emerging contemporary scholars rely heavily on Black's work, demonstrating that many of Black's ideas continue to play an important role in constitutional thinking.¹¹

Thus, while Black's scholarship is not without its critics, his ideas are well represented in contemporary scholarship and can be expected to receive the attention of future scholars. In trying to understand fully the attitudes and theories of such an influential thinker, it is helpful to look beyond both the content of Black's ideas and the technical nature of his

⁵ See CHARLES L. BLACK, JR., *IMPEACHMENT: A HANDBOOK* (1974).

⁶ See CHARLES L. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974); Charles L. Black, Jr., *The Death Penalty: A National Question*, 18 U.C. DAVIS L. REV. 867 (1985); Charles L. Black, Jr., *Reflections on Opposing the Penalty of Death*, 10 ST. MARY'S L.J. 1 (1978); Charles L. Black, Jr., *Due Process for Death: Jurek v. Texas and Companion Cases*, 26 CATH. U. L. REV. 1 (1976); Charles L. Black, Jr., *The Crisis in Capital Punishment*, 31 MD. L. REV. 289 (1971).

⁷ *Supra* note 2.

⁸ 347 U.S. 483 (1954).

⁹ See CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* (1981); Charles L. Black, Jr., "One Nation Indivisible": *Unnamed Human Rights in the States*, 65 ST. JOHN'S L. REV. 17 (1991) [hereinafter Black, *Unnamed Human Rights*]; Black, *Further Reflections*, *supra* note 3; Charles L. Black, Jr., *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* 187 (M. McDougal & W.M. Reisman eds. 1985) [hereinafter Black, *Ninth Amendment*]. For praise of Black's writings on the Ninth Amendment, see Bruce Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419, 1432 n.41 (1990) ("an encounter with [Black's] work is absolutely vital for reaching a judgment worth having"); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 159 (1988) (Black "led the way in reading the Ninth Amendment as a positive charter for the positive entitlements of the welfare state"); Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1439 n.128 (1991) (writing of "the pioneering work of Charles Black").

¹⁰ *State Action*, for example, has been ranked as the twelfth most-cited law review article. See Fred R. Shapiro, *The Most-Cited Law Review Articles*, 73 CAL. L. REV. 1540, 1549 (1985). *Segregation Decisions* has been ranked as the twenty-first most-cited article in the *Yale Law Journal*, see Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1462 (1991), and has been referred to as "one of the finest law review articles of this half-century." Laurence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726, 730 (1989).

¹¹ See Akhil Reed Amar & Vikram Amar, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 139 n.aa (1995) (authors "dedicate this essay to Professor Charles L. Black, Jr., whose pioneering work on structure and relationship in constitutional law has inspired the way we think about the Constitution, here and elsewhere"); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 4 (1995) (author refers to his own project as "The Unfinished Business of Charles Black").

methodology of constitutional analysis. It is instructive to identify and discuss some of the principles and ideals that have motivated Black's innovative approach to constitutional scholarship.

This Essay briefly surveys a number of Professor Black's articles, focusing on two areas of his scholarship: unnamed human rights and racial justice. By analyzing these two topics, which represent, respectively, Black's most recent scholarship and his most significant early work, I attempt to show certain principles and themes that have permeated Black's writings throughout his academic career.¹² The Essay begins, in Part I, with a discussion of Black's recent work, providing an overview of his current interest in unnamed human rights and an analysis of the ideals and principles that underlie his approach. Part II then moves in reverse chronological order, tracing back to Black's earlier writings many of these same ideals and principles, in an effort to demonstrate that his current work incorporates the same approach that served as a basis for his efforts in pursuing racial justice.

In particular, I try to illustrate that Black's legal scholarship has been characterized by his commitment to identifying, elucidating, and realizing the goals and values found both explicitly and implicitly in the text of the Constitution. I suggest that Black's success in this pursuit is in large part a result of his firm insistence on carefully and honestly examining the legal and historical realities that have existed in American society, which are, after all, ultimately the subject and concrete result of all American constitutional theory.

In Part III of this Essay, I suggest that it is Black's unswerving dedication to the goals of the Constitution, together with his ability to put into historical perspective the possibility of legal and social change, that has allowed him to continue to pursue his goals, even in the face of challenges and strong opposition. Finally, I conclude this Essay with the words of Isaiah Berlin, spoken at Oxford two years before Black wrote *The Lawfulness of the Segregation Decisions*, that, I think, can serve as an apt description of Charles Black's approach to constitutional scholarship.

¹² I have chosen the particular pieces discussed in this Essay not only because they encompass certain representative principles that have spanned the course of Professor Black's academic career, but also because it is my impression, based both on numerous conversations with him as well as on his emphasis on these articles in his courses at Columbia Law School, that Professor Black himself considers these among his works that best express his thoughts and concerns.

In addition, my focus on Black's later works coincides with the publication of his book, CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1997), which further develops a number of his more recent ideas.

I. UNNAMED HUMAN RIGHTS

Much of Black's recent work has been dedicated to an endeavor that he has termed the "rational development of an open-ended corpus juris of human-rights constitutional law,"¹³ aimed in part at identifying a congressional duty to fight poverty, implied by a constitutional right to a decent livelihood.¹⁴ In proposing a textual basis for a generalized system of human rights, Black gives meaning to texts that have been largely ignored in American legal history. Black suggests that a broad reading of the Ninth Amendment, by itself or in conjunction with the Declaration of Independence and the Privileges and Immunities Clause of the Fourteenth Amendment, can provide such a textual basis.¹⁵ In Black's view, one of the greatest obstacles to developing unnamed human rights is the argument that the Constitution should be narrowly construed with regard to the powers of Congress as well as the rights retained by the people.

While philosophically Black may favor an expansive reading of the Constitution, rather than engage in a theoretical and philosophical dispute, he responds to proponents of narrow construction through a careful and concrete look at legal history. For example, Black examines the history of the Supreme Court's application of the Commerce Clause and concludes that, as early as 1824, the Court exercised a broad application of Congress's commerce power.¹⁶ Specifically, Black looks anew at the familiar case of *Gibbons v. Ogden*¹⁷ and notes that the Court expanded the plain meaning of the word "commerce," found in the Constitution, to include both navigation and the transportation of human passengers.

A stronger illustration of Black's intellectual honesty and independence is his refusal to restrict his analysis to cases that commonly appear in casebooks or treatises. In a sense, Black "discovers" *United States v. Coombs*,¹⁸ a significant case relating to the Commerce Clause, decided by a unanimous Court just fourteen years after *Gibbons*, but a case that,

¹³ See Black, *Ninth Amendment*, *supra* note 9 at n.*.

¹⁴ See *supra* notes 3, 9.

¹⁵ See generally Black, *Unnamed Human Rights*, *supra* note 9.

¹⁶ See Black, *Worrying*, *supra* note 3, at 474-75.

¹⁷ 22 U.S. (9 Wheat.) 1 (1824). In *Gibbons*, the Court considered a challenge to a New York law granting a monopoly on steamboat operation. See *id.* at 1-2. The Court reasoned that the word "commerce" must include navigation because "power over that subject . . . has been exercised from the commencement of the [federal] government" and that "[t]he universally acknowledged power of the government to impose embargoes, must also be considered." *Id.* at 191. The Court thus concluded that "commerce" "comprehends, and has always been understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word 'commerce.'" *Id.* at 193.

¹⁸ 37 U.S. (12 Pet.) 72 (1838).

Black notes, is not even found in the "supposedly comprehensive" Annotated Constitution of the United States.¹⁹

In *Coombs*, the Court considered the constitutionality of a federal statute that criminalized stealing goods from a wrecked ship. Through a close reading of Justice Story's opinion, Black finds that, although the Court upheld the statute based on the "interstate commerce" clause, the opinion does not mention whether the wrecked ship was traveling between states. Black's careful reading of the case reveals that, even more surprisingly, the very statute in question did not require as an element of the crime that the ship be involved in commerce between states. Moreover, the only facts established regarding the goods demonstrated that they were lying on a New York beach. The destination of the ship thus appeared oddly irrelevant to a federal prosecution relating to the Commerce Clause.

As Black convincingly argues, it is unlikely that a narrow reading of the Commerce Clause would allow for such a lack of emphasis on, or even a mention of, any interstate stolen goods. By analogy, Black argues, the Court's expansive interpretation of Congress's commerce power, which continued through the latter part of the nineteenth century into the twentieth century,²⁰ would suggest that there are strong historical grounds for a similarly expansive interpretation of those parts of the Constitution that protect human rights.

In fact, focusing on the historical development of human rights, Black has observed that the Commerce Clause itself has been used as a means for protecting individual rights against certain state regulation and taxation of interstate transactions. He cites numerous cases in which the Supreme Court has interpreted the Commerce Clause as limiting state interference with an individual's interstate commerce rights.²¹ The Court's decisions, in light of the absence of these rights—or of any restrictions on states—in the text of the Commerce Clause, are direct evidence of the Court's willingness to identify human rights beyond those named explicitly in the Constitution.

Moreover, through a critical look at legal history, Black shows that even those rights "named" in the text are fully realized only through an

¹⁹ See Black, *Worrying*, *supra* note 3, at 474.

²⁰ See *id.* at 474-76 (citing *The Shreveport Rate Cases*, 234 U.S. 342 (1914) (upholding national laws relating to intrastate railroad rates and local practices of stockyards on the ground that these practices affected interstate shipment and movement of cattle); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1871) (upholding the application of federal safety regulations, designed to protect passengers, to a ship carrying passengers between intrastate points, because the vessel at times carried cargo between states)).

²¹ See Black, *Further Reflections*, *supra* note 3, at 1109.

expansive reading of the Constitution.²² Specifically, Black traces the development of free speech law, which involves, he notes, what is often considered “the paradigm of the named right,” but which is actually “[i]n most of its applications . . . the paradigm of the unnamed right.”²³ As Black points out, in the 1925 case of *Gitlow v. New York*,²⁴ the Supreme Court exercised considerable deference in upholding a state statute limiting the right to free speech. Though the Court seemed to assume that the protections of the First Amendment apply against the states, the Court neither explained the basis for this assumption nor indicated that this application would offer meaningful protection against state laws restricting free speech.

Just twelve years later, however, despite never having fully explained why freedom of speech applied against the states, the Court struck down as unconstitutional state restrictions on free speech.²⁵ Black argues that notwithstanding Justice Cardozo’s explanation in *Palko v. Connecticut*²⁶ of the process for determining whether a right is protected against state law, a plain and honest look at the Constitution leads to the simple realization that freedom of speech against the states is an unnamed right.

Even if it is contended that there is somehow a substantially named right to freedom of speech against state law, Black presents further evidence of the Court’s recognition of unnamed human rights in his discus-

²² See *id.* at 1109-11.

²³ *Id.* at 1109.

²⁴ 268 U.S. 652 (1925). In *Gitlow*, the Court deferred to the state’s determination that “utterances advocating the overthrow of organized government by force, violence and unlawful means, are so inimical to the general welfare and involve such danger of substantive evil that they may be penalized in the exercise of its police power.” *Id.* at 658. The Court concluded that the state’s determination “must be given great weight. Every presumption is to be indulged in favor of the statute.” *Id.* at 668.

²⁵ See *Herndon v. Lowry*, 301 U.S. 242, 263-64 (1937) (holding unconstitutional state statute against attempting to incite insurrection, as applied to membership in Communist party and solicitation of members for that party); *De Jonge v. Oregon*, 299 U.S. 353, 366 (1937) (holding unconstitutional state statute against conducting a meeting for criminal incitement, as applied to meeting of Communist party for lawful discussion).

²⁶ 302 U.S. 319 (1937). Justice Cardozo wrote that “neither liberty nor justice would exist” without the right to freedom of speech against the states, and “[o]f that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.” *Id.* at 326-27. Black responds to Justice Cardozo’s formulation with harsh candor:

Now come on! Is that the way you name a right? . . . We have to do here not with namings but with radical glosses written over the text by later scholiasts for reasons extrinsic to the text itself. In the rough-and-ready world of law, the truth is that freedom of speech, as against state and local authority, is a right not named in the Constitution.

Black, *Further Reflections*, *supra* note 3, at 1110.

sion of rights that are an extension of free speech, rights Black calls "unnamed rights in the second degree."²⁷ Black refers to an "exceedingly profuse development"²⁸ of such rights, citing the example of *Citizens Against Rent Control v. Berkeley*,²⁹ in which the Court struck down a city ordinance limiting campaign contributions to \$250. The Court applied exacting scrutiny to the ordinance in *Berkeley*, in sharp contrast to its deference in *Gitlow*. Moreover, the Court based its holding on a right to association, which certainly is not named in the Constitution, but which the Court derived from the right to free speech and which the Court thereby applied against the states. Black's thoughtful analysis of the development of free speech law thus offers strong evidence that the Court has engaged in broad interpretations of the Constitution to establish unnamed rights.

Indeed, Black's survey of the history of the Court's "broad and creative interpretive techniques"³⁰ serves as a stark contrast to an area in which the Court has often failed to expand human rights: racial equality. Employing both careful attention to the attitudes underlying Supreme Court decisions as well as deep reverence for the goals of the Constitution, Black reveals the Court's disturbing lack of will to protect the rights of African Americans.

Black presents yet another example of the Court's creative and expansive reading of the Constitution, the area of maritime law, while illustrating by contrast the Court's unwillingness to engage in broad interpretive techniques to promote racial equality. Black cites *Butler v. Boston Steamship Co.*,³¹ in which the Court considered the constitutionality of the Limitation of Liability Act of 1851, as applied to a maritime accident in Massachusetts waters. Black proceeds carefully through Justice Bradley's majority opinion, noting the interpretive techniques at work in each step of the analysis.³²

First, the Court held that, although the text of the Constitution merely provides for federal judicial jurisdiction over admiralty and maritime law, the clause implies a national substantive maritime law. Next, the Court held it only reasonable that Congress thereby had the power to change the law. Finally, even though the case involved wrongful death—an issue covered only by state law and not by maritime law—the Court

²⁷ Black, *Further Reflections*, *supra* note 3, at 1110.

²⁸ *Id.*

²⁹ 455 U.S. 290 (1981).

³⁰ See Charles L. Black, Jr., *The Forest and the Trees in Constitutional Law*, 7 PACE L. REV. 475, 484 (1987) [hereinafter Black, *Forest*].

³¹ 130 U.S. 527 (1889).

³² Black, *Forest*, *supra* note 30, at 486-87.

held that the federal maritime statute applied to the case. In characteristically blunt yet accurate style, Black summarizes the process of the Court's reasoning:

[F]irst, that it is a valid method of constitutional interpretation to *add* to a provision in the text *another* provision that (though *not* in the text) is wanted or needed because without it the provision that *is* in the text would lose a great part of its effectiveness; and, secondly, that it is an example of permissible constitutional inference to hold that Congress is to have a power that it is convenient for it to have.³³

In Black's view, this type of reasoning reflects the admirable quality of common sense and therefore is properly employed in many areas of constitutional adjudication. It is all the more upsetting, then, to find that the Court did not use this type of reasoning to empower Congress to protect the rights of African Americans.

In the *Civil Rights Cases*,³⁴ the Court faced the question of how to interpret the Equal Protection Clause of the Fourteenth Amendment. The Court held that the Constitution did not grant Congress the power to enact laws prohibiting racial discrimination in public carriers, hotels, and other places of public resort. The decision rested on a narrow reading of the Fourteenth Amendment, which, on its face, prevents only a state from denying equal protection of the law and empowers Congress to enforce this protection. The amendment does not address discrimination by private actors.

While Black is disturbed by the Court's failure to appreciate the extent of government involvement in public carriers and resorts,³⁵ he is more concerned with the broader interpretive approach signaled by the Court's methodology in this case. Black finds the Court's narrow reading of the Fourteenth Amendment to be "out of consonance with . . . nearly all of the nineteenth century cases on the powers of Congress."³⁶ It was only in the area of racial equality that the Court engaged in what Justice Harlan, in dissent, called "narrow and artificial" and "subtle and ingenious verbal criticism."³⁷

Having illustrated the aberrant nature of the decision in the *Civil Rights Cases* by placing it in the context of broader nineteenth century constitutional history, Black offers one more striking piece of evidence to

³³ *Id.* at 487.

³⁴ 109 U.S. 3 (1883).

³⁵ In an earlier article, Black criticizes the Court's consistently narrow interpretation of "state action." See *infra* text accompanying notes 43-58 (discussing Black, *State Action*, *supra* note 2).

³⁶ Black, *Forest*, *supra* note 30, at 489.

³⁷ *The Civil Rights Cases*, 109 U.S. at 26 (Harlan, J., dissenting).

suggest that the Court's approach reflected an insidious refusal to protect the rights of African Americans. Black notes that the majority opinion in the *Civil Rights Cases* was written in 1883 by the same Justice Bradley who wrote both the opinion in *Butler* in 1889 and a "splendid nationalistic opinion"³⁸ in the *Legal Tender Case*³⁹ in 1871, both of which recognized a broad range of congressional powers outside those found in the text of the Constitution. Thus, the narrow reading in the *Civil Rights Cases* presents a divergence in Justice Bradley's own interpretive approach that is at first glance difficult to explain. The apparent explanation seems to be that, in the view of Justice Bradley and the rest of the Court in the late-nineteenth century, broad constitutional interpretation ends when the rights of African Americans are involved.

II. RACIAL JUSTICE

Of course, uncovering judicial hypocrisy in issues of race is nothing new for Charles Black. Black's early constitutional scholarship is notable in large measure for its commitment to racial justice. Although he had not yet developed some of the methods of constitutional analysis that he employed in his later writings,⁴⁰ Black's earlier articles evince the same underlying approach to constitutional scholarship that would appear in his later pieces. Black's approach to the question of racial equality is based on a commitment to realizing the goals of the Constitution through a close and honest examination of American legal and social history. Black refuses to subscribe to accepted wisdom when fairness and common sense dictate otherwise.

In his 1967 *Foreword* in the *Harvard Law Review*,⁴¹ Black addresses *Reitman v. Mulkey*,⁴² in which the Supreme Court struck down as violative of the Equal Protection Clause a section of the California Constitution that authorized racial discrimination in the housing market. In his

³⁸ See Black, *Forest*, *supra* note 30, at 489.

³⁹ 79 U.S. (12 Wall.) 457 (1871).

⁴⁰ See CHARLES L. BLACK, JR., *DECISION ACCORDING TO LAW* (1981); CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969); Charles L. Black, Jr., *A Round Trip to Eire: Two Books on the Irish Constitution*, 91 YALE L.J. 391 (1981); Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3 (1970); Black, *Further Reflections*, *supra* note 3; Black, *Ninth Amendment*, *supra* note 9; Black, *Unnamed Human Rights*, *supra* note 9.

⁴¹ Black, *State Action*, *supra* note 2.

⁴² 387 U.S. 369 (1967); see also Benno C. Schmidt, Jr., *A Postscript for Charles Black: The Supreme Court and Race in the Progressive Era*, 95 YALE L.J. 1681, 1683 (1986) ("Black's brilliant 1967 *Foreword* in the *Harvard Law Review* gave this pivotal decision a foundation in reason that has stood the test of two decades, and it offered a perspective on the overall problem of state action that is the most persuasive in modern constitutional law scholarship").

discussion, Black considers, from a decidedly realistic point of view, such concepts as state action, equal protection, and neutrality in the law.

Like his opinions in many other areas of constitutional law, Black's view on the question of state action is informed by a look to the historical development of the issue in Supreme Court cases. Relying on findings of historical fact as a basis for his opinion enabled Black to reject much of the prevailing scholarship regarding *Reitman* and caused him to ask "why a climate of attitude still persists in which it is possible for anyone to think that a state measure so evidently hostile to Negroes has any chance of getting by."⁴³

The history of Supreme Court decisions dealing with state action begins with the *Civil Rights Cases*,⁴⁴ singled out in Black's later writings as an aberration to the Court's broad empowerment of Congress in the nineteenth century.⁴⁵ Though perhaps aberrant in the class of general constitutional decisions, the *Civil Rights Cases* decision became standard doctrine for cases concerning state action. Black traces state action cases through 1906, observing that the Court continued to distinguish merely between action by the state and action by private actors, without investigating the degree to which the state may have supported the private actors.⁴⁶ The Court's narrow reading of state action thus often prevented increased protection of African American rights.

Black shows, however, that starting in 1944, the Court began to recognize additional forms of state involvement that rise to the level of state action.⁴⁷ These include, among other modes of behavior, such conduct as the judiciary's enforcement of negative easements against occupancy by African Americans,⁴⁸ a state lessee's exclusion of African Americans from his restaurant,⁴⁹ and a private amusement park's use of a badged police officer to enforce a policy excluding African Americans.⁵⁰ Based on "the full truth" of his historical survey, Black concluded, in 1967, that

the last racial case now of authority, in which the [state action] doctrine was applied in favor of the racist, is sixty-one years old[,] . . . that the last case resembling any of the modern cases is the

⁴³ Black, *State Action*, *supra* note 2, at 84.

⁴⁴ 109 U.S. 3 (1883).

⁴⁵ See *supra* text accompanying notes 34-39.

⁴⁶ See Black, *State Action*, *supra* note 2, at 84-86.

⁴⁷ See *id.* at 86.

⁴⁸ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

⁴⁹ See *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

⁵⁰ See *Griffin v. Maryland*, 378 U.S. 130 (1964).

Civil Rights decision itself, and that that decision speaks with an inherent, ineradicable ambiguity.⁵¹

Recognizing that the Court's more recent decisions had "been strongly marked by receptivity to new insights into the practical relations of state power to life," Black proposes "[a] flexible and realistic view" of state action that would incorporate the goals of equal protection.⁵² He offers three possible views, differing only in the degree of obligation they impose on the government, that could signal a greater appreciation for "the realities of law's involvement with life."⁵³ While Black himself advocates an affirmative duty to pass laws guaranteeing equality, at an absolute minimum he calls on government to refrain from participating, in any manner, in discriminatory practices.⁵⁴

Thus, under Black's approach to state action, there must be government commitment to the realization of the constitutional goal of genuine equal protection for African Americans. His approach insists on an honest dedication to solid and practical equality, instead of "hollow and formal 'equality.'"⁵⁵ Black offers a hypothetical scenario of continued subordination of African Americans in society that has proven prophetic. He asks the tough rhetorical question of whether, in reality, a passive state will be able to deny significant involvement in "inequalities which have thriven under the regime it maintains and guards, and which have enjoyed the immunities mathematically reciprocal to its abstentions."⁵⁶

For Black, the mere fact that a state does not pass laws actively encouraging racism does not indicate that African Americans are treated equally under the law. Rather, according to Black, "equal protection of the laws against racism is always 'denied' if law . . . is not being used to eradicate inequality."⁵⁷ In another rhetorical question premised on an honest depiction of society, Black asks: "How . . . in a society permeated with racism, can a state that decides to leave racial discrimination to 'freedom of choice' be thought, realistically, not to be deciding that there shall exist some substantial racial discrimination?"⁵⁸

Just as Black rejects the formal equality that is said to exist when a state is passive in a racist society, he also refuses to accept the notion that

⁵¹ Black, *State Action*, *supra* note 2, at 89.

⁵² *Id.* at 96.

⁵³ *Id.* at 97-100.

⁵⁴ *See id.*

⁵⁵ *Id.* at 98.

⁵⁶ Black, *State Action*, *supra* note 2, at 98.

⁵⁷ *Id.*

⁵⁸ *Id.* at 107.

a state does not deny equal protection when it is "neutral" in its treatment of African Americans and "those who wish to isolate them."⁵⁹ Black recognizes that, formal neutrality notwithstanding, the conditions under which African Americans are left to struggle for housing through the political process does not offer them the same opportunities available to others. Indeed, in discussing *Reitman v. Mulkey*, Black decries the "smirking facial neutrality" of the California Constitution that, although not explicitly racist, in effect acts against African Americans by ignoring the "factual status" of African Americans as the primary victims of housing discrimination.⁶⁰ The hypocrisy that exists when states allow abstract notions of formal equality and facial neutrality to conceal a concrete structure of racism is unacceptably inconsistent with Black's principles of honest assessment of reality and uncompromising commitment to the goals of the Constitution.⁶¹

In criticizing the use of the "state action 'doctrine'" as a "threat to racial minorities and as an encouragement to racial patterns in public life,"⁶² Black draws a poignant analogy to another "doctrine," "separate but equal," that was used in *Plessy v. Ferguson*⁶³ as a pretense for state-sanctioned racism. Black points to the pernicious logic of these doctrines, which "adroitly invited [their] opponents to show themselves logical dunces."⁶⁴ Those who supported segregation reasoned that, if the doctrine stated that separate was equal, then it was by definition illogical to suggest that segregation violated equal protection. Black's "simple" answer is that, while in the abstract this reasoning seems based on sound logic, in reality "[s]eparate cannot be equal, in the society we are talking about."⁶⁵

⁵⁹ *Id.* at 99.

⁶⁰ *See id.* at 82.

⁶¹ Black's determined and consistent rejection of abstract theory that contradicts concrete reality is expressed in some of his earliest writings. *See* Charles L. Black, Jr., *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 962 (1953) ("I tremble for the sanity of a society that talks, on the level of abstract principle, of the precious integrity of the individual mind, and all the while, on the level of concrete fact, forces the individual mind to spend a good part of every day under bombardment with whatever some crowd of promoters want to throw at it"); *see also infra* notes 67-88 and accompanying text (discussing Black, *Segregation Decisions*, *supra* note 2).

⁶² Black, *State Action*, *supra* note 2, at 109.

⁶³ 163 U.S. 537 (1896).

⁶⁴ Black, *State Action*, *supra* note 2, at 70.

⁶⁵ *Id.*; cf. Charles L. Black, Jr., "And Our Posterity," 102 YALE L.J. 1527, 1530 (1993) (writing of the "[p]aradox of 'separate but equal,' improvised . . . with a broad knowing wink"); Black, *Segregation Decisions*, *supra* note 2, at 425 (1960) ("'Separate but equal' facilities are almost never really equal").

Likewise, Black argues, the answer to those who would use the state action doctrine to insulate states from responsibility for the racism they at least tacitly support is "one of great simplicity."⁶⁶ In theory, it is true that there would be no constitutional violation if a state were not at all involved in private racism; in reality, however, states are routinely involved, passively and often more directly, in supporting private racism. Thus, Black uses *Plessy* as a point of reference for his argument that the state action doctrine represents yet another improperly unrealistic approach to the constitutionality of racist social constructs.

Black's reference to *Plessy* is significant, among other reasons, because it evokes the classic article he wrote seven years earlier, *The Lawfulness of the Segregation Decisions*.⁶⁷ Black's plain and outspoken criticism in 1960 of the legal structure of segregation exhibits many of the attitudes that continued to find expression in his constitutional scholarship for more than thirty years. The extent to which Black's arguments about segregation gained acceptance is perhaps a reflection of the general importance of his approach to constitutional scholarship.⁶⁸

The two aspects of Black's approach that may be most apparent in his 1960 article are his commitment to the goals of the Constitution and his insistence that constitutional scholarship is not a theoretical exercise. According to Black, effective constitutional scholarship requires the close examination of the practical effects of laws, with a focus on whether such laws are acceptable in American society.⁶⁹

Black begins the article by immediately rejecting the conceptual possibility that the segregation decisions should be allowed to stand even

⁶⁶ Black, *State Action*, *supra* note 2, at 70.

⁶⁷ Black, *Segregation Decisions*, *supra* note 2.

⁶⁸ As Professor Margaret Jane Radin reminds us, "It is important to recall that traditional concerns about neutral principles and the Rule of Law made *Brown* controversial when it was decided." Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 718, 816 n.123 (1989). The current acceptance of what Professor Radin praises as Black's "eloquent pragmatic defense" of *Brown*, *see id.*, is evidenced in the writings of contemporary scholars. See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1299 n.248 (1995) (citing *Segregation Decisions* to support the proposition that the "legitimacy of the *Brown* decisions rests . . . straightforwardly on the only defensible reading of the equal protection clause"); Sanford Levinson, *They Whisper: Reflections on Flags, Monuments, and State Holidays, and the Construction of Social Meaning in a Multicultural Society*, 70 CHI.-KENT L. REV. 1079, 1102 (1995) ("Most of us, regardless of our theoretical commitments, have little trouble accepting Black's analysis").

⁶⁹ Professor Betsy Levin, a former student of Charles Black, has commented that as a professor, Black "made one care about the law not only as an intellectual exercise, but also for the role it could play in bringing about a more just society." Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1680 (1986).

if they were wrongfully decided according to law. In Black's view of constitutional law, "there is practical and not merely intellectual significance" to discussions of the soundness of important Supreme Court decisions.⁷⁰ Simply put, "[i]f the cases outlawing segregation were wrongly decided, then they ought to be . . . [and] will be overruled."⁷¹

Simplicity is often Black's preferred form of argument, particularly as a means for revealing and avoiding the hypocrisy and even dishonesty that more "sophisticated" methods of thinking obscure. Thus, Black prefaces his analysis with an "apology" that the reasoning supporting the segregation decisions is "awkwardly simple."⁷² Specifically, the two stages of Black's argument involve "no subtlety at all." They must merely conform, respectively, to two qualifications: "the rightness of their law and the truth of their fact."⁷³ The first stage of the argument, which provides the legal framework, is a reading of the Fourteenth Amendment as prohibiting the significant disadvantage of the African American race, as such, by the laws of the states. The second stage of the argument is an application of the facts to the law, acknowledging segregation to be indeed "a massive intentional disadvantaging of the [African American] race, as such, by state law."⁷⁴

The techniques Black employs to support his argument typify the techniques he would continue to rely on so effectively in his subsequent constitutional scholarship. First, Black explains the historical basis for his understanding of the Fourteenth Amendment as requiring that African Americans be guaranteed true equality in the form of legal protection against discrimination. His legal framework rests on the solid historical grounds of Supreme Court decisions, in particular the *Slaughterhouse Cases*⁷⁵ and *Strauder v. West Virginia*.⁷⁶ Black cites extensively from the

⁷⁰ Black, *Segregation Decisions*, *supra* note 2, at 421.

⁷¹ *Id.*

⁷² *Id.* Of course, as Black writes near the end of the article, he does not really apologize for the simplicity of his argument, a "reasoned simplicity" he considers necessary to justify such a major change in society. See *id.* at 429.

⁷³ *Id.* at 412, 429.

⁷⁴ *Id.* at 421.

⁷⁵ 83 U.S. (16 Wall.) 36, 81 (1873). The court held in reference to the equal protection clause that:

In light of the history of these amendments, and the pervading purpose of them . . . it is not difficult to give meaning to this clause. The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by such laws are forbidden. If, however, the states did not conform their laws to its requirements, then by the 5th section of the article of amendment Congress was authorized to enforce it by suitable legislation).

Id.

latter, which declares, among other principles of actual equality for African Americans, "that all persons, whether colored or white, shall stand equal before the laws of the States" and that African Americans are guaranteed "exemptions from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."⁷⁷

Black's historical analysis extends a step further to "the whole tragic background" of the Fourteenth Amendment, which "puts it entirely out of doubt that [its] chief and all-dominating purpose was to ensure equal protection" for African Americans.⁷⁸ Thus, Black rejects a reading of equal protection that would mandate equality only "until a tenable reason for inequality is proffered."⁷⁹ Black finds such a reading irreconcilable with a realistic look at the drama of the Civil War, because "[t]hat cannot have been what all the noise was about in 1866."⁸⁰ Instead, he insists, the Fourteenth Amendment excluded from legal consideration "[a]ll possible arguments, however convincing, for discriminating against" African Americans.⁸¹

Having established his contention that states have a duty to afford African Americans protection from discrimination under the law, Black proceeds to the second stage of his argument. Looking closely at the actual facts of segregation, he concludes that segregation violates the Fourteenth Amendment guarantee to equal protection. Refusing to accept the hypocrisy and dishonesty of abstract and theoretical justifications for segregation, Black looks at the reality of the effects of segregation, based on "evidence of what segregation means to the people who impose it and to the people who are subjected to it."⁸²

Black argues forcefully and convincingly that "[t]he Court that refused to see inequality in this cutting off [of blacks from society] would be making the only kind of law that can be warranted outrageous in ad-

⁷⁶ 100 U.S. 303 (1880).

⁷⁷ *Id.* at 307-08.

⁷⁸ Black, *Segregation Decisions*, *supra* note 2, at 423.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* Julius Getman has written that the article's "power derives partly from Professor Black's insistence that this issue was one in which fundamental and common understandings of justice and equality could not be separated from the law without doing violence to the Constitution and the values that gave rise to the fourteenth amendment." Julius G. Getman, *Voices*, 66 TEX. L. REV. 577, 585 (1988).

⁸² Black, *Segregation Decisions*, *supra* note 2, at 426; *see also* Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1608 (1987) ("In contrast to the type of critique . . . which could be said to manifest the worst use of legality to abstract human reality out of existence, is the defense of *Brown* by . . . Charles Black").

vance—law based on self-induced blindness, on flagrant contradiction of known fact.”⁸³ Indeed, law is not a discipline of abstract principles; it is a reflection of and prescription for the way society actually functions in real life. Thus, the best evidence for a legal decision may be found in “matters of common notoriety, matters not so much for judicial notice as for the background knowledge of educated men who live in the world.”⁸⁴

In perhaps the most famous passage of the *Segregation Decisions* article, Black confronts squarely the question at the heart of his analysis: “does segregation offend against equality?”⁸⁵ After acknowledging that “[e]quality, like all general concepts, has marginal areas where philosophic difficulties are encountered,”⁸⁶ Black plainly and eloquently explains why he has no philosophic difficulty in concluding that segregation violates equality:

[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station, and if the question is then solemnly propounded whether such a race is being treated “equally,” I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter. The only question remaining (after we get our laughter under control) is whether the segregation system answers to this description.

Here, I must confess to a tendency to start laughing all over again. I was raised in the South, in a Texas city where the pattern of segregation was firmly fixed. I am sure it never occurred to anyone, white or colored, to question its meaning. The fiction of “equality” is just about on a level with the fiction of “finding” in the action of trover.⁸⁷

In this powerful passage from one of his earliest pieces, Black exhibits the qualities that would become so familiar in his writings, a commitment to the goals of the Constitution, and an intellectual independence based on honesty, common sense, and a close look at reality.⁸⁸

⁸³ Black, *Segregation Decisions*, *supra* note 2, at 426.

⁸⁴ *Id.*

⁸⁵ *Id.* at 424.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Indeed, legal scholars have noted that Black’s arguments against segregation were so convincing in part because they were based on his experience of reality rather than on abstract philosophy. See GREENBERG, *supra* note 1, at 161-62 (“When some articles theorized abstractly about the constitutionality of segregation, arguing that though it treated blacks and whites separately, it treated them equally, [Charles Black] responded with a healthy dose of reality. He *knew* the purposes and effects of segregation firsthand”); see also Samuel J. Levine, *Toward A Religious Minority Voice: A Look At Free Exercise Law Through a Religious Minority Perspective*, 5 WM. & MARY BILL OF RTS. J.

III. THE REALISTIC OPTIMIST

One of the results of Charles Black's unswerving commitment to the goals and ideals of the Constitution is his willingness to propose change and potential solutions where others see only problems. For example, in considering what course of action to pursue with regard to identifying and promoting unenumerated rights, Black acknowledges that some would suggest to "throw up your hands and say that no action is possible, because you haven't been told exactly how to act."⁸⁹ Black rejects this form of despair, choosing instead to "take the Ninth Amendment as a command to use any rational methods available to the art of law, and with these in hand to set out to discover what it is you are to protect."⁹⁰

Black likewise observes that in the course of arguing for a constitutional justice of livelihood that imposes a duty upon Congress, he is often asked, "How much?" or "Where will you draw the line?"⁹¹ Black responds to such a defeatist attitude with typical commitment and optimism. He suggests stepping back and thinking small: rather than asking "What is the whole extent of what we are bound to do?" he asks, "What is the clearest thing we ought to do first?"⁹² Referring to questions regarding the "exact perimeter of 'decent livelihood'" as a "commonly diversionary tactic," Black chooses a more direct approach based on the unquestionable fact that "malnourished people are not enjoying a decent livelihood."⁹³ Black's direct and simple solution is based on the goal and obligation of "giving hungry people more food the shortest way."⁹⁴

A similar optimism, stemming from his firm commitment to the ideals of the Constitution, drives Black to continue to express his ideas in the face of opposition. Keeping a characteristically careful eye on reality, Black has no illusions about the popularity of his ideas regarding unnamed human rights. In arguing that there exists a constitutional right to a "decent livelihood," which implies a legislative duty on Congress, Black acknowledges that "I'm talking into the political wind."⁹⁵ In 1986, speaking of a political attitude that is still prevalent, Black criti-

153, 158-60, 168, 174-75, 182 n.176 (1996) (applying Black's approach to questions of free exercise jurisprudence).

⁸⁹ Black, *Ninth Amendment*, *supra* note 9, at 188-89.

⁹⁰ *Id.* at 189.

⁹¹ Black, *Further Reflections*, *supra* note 3, at 1113.

⁹² *Id.* at 1114. Black's dedicated refusal to despair from acting at all because of doubts regarding the ability to do all that is necessary evokes the Talmudic dictum that "You are not required to complete the task, but you are not free to withdraw from it." Talmud Bavli, Avoth (2:21).

⁹³ Black, *Further Reflections*, *supra* note 3, at 1115.

⁹⁴ *Id.*

⁹⁵ *Id.*

cized those who praise the state of the economy while ignoring that "millions of children are not getting enough to eat, and millions of adults who want work cannot find it."⁹⁶

Nevertheless, the recognition that he faces an uphill battle does not deter Black's optimistic view that the ideals he believes to be mandated by the Constitution will someday prevail in the legal and political communities. Black's commitment to the goals embodied in the Constitution and his faith in the American people do not allow him to despair. While the political winds may oppose him, Black confidently states that "winds change; they always have, and doubtless they always will. A period of no power is a period for the reformation of thought, to the end that when power returns it may be more skillfully, more fittingly, used."⁹⁷ Thus, Black sees the current political environment as one in which he has the opportunity and obligation to refine and articulate his ideas so that they may be implemented in the future.

Like many of his thoughts, Black's optimism about the possibility of political change has a strong basis in legal history. Returning to his insightful historical analysis of the process through which the states were held to be subject to the free speech protections of the First Amendment,⁹⁸ Black notes that as late as 1922, the Supreme Court still held that the Fourteenth Amendment, which had existed for fifty-four years, did not restrict the states with regard to freedom of speech.⁹⁹ Yet, only fifteen years later, Black observes, Justice Cardozo appeared to consider fundamental the application of freedom of speech against the states.¹⁰⁰ By 1981, in *Berkeley*,¹⁰¹ the Court derived from the right to freedom of speech the unnamed right to freedom of association, which it readily applied to the states.

Such extensive changes in the Court's attitude give Black reason to hope that the legal community's attitude to his ideas about unnamed human rights, though now admittedly negative, will likewise change over time. As Black puts it, someone who had, in 1922, predicted such a change in free speech law, "would have been judged . . . about as crazy as somebody who this afternoon insists that this nation is permanently committed, as a matter of constitutional right, to a generous use of its oceanically overabundant resources to keep all its people out of poverty,

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *supra* notes 23-33 and accompanying text.

⁹⁹ See *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 543 (1922).

¹⁰⁰ See *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

¹⁰¹ *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 290 (1981).

all the time.”¹⁰² In Black’s view, the development in free speech law demonstrates that “a vast revolution in legal doctrine and action, a revolution to astound and bewilder the old people, can take place in a very short time, and that revolutionary doctrine may after not very much more time be looked upon as ancient doctrine.”¹⁰³

Indeed, Black acknowledges that his own proposals involve a “radical redirection of theory and practice toward wiping out poverty in the United States.”¹⁰⁴ Moreover, he recognizes that “[t]he political difficulties will be very great.”¹⁰⁵ Black finds comfort, however, in his own experience in the successful battle for racial justice. Black writes that “I would be discouraged now, if I didn’t remember that I was already graying around the temples when the people who were supposed to know were telling us that you could never get Congress to move against racism.”¹⁰⁶ Black further recalls the “doubts—or worries” regarding Congress’s power to combat racial justice, concerns which “like dreams . . . are hard now even to remember.”¹⁰⁷ Likewise, Black realizes that looking to a future “justice of livelihood” may now seem like a dream, but his historical perspective gives him reason to dream because, although “[h]istory does not always repeat itself . . . history does show us what is possible.”¹⁰⁸

CONCLUSION

In a 1958 lecture, just two years before Charles Black wrote *The Lawfulness of the Segregation Decisions*, Isaiah Berlin reflected on the destruction that Germany caused in the first half of the twentieth century, in light of German philosophy and the nineteenth-century German poet Heinrich Heine’s warning and prediction that “philosophical concepts

¹⁰² Black, *Further Reflections*, *supra* note 3, at 1116.

¹⁰³ *Id.*

¹⁰⁴ Black, *Worrying*, *supra* note 3, at 471.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* This is not to say that Black is satisfied with the current treatment of African Americans in society. See, e.g., Black, “*And Our Posterity*,” *supra* note 65, at 1529, 1530 (speaking of the plight of African Americans today as “the most flagrant denial” of the commitment to equality, and of the “painful distress” of African Americans “as to work, food, medical care, housing, as to police cruelty, as to the administration of the death penalty, even as to respect”).

¹⁰⁸ Black, *Further Reflections*, *supra* note 3, at 1116. As Benno Schmidt has put it, “Charles Black’s work in constitutional law is . . . a statement of fundamental truths about our conditions and aspirations that often takes a while to set in It will be interesting to see over the next twenty years whether Black’s approach to [poverty and related problems] has the same generative power as his earlier writing.” Schmidt, *supra* note 42, at 1683.

nurtured in the stillness of a professor's study could destroy a civilization."¹⁰⁹ Berlin spoke of the responsibility incumbent on professors due to the "fatal power" they wield and criticized philosophers who "seem oddly aware of the . . . devastating effects of their activities."¹¹⁰ Berlin suggested that perhaps these philosophers were "intoxicated by their magnificent achievements in more abstract realms" and therefore "look[ed] with disdain" upon disciplines not restricted to "fixed concepts," "abstract models," "logic," and "linguistic analysis."¹¹¹

Two years later, as if responding to Berlin's urgings, Black embarked on a career of constitutional scholarship premised on principles similar to those advocated by Berlin. Black saw in American society the dangerous results of theoretical concepts espoused by those who, either intentionally or unwittingly, refused to acknowledge the sometimes devastating effects of their philosophies. Black has dedicated his scholarship to realizing concretely the goals of the Constitution. To that end, Black has consistently rejected any logic based on abstract models that ignore reality and thereby foster hypocrisy and dishonesty. Black's method of constitutional analysis requires an independence of thought based on a firm commitment to the ideals embodied by the Constitution, coupled with careful observation of the actual society in which the Constitution must function.

Perhaps the best way to characterize and summarize Charles Black's commitment to constitutional scholarship is through Berlin's words of praise for Professor Douglas Cole of Oxford: a "thinker of complete independence, honesty, and courage[,] . . . a man who has given his life to the fearless support of principles not always popular, and to the unswerving and passionate defense of justice and truth, often in circumstances of great difficulty and discouragement."¹¹²

¹⁰⁹ Berlin's Inaugural Lecture at the University of Oxford was published as ISALAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 119 (1969).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 120.