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Book Review: The Humane Imagination. by Charles Black.

Mark Tushnet

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are in the throes of far-reaching changes whose consequences are not yet fully understood. There can be little doubt that feminist passions—unintentionally perhaps, but nonetheless substantially—have endangered freedom. Toward the end of his book, Levin summarizes it well: “A major obstacle to appreciating the extent to which liberty has been curtailed in the name of sexual equality is the search for a key event, a turning point. Pessimists from Plato to Orwell have thought too much in terms of collapse, too little in terms of erosion. Contrary to Orwell, the best picture of the future may not be a boot stamping on a human face, but a bureaucratic black hole drawing one matter after another out of the sphere of individual discretion and into itself.”

THE HUMANE IMAGINATION. By Charles Black.¹ Woodbridge, Ct.: Ox Bow Press. 1986. Pp. ix, 201. \$16.95.

*Mark Tushnet*²

Professor Charles Black is one of the masters of constitutional law scholarship of his generation. Along with Alexander Bickel and Herbert Wechsler, Black decisively shaped our understanding of the Constitution. His contributions have been twofold, and both are reflected in this collection of his occasional essays. First, he insisted on the importance of the overall structure of the Constitution as a guarantor of liberty. Black developed this point with reference to federalism, but his general approach can inform consideration of separation of powers issues as well. Issues of structure have become increasingly prominent, as the Reagan administration has insisted on interpretations of separation of powers which raise important questions about the relation between structures and liberty, and as the Supreme Court has become less receptive to arguments asking it to protect liberty directly and nationwide. But Black's approach has also occasionally seemed too diffuse to help resolve concrete controversies. Despite the careful technical analyses that Black offered, it sometimes seemed that inferences from structure could run pretty much wherever the analyst wanted them to run.

Black's second contribution served to control the inferential

1. Sterling Professor Emeritus of Law, Yale University.
2. Professor of Law, Georgetown University law Center.

process. Simply put, he displayed the most humane sensibility available in constitutional law. His articles were always deeply personal, and showed how sensitivity to the human impact of legal and constitutional rules could give answers to the questions he posed. After reading *The Lawfulness of the Segregation Decisions*³ one cannot take seriously all the quibbles scholars have raised about *Brown v. Board of Education*. Nor, having read that article and having remembered the background of scholarly criticism of *Brown* against which it was written, can one comfortably dismiss the appeal to humanity as “all right for those issues, which are basically easy ones, but not much help for the much harder ones we face today.” Black showed us that though many people regarded *Brown* as a hard decision for its time, it did not have to be seen in that way. This should lead us to wonder whether our present quandaries will one day appear less difficult than they do today.

One way to assess these essays is to consider how much they are concerned with constitutional law outside the courts. Frederick Schauer has revived interest in the issues that go unlitigated because their resolution is so obvious that disputes never arise about them.⁴ Black has been concerned with another type of issue, although as we will see the two types are rather closely related. Black’s interest lies in analyzing real disputes over the meaning of the Constitution that happen not to be important in litigation, sometimes because justiciability doctrines make adjudication unavailable but even more because the disputes arise in front of those other decisionmakers who take oaths to uphold the Constitution—legislators. His concern for the constitutive rules and structures of our government occasionally has the ring of political science about it. For example, much of his discussion of the merits of proposals to amend the Constitution to allow national lawmaking by initiative is not distinctively legal. Strikingly, however, he begins with a fundamental technical point, that the proposal may violate the constitutional prohibition against altering the equality of the states in the Senate.⁵

The difficulty with Black’s approach is that the technicalities, which make his approach a lawyer’s rather than a political scientist’s, rarely do more than suggest answers. Black mentions that he introduced his students to the issue of the scope of Congress’s powers not through the commerce clause but through the admiralty,

3. 69 YALE L.J. 421 (1960).

4. Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

5. We might wonder then about the technical status of an unamendable provision of the Constitution. Suppose that appropriate majorities did amend the Constitution to deprive the states of equal representation. Is the new amendment unconstitutional? Anti-constitutional? Constitutional, but lawless? Constitutional pure and simple?

patents, and post roads clauses, with the effect of suggesting to them that expansive interpretations of the power-granting clauses are completely uncontroversial over wide ranges of the law and that they should therefore not be surprised to find similarly expansive interpretations of the commerce clause. My personal favorite is that portion of article II, section 2 stating that the president "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices." On the face of it, the fact that the Constitution had to state expressly that the president could require opinions in writing from cabinet officers suggests that "the executive Power" vested by article II, section 1, cannot be as all-encompassing as is sometimes thought. But here, as elsewhere, competing inferences can be drawn from structural provisions: for example, perhaps the framers were particularly concerned to avoid problems that might arise if cabinet officers could develop independent power bases.

How, then, can Black's approach be useful? The answer, as the title of this collection suggests, is to deploy a "humane imagination." According to Black, the difficulties will disappear if we force ourselves to expand our imaginative ability to assimilate the conditions of other peoples' lives. Throughout the essays he stresses the importance of what Edmond Cahn called the sense of injustice and the role of intuition in guiding judgment.

This, however, only defers the problem. For, as should be evident to anyone who reads these essays after reading a selection—*any* selection—of Supreme Court decisions, few people are as humane as Charles Black. Indeed, we might consider the lesson of recent nominations to the Supreme Court to be that the process of selection for the Court comes close to guaranteeing that only people of moderate sensibilities—not too insensitive, but not overly sensitive either (that's what the mainstream is)—will be selected for the Court. Given the actual sensibilities of the Justices, the prospects that they will deploy Black's humane imagination are not terribly encouraging.⁶

Of course, Black is speaking to us, not directly to the Justices. Perhaps we should understand his works as examples of edifying discourse, exhibiting a humane sensibility in the course of recommending it. By referring to edification, I mean to call up images

6. I think here of the desperate apotheosizing of Justice O'Connor as an exemplary female judge. Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-613 (1986), and Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987) (the latter is somewhat more muted than the former).

related to those suggested by the term "sensibility" as well. It seems to me that Black has a basically classical sense of the range of human possibility, rather than a modernist one. For example, in one of these essays Louis Armstrong appears as an artist-hero whose struggle against the constraints of society provides an example for us to admire. But, as Black suggests, the struggle against constraints occurs within a framework set by society. He speaks of his attraction to jazz, apparently a modernist art form, in terms of its allegiance to tradition.⁷

In another forum I would raise questions about the ability of classical sensibility to edify under modern circumstances, and about the adequacy of that sensibility as an account, even a partial one, of human possibility. For the present, though, a different point seems more pertinent. Edifying discourse, and its commendation, have been around for a long time. One might have expected the need for such commendation to have diminished. Yet it obviously has not. That in turn suggests that the attempt to solve problems of the unjust deployment of power by means of edification and humane imagination cannot succeed.

AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE. By Derrick Bell.¹ New York, N.Y.: Basic Books, Inc. 1987. Pp. xii, 288. \$19.95.

COMPASSION VERSUS GUILT AND OTHER ESSAYS. By Thomas Sowell.² New York, N.Y.: William Morrow & Co. 1987. Pp. 246. \$15.95.

*Lino A. Graglia*³

It is fortunate that I had to read these two books together. The great, not to say excessive, pleasure I derive from reading my soulmate, Thomas Sowell—for example, "The streets of New Delhi are far better paved than the streets of New York. . . . Some Third

7. I confess that I do not know what exactly to make of the abstract painting by Black, entitled "A Quarter-Inch Plate Glass Window in a Color Storm," that he uses for the cover of the book.

1. Professor of Law, Harvard University.

2. Senior Fellow, Hoover Institution.

3. Rex G. Baker and Edna Heflin Baker Professor in Constitutional Law, University of Texas School of Law.