KEYNOTE

“ONE NATION INDIVISIBLE”: UNNAMED HUMAN RIGHTS IN THE STATES*

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In the United States, the right to free expression, if it is to be enjoyed in the real world, has to be guarded (like all American human rights) within the structure of federalism—of the coexistence, in as good as every square foot of the country, of two governments, the national government and the government of some State. Free expression might be guaranteed in the most absolute and efficient way against infringement by national law—and still, if there were no national guarantee of free expression against action by the States, you might live all your years in dread of going to prison for publishing or even owning a book dealing favorably with Socialism. The nation would not in practical truth be a free nation. There is no advantage, believe me, in going to a state prison rather than to a national prison.

Now it is true that most or all of our States have in their own constitutions some protection of free speech. But these protections—not being national law—would by themselves be subject to final interpretation by state court judges most of whom are popularly elected, in decisions not reviewable in the national courts. And a state constitution is freely amendable by the legislature and the people of the State; in California, for one huge example, the state constitution may be and has often been amended by popular referendum.

If, as a last resort, you think this represents only a theoreti-

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This Article is dedicated, for her third birthday, to my second granddaughter, Elizabeth Julia Simins.—C.L.B., Jr.
cal danger—that our States would never do bad things about free speech—then you ought to read a few of the hundreds of cases in which they have attempted suppression of speech of many kinds, including explicitly political speech. In this respect, they have shown far more imagination, over a much wider range, than the national Congress.

The upshot is that if we had no general national law binding the States to respect freedom of speech, enforced in the national courts, we would in no way be sure of at all enjoying this freedom, virtually anywhere. (This, I say again, is true of all human rights in the United States; without, for example, a national constitutional rule protecting the freedom of contraception against state violation we would not have freedom of birth-control and family planning, anywhere in the country, except where the States one by one chose to grant it from time to time. If none of them chose to grant it, we wouldn’t have it anywhere—except in the District of Columbia, a national enclave—or I guess maybe in our Post Offices, where the question does not usually come up.)

It is well to mention, too, that “state law” means not only the formal law of a whole State, but also the ordinances put in place by cities and other subdivisions of the State, and the actions of State judges and other state officials, including police.¹

I have started with this passage from a paper presented last year in Moscow, because it illustrates how clarifying it is to one’s own thought to be given the job of conveying to a foreign audience, in a few words, the fundamentals of a constitutional pattern in one’s home country. I have always been a friend of the protection of human rights against local or state power. It is near home, after all, that such protection has been shown to be most chronically needed. But I am not quite sure that before I came to write the above words I had seen, steadily and whole, just what it is, in integral sum, that is at stake.

How could you leave unsaid, to a Soviet audience, the evident truth that, without national protection of human rights against fifty local governments collectively controlling virtually the entire national territory, we could not speak of our being a free country at all, a country wherein human rights are guaranteed—certainly not as to theory, and to complete factual certainty not as to prac-

¹ Black, The American Law of Free Speech as Applied Against the States, in Faculty Presentations, Moscow Conference on Law and Economic Cooperation 177 (1990) (paper presented to panel in Moscow on “Glasnost”).
tice either?

The point of theory is worth pausing on. If the strict theories sometimes aired were to be accepted, made a part of orthodoxy, then it would not only be true, but would be seen and known to be true, it would stand confessed, that the States and their subdivisions were constitutionally restrained only by textually set-out human-rights guarantees. These are in truth very sparse; they hardly begin to cover the ground that really free people need to move around on.2 Aside from particular practical effects (which, as I shall show, could be expected to be dire), this would be an advertisement of the hollowness, the falsity, of any pretense that, even as a matter of principle, whatever our failings, we are a nation that accepts the duty of “securing” the human rights of its people in return for their obeying its national laws, paying its taxes, and fighting its wars. We would have to carve a lot of fine-print warnings under inscriptions on many buildings: Certain Restrictions Apply. It would be too late to straighten out the students who built a replica of our Statue of Liberty on Tiananmen Square.

We all remember Madison’s insight that numbers, and the consequent interplay of many interests on a great scale, can be an antidote to the evils of “faction.”3 But we ought to remember too that what he called “faction” can be the generator not only of grabs for material advantage, but of threats to human rights as well. For a huge example, let us take the matter of religion.

No national Congress is likely to be mad enough to move toward “establishing” a national church or toward prohibiting the free exercise of religion; the national diversity in religion is too great. But this diversity is not evenly distributed. The demography of religion in the United States is such that it cannot be surprising that little bits and pieces of “establishment” are constantly being pressed for in many States, especially in their subdivisions, and that even “free exercise” seems at times imperilled. And remember that what there is of this now takes place even against the background of a known de facto national guarantee of religious neutrality and freedom—however shaky its doctrinal foundation may be.4 What would be the result, as to the setting up of crèches on the courthouse lawn, or the teaching of evolution in public or even pri-

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2 See infra notes 10-21 and accompanying text (discussion of the paucity of textually expressed guarantees of human rights applicable against the States).
3 The Federalist No. 10 (J. Madison).
4 See infra note 16 and accompanying text.
vate schools (or even by parents to their children), if such a bar were known not to exist at all, were not so much as there to be circumvented? In the known absence of a national bar, would not local “fractions” in favor of the courthouse crèches, or of the suppression of the teaching of evolution, or of school prayer simply as such, be encouraged to form, and to fight for what they wanted? And, having won, to go on and on? Suppose that the vaguely defined offense anciently called “blasphemy” were known to be freely punishable by the States and their subdivisions, under standards set by themselves. And what might be next?

A question must come to mind: “Are you not mourning a healthy horse—sounding an alarm at the possible consequences of a condition that does not prevail? We do, as all know, have national constitutional protection of human rights against actions of the States and their local subdivisions.”

Well, let’s look into that a bit, bringing the sharp reality of constitutional text into the same focal plane as the contention, on the part of some judicial and academic writers, that neither national nor state laws should be judicially invalidated, unless there is a particular constitutional text commanding that result. Where would we stand as to human-rights protection against actions of the States if this counsel were to prevail? It is true that we have a reasonably firm textual foundation for national protection of a very few substantive human rights as against state invasion. In the original Constitution there are the bill of attainder and ex post facto clauses, as well as the somewhat Delphic section 2 of article four. By the thirteenth amendment, slavery is abolished everywhere, and, by the fifteenth, nineteenth, twenty-fourth, and

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8 I am sticking to the texts here, and not introducing the problem of adjustments for so-called “original intent.” The picture based on texts alone, undiminished by “original intent” contentions, is sufficiently demonstrative of the sparseness of the expressed human-rights guarantees.

9 See U.S. Const. art. I, § 10, cl. 1. These provisions may be in a penumbra between “substance” and “procedure”; we need not pursue the question of their classification.

7 See id. art. IV, § 2. Although its wording is somewhat puzzling, this provision has settled down as a prohibition only of discrimination against out-of-staters. For example, a State may not punish citizens of other States for publicly denying the existence of God, unless it similarly punishes its own citizens. Call that a “human right” if you like.

There are early hints of a more ample meaning for this clause, see Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 10,444), but that lead played out very early—though the case is referred to with approval, by the second Justice Harlan, in 1861. See infra note 56 and accompanying text (quoting Justice Harlan’s dissent in Poe v. Ullman, 367 U.S. 497, 541-43 (1961)).
twenty-sixth amendments, the States are forbidden to effect certain discriminations as to voting. All these provisions require interpretation, but that is the irreducible difficulty in all textual law.

The fourteenth amendment, also binding on the States, is by contrast encumbered with very large problems. Let us put to one side (to be revisited later) the astounding fact that the “privileges and immunities” clause of the amendment’s first section has so far been allowed no working application in law; it has been idling in place, with no gear engaged, for about a century and a quarter. The “equal protection” clause—one once one leaves the historically marked-out special field of discrimination against blacks, and evidently analogous areas—poses a nigh insoluble general problem: Since law itself is a set of organized and systematized commands of different treatment for different persons and things, which linkages of descriptive differences to differentiation in law are forbidden?8

Let us pass on to what has for now turned out to be the main matter, the celebrated “due process” clause of the fourteenth amendment.9

That clause may and must be taken to deal expressly (though generally) with matters of state procedure. That is what “process” means in English. It is entirely right, therefore, that the text of the clause be held to utter, against the States, the command that those procedures be fair, by which people are to be deprived of life, liberty or property. The rest is matter, relatively, of detail—of procedural problems and their subproblems—but always concerning the rightness of procedure.

If one comes to a stop here and looks over this canvass of textually expressed guarantees of human rights against actions of the States, one has to be impressed with their entire inadequacy, by a very wide margin, as a corpus of human-rights substantive protections that could possibly characterize any society generally as a free society by law. The bill of attainder and ex post facto provisions are all but arbitrary selections, for condemnation, of two among the very most outrageous wrongs; they don’t come up much in conversation. The mere absence of human slavery is likewise a

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8 See infra text accompanying note 40 (discussing equal protection clause of fourteenth amendment).
9 U.S. Const. amend. XIV, § 1. “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” Id. (emphasis added).
bare-bones minimal requirement.\textsuperscript{10} The right to vote is an important protection of a practical kind for the majority, or for smaller segments of the population who from time to time can coalesce with a majority, but that is not what we mean by “human rights.”

On the other hand, the freedoms of speech, press, assembly, and religion are not there. (Anybody who can read at all can read that the first amendment applies, in its textual terms, only to Congress.) Immunity from a State’s sending everybody’s children to state-run military schools is not there. The right to marry is not there. The right not to have a State take your property without compensation is not there.\textsuperscript{11} The right to dress pretty much as you please—for example, the right to wear shorts in public, or the decorations awarded by a foreign government—is not there. The right to speak a foreign language or to deny the existence of God, even at home, is not there. It might be an exaggeration to say that not much of anything is there, in the way of substantive human rights good against action of the States—as measured against the thorough generality that must characterize any system of substantive human rights sufficient to the task of forming the legal structure of a free society. But it would be a modest exaggeration pointing to an illimitable truth.

(It is highly important, though parenthetical within the stricter scope of this Article, that very much the same is true of the constitutional protections explicitly set up, by constitutional text, against actions of the national government. The main differences are that the freedoms of speech, press, and religion are guarded against national infringement (and against that only) by the text of the first amendment, while, on the other hand, the “equal protection” clause of the fourteenth amendment applies, in terms, only to the States.\textsuperscript{12} Just read the Bill of Rights and the few guarantees of article I, section 9, and then start thinking of things the national government could do to you without violating any of the pertinent

\textsuperscript{10} I do not forget the radiations from the thirteenth amendment found in such a case as Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968), but these are limited in their nature to some special relation with slavery, and are in any case not “textual” in the sense in which that term would normally be used.

\textsuperscript{11} It was specifically so held in Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250-51 (1833); cf. Sweet v. Rechel, 159 U.S. 380, 392-93 (1895).

\textsuperscript{12} The national government is on the other hand bound by the prohibition concerning quartering of soldiers (third amendment) and the keeping and bearing of arms (second amendment). See U.S. Const. amends. II & III. Those do not seem to change the picture very much.
textual guarantees. Take your children and put them in government-run military schools between the ages of five and fifteen? Make you wear a wool cap of a different color every day of the week, to promote the wool-growing industry? Even so impudent a thing as to make it a crime for you and your spouse to practice birth control? Or, for that matter, not to practice birth control? Or they might even resegregate the District of Columbia—schools, restaurants and all—since the fourteenth amendment’s “equal protection” clause does not, as a matter of text, apply to Congress, or to any other national authority.

Of course the government would, under the largely procedural Bill of Rights, have to give you something like a fair trial, on the issue of guilt or innocence of omitting to wear the wool cap, or of having practiced—or not practiced—birth control. Or of being overly insistent on service in a Washington restaurant that is forbidden by law to serve your race. But try to find anything in the text that would bar Congress, as a substantive matter, from criminalizing these actions.

A few exercises like this can make you wonder why the Bill of Rights is so often all but tearfully eulogized in terms suggesting that it sets up a comprehensive human-rights regime. No, to find the basis for that, you have to read beyond the first eight amendments, where all the particular guarantees are found; you have to read on into the ninth amendment. The principle of the ninth amendment is the radical principle of a fully and generally free society—whether as to the incidence of national power or as to that of state power.)

But the constitutional text has not been the end of the story. The overwhelming moral imperative (arising from the structural factors touched on in the beginning of this piece) for the generalized protection of substantive human rights has brought into being something now comfortably or uncomfortably at home in law, called “substantive due process,” whereunder have been subsumed freedom of speech and press, the guarantees about religion, the right of parents to have an important say in their chil-

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13 See infra note 27 and accompanying text (quoting ninth amendment).
14 Here we are focusing attention on protection against actions of the States. Of course the same reading has been applied to the “due process” clause of the fifth amendment, binding on the national government.
16 See Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
children's education, the right to a large measure of freedom of association with others, the right to speak a foreign language, the right effectively to plan a family, the right of a grandmother to take her grandsons under her roof, and so on through many unnamed substantive rights, obviously in an open-ended and open-textured series.

These substantive derivations, from the phrase "due process of law," are incorrigibly paradoxical, but their proliferation might be thought relatively harmless if the development and its consequences were universally acquiesced-in—"credo quia absurdum." That this is not so is shown by the fact that, after about a century of its use, every important new application of the "substantive due process" concept produces something like random verbal behavior, often suffused with strong emotion. Judges and writers who were not yet born, or not yet of the age of discretion, when it was decided that the fourteenth amendment "due process" clause protects, against the States, the right not to have your property taken without compensation, the right to send your children to a private military school, the rights to freedom of speech and of religion, can loftily and sometimes angrily denounce a new claim to such "substantive due process" protection, on the quite general ground (which would have been equally applicable to each of the numerous earlier instances) that no express terms are found in the constitutional text protecting the newly claimed right from invasion by the States. The locus classicus may be Justice Stewart's dissent in Griswold v. Connecticut but the same sort of thing is epidemiologically occurrent, in one form of words or another. The "due process" derivation of substantive rights against actions of the States is congenitally and permanently vulnerable to such objections. It is intellectually shaky or worse, and has been so over its century-long range.

We need something better.

I think that that "something better" is something we have had all along. A strange purblindness has clouded our seeing. This

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17 See Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). It is to be noted that this came up as a companion case to a case involving a military school, decided the same way.
19 See Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).
22 381 U.S. 479, 527 (1965) (Stewart, J., dissenting); see infra note 34.
peror does have clothes, after all—though they are not new.

There are three highly placed seminal texts committing this
nation to the protection of human rights generally—the Declara-
tion of Independence,23 the ninth amendment,24 and the privileges
and immunities clause of the fourteenth amendment,25 in its very
significant contiguity with the national constitutional command
that virtually all United States citizens be received and treated as
citizens by their respective States of residence. These texts are
structurally and functionally related to one another, as I shall
show. They are related also by their being the only texts of com-
parable weight that have been (quite without adequate explanation)
ignored in the development of our constitutional law; this silent
ostracism of these texts, this sending them (and, among texts of
like weight and authority, them only) to Coventry, would be
strange enough if they were unrelated. But such treatment of these
three closely-related texts, these three voices harmonizing on the
theme of human rights, is staggering, scandalous, in the case of a
nation that has staked and continues to stake its moral life on its
national dedication to the rights of humankind, at home and
everywhere.

In another place, it might be more than merely interesting to
explore the question, "Why has such a thing happened?" Why,
above all, has it happened while we have in fact been protecting
human rights, unnamed as well as named, under explanations
which, as to the unnamed rights, have been highly vulnerable, alto-
gether unsatisfactory—acquiesced-in, it seems, only because the
national and general protection of human rights is so inexorable a
moral demand, in a nation of our self-conception at home and
pretensions in the world, that any explanation will just have to do?
But in this place I will be ruled by the Buddhist maxim that the
best course is not to worry about where the arrow came from, but
to concentrate instead on plucking it out and staunching the
wound.

I have elsewhere26 explored the thesis, not new with me, that

23 See infra note 28 and accompanying text.
24 See infra note 27 and accompanying text.
25 See infra note 31 and accompanying text.
26 See Black, On Reading and Using the Ninth Amendment, in Power and Policy in
Quest of Law: Essays in Honor of Eugene Rostow 187 (M. MacDougall & W.M. Reisman,
eds. 1985) [hereinafter Black, On Reading and Using the Ninth Amendment], reprinted in
C. Black, The Humane Imagination 186 (1986) and in The Rights Retained by the Peo-
ple 337 (R. Barnett, ed. 1989); see also Black, Further Reflections on the Constitutional
in the ninth amendment to the Constitution a sound solution of the “unnamed-rights” problem is to be sought. Since this piece focuses on the problem of human rights as limits on the States, one could arrange the rest of it around the problem of the application, to the States, of that amendment. At least that makes a good start. Let me quote it:

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.\textsuperscript{37}

Now if you’re really a textualist, the application of that text to the States ought to be clear; it uses “certain rights” enumerated “in the Constitution” as its base of reference, and “certain rights” against the States are enumerated “in the Constitution”—in the original Constitution, actually, something like as many as are “enumerated” against actions of the national government. The moral-political case for its application against the States is (as I believe I have shown above) as firm as is our commitment to being a nation \textit{on whose territory and as to whose people} human rights shall actually prevail as a matter of law; there is no sound reason for not reading it literally. If that were all we had, it would be enough to do. But there is a good deal more; let me take up this question against an ampler frame of texts and time.

We must go back to the Declaration of Independence, in its capacity as an obvious precursor of the ninth amendment, operating \textit{in pari materia} with that amendment, and thus as an aid to the interpretation of the latter. For convenience, I will set before the reader these unfading lines of the Declaration:

\begin{quote}
When in the Course of human events, it becomes necessary for one people to dissolve the political bands, which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments
\end{quote}

\textsuperscript{37} U.S. Const. amend. IX.
are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness . . . . 28

Now what was this "Declaration?"

Some people talk as though the Declaration were a Fourth of July speech. But the first Fourth of July speech wasn't delivered until July 4, 1777. The Declaration was and is a legal instrument, a juristic act of ultimate solemnity, effecting the most fundamental constitutional change, a change in the very source and foundation of law. It is par excellence constitutional. It is our one legal document on which all else rests. The passage I have quoted enunciates (as you will have seen) the theory of law, of ultimate constitutional law, on which the signers based their claim of power and right to effect this great legal-constitutional change. The force and thrust of the passage, as a permanent commitment of the nation, must be appreciated in that light.

As a new question (and such a question is always new) it would seem that this passage should be taken simply to have the force of law—of national commitment that all levels and all branches of government, as these may come into being, are to govern in accord with the stated principles. That is emphatically my own view, to which I shall recur. But since we are here chiefly interested in the application of human-rights principles to the States, let us first consider where the States stood, and stand, with respect to the Declaration.

First, all the States then in being joined in the Declaration through their representatives—and, on the most fundamental and obvious principles of the American Union, all States later joining the Union are as much bound by it as if they had signed it.

Secondly, the "rights" acknowledged by the Declaration are said to be good against "governments" generally, with no (quite preposterous) suggestion of these rights being limited in their application to one or another governmental component or form. Whatever is a "government"—state, national, county, city, or other—exists (is "instituted") principally "to secure these

28 The Declaration of Independence, paras. 1-2 (U.S. 1776).
rights."

I suppose I ought to put in here by way of anticipation (at the risk of seeming to insult the reader's intelligence or my own) that I know that neither "liberty" nor "the pursuit of happiness" is or can be an "absolute" right. But "free speech," "freedom of the press," and "freedom of religion" are not "absolute rights" either, as every lawyer who deals with those subjects must have learned. If you have thought that the "right to the pursuit of happiness" cannot be a "right" at all, because it cannot be "absolute," or because those limitations that would in time, and from time to time, be seen to qualify it are not at once (nor ever will be) blueprint-clear in their full range, then you ought to consider the huge body of material dealing with freedom of speech and of the press, where exactly these same problems exist, and turn out to be tractable enough not to block those guarantees from wide and serious use in law. The freedoms of speech, press, and religion are neither "absolute" nor meaningless as law; the same could easily be made true, with use of quite comparable approaches, of the "right to the pursuit of happiness"—a principle to which we are as distinctly and as seriously committed as we are to the principle of "free speech."

Nor does acceptance of the task of interpreting and applying the principles of the Declaration entail the same problems as would the espousal of "natural law." The critical difference is that this nation is not committed to any one or more of the many varieties of "natural law," or to any set of the widely varying conclusions to which these have led speculative thinkers. Unless commitment is absolutely impossible, this nation is committed to the principles stated in the Declaration of Independence. The clarity of this commitment ought not to be clouded by the thought that these principles may, in ways hard to trace, have been in some part the fruit of reflection—even philosophic reflection—about the grounds of right and justice. In the Declaration, such thought eventuated in a clear commitment of the nation to a choice, a selection, among the ideas to which such speculation—call it "natural law" speculation if you will—might have led. Not all general thought about human rights and the justice of political society would have led to the Declaration's conclusions. But those were the conclusions to which we committed ourselves—wherever they came from.

This transition from speculative thought to positive commitment can be seen, in the fine grain or in the large, in the develop-
ment of much—perhaps all—law. The wholly general principle that agreements should be held to, and legal remedies awarded when they are not held to, is supported by some varieties of “natural law” speculation, but the commitment of a legal culture to this principle (however that commitment may be registered) takes it out of speculation and puts it up to the legal order to implement it. One must also add that this “contracts” commitment turns out to be neither “absolute” nor so vague as to be unserviceable. We are dealing here with a characteristic widely permeating law.

But let us not be diverted by these side-glances from the uniquely definite and uniquely fundamental character of the commitment that was registered in the Declaration of Independence.

Now what is the relation of these “rights,”—thus declared in this solemn legal document—to the “rights” said to be “retained by the people” in the ninth amendment, which was proposed by Congress just a little more than thirteen years after the Declaration was signed—hardly a lapse of time sufficient to have produced a diastrophic shift in the meaning of the word “rights”?

I put it to you that, if you had nothing but the texts of these two documents before you, no conclusion would be possible other than that the ninth amendment rights “retained by the people” were the very rights, at the very least, named in the Declaration as rights belonging to all humankind by the endowment of God. (If you’re worried because you think that God is just a ghost story, you must at least grant that such a claim of derivation is a very serious assertion of the validity and importance of these rights.) And these two passages are what the country formally committed itself to, on the subject of human rights in general, by solemn assent in our years of beginning. It should take an awful lot of brightly clear evidence to show that something else, something Pickwickian, contradicting what looks like the plain meaning of these two formal commitments taken together, was “intended” in the ninth amendment—if indeed that matters. I have never seen such evidence of the requisite high clarity and overpowering weight. (But then those who believe in astrology always know more about astrology than do those who do not believe in astrology.) For my part, I believe that something rather like an evidently wise contracts-law rule\textsuperscript{28} can find no more fit application than in the case of

\textsuperscript{28} I am referring, of course, to the “parol evidence rule”—not to all its technical ramifications, but to its basic good sense.
high commitments solemnly and formally assented to on parchment by responsible representatives. I must sadly add that, to me, it would be a stumbling among the foothills of fraud for a country to seek the approval “of a candid world” by the designation of human rights in the Declaration, and then, only thirteen years later, to put an amendment in its Constitution that “intended” something else by the use of the words “rights . . . retained by the people”—something else as to the scope of the rights, or something else as to the governments bound.

The word “retained,” in the phrase “others [that is, rights] retained by the people” strongly (though perhaps needlessly) corroborates this interpretation. “Others retained” means “rights the people have had up to now.” Thirteen years before, it had been said, as seriously and authoritatively as was possible just barely short of immediate Divine Revelation, what these rights were—or at least what the most vital and valuable of them were. The obligation of all governments to “secure” them, to keep them safe, was affirmed.

I have already indicated that I think the Declaration alone would, in a tolerably well-tuned world of law, stand as the direct source, in law, of the “rights” it names. On that view, the ninth amendment could be thought of as only cautionary. In this part of the forest of discourse, there can be no doubt that such caution is a commendable and wise redundancy.\(^{30}\)

\(^{30}\) Another caution, perhaps redundant but doubtless wise too: The connection here developed between the ninth amendment and the general rights expressly put forward in the Declaration has no tendency to contradict the propriety of using other methods as well, to give content to the ninth amendment’s language. I have in mind especially, though not exclusively, the methods of analogy and of structural inference. See C. Black, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW *passim* (1969); Black, *On Reading and Using the Ninth Amendment, supra* note 26, *passim*. These methods are already well-established in our constitutional law of human rights, as well as in all the rest of our constitutional law. As to these two methods especially, the ninth amendment serves to mark as legitimate, even to invite, the uses to which they have already been put, and their further and more confident employment. No more than in any other field of law should the methods of developing human-rights law, toward that “rational continuum” of which the conservative Mr. Justice Harlan the younger speaks (see infra notes 56-57 and accompanying text), be looked on as a narrowly closed class. Quite obviously the method of reference to the general words of the Declaration will often lead to the same conclusion as will these other more specific methods. The right to produce such instrumental music as one desires and is able to create, and to offer it to others who are to have the right to listen, may well be considered a right soundly analogous to the right of “free speech.” At the same time, who could doubt that this right is, for very many, both of those who create music and of those who listen, a precious important part of “the right to the pursuit of happiness”? Is the censorship of music unimaginable? Ask the shade of Dmitri Shostakovich.
Let me pass on (or go back) to the fourteenth amendment's "citizenship" and "privileges and immunities" clauses, which are contiguous, and may be treated as a single, though complex, clause:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . . 31

It is the most astonishing fact in the history of American law that this language, sweeping as it is—the summed-up result of our great War for nationhood—has borne no decisional fruit, has had no effect at all, is now treated by working lawyers as a dead letter.32 It has not often been remarked explicitly that this passing strange consignment to oblivion closely resembles the fate of the ninth amendment—though the ninth amendment just now shows some slight signs of stirring, at least in academic writing. And these two occupants of oblivion stand alone, as I have said, among

31 U.S. Const. amend XIV, § 1.

32 It is a venerable hypothesis that the strange disappearance of the "privileges and immunities" clause from the tool kit of working law is to be explained by a reluctance in the courts to exclude aliens from benefits that the clause might otherwise have been held to engender. I find this ridiculous, in regard to a century covering the infamous Chinese Exclusion Case, Chae Chan Ping v. United States, 130 U.S. 581 (1889), the somewhat later cases that denied anything like even procedural due process to persons of oriental appearance who were so much as alleged not to be citizens, and the deplorable anti-alien cases of even later decades. But in any event, the fear of harm to aliens is easily exorcised. In Truax v. Raich, 239 U.S. 33 (1915), the Court indicated that Congress' decision to admit certain aliens was tantamount to a direction that they be allowed by the States to live amongst us and to enjoy in a substantial sense and in full scope the privileges conferred by the admission. This general line of thought stems back to Gibbons v. Ogden, 22 U.S. 1 (1824), where Congress' licensing of a vessel in the coast-wise trade was held to be tantamount in law to the creation of an affirmative right to engage in that trade. (The Truax court, perhaps redundantly but very significantly, held that aliens' admission brought them under the "equal protection" clause, as to discriminations between them and citizens.) The Court has flip-flopped on the detailed application of this principle, but the principle is evidently sound, and serviceable as a complete answer to the fear, doubtless in many cases a pretended fear, that it would be dangerous to give much scope to the "privileges and immunities" clause, because the benefits extended thereby to citizens could not be thought to be within the reach of aliens. For a somewhat fuller discussion of the Truax v. Raich principle, and its few legitimate qualifications (as to voting and as to eligibility for major policy-forming public office), see C. Black, Decision According to Law 56-62 (1981).

Of course, this special derivation of aliens' human rights, as against the States (though entirely valid), easily falls as well under the more general reasoning from the Declaration of Independence, in itself or through the ninth amendment, as developed in the text. Good propositions in law, like good theorems in mathematics, are very often establishable in more than one way.
important "constitutional" texts. (Do you recall any other constitutional provision so likely to strike the normal reader of English as of prime interest and significance, that has just been left to wither?) Nor are these two texts—the ninth amendment and the privileges and immunities clause—similar only in the fact of their being as good as tabooed. They are, at the same time, the two constitutional texts stricto sensu from which a thoroughly general constitutional law of human rights might be developed. And remember that in this characteristic (that of being ignored) they are linked to the one other text, constitutive and supraconstitutional, that might also serve such a development—the text of the Declaration of Independence that "constituted" the nation—for that text too has been treated as without efficacy in law.

Just before we reach the very text of the privileges and immunities clause proper, certain persons are declared to be "citizens of the United States." Then, in a provision which bears strongly on the problem addressed in this piece, all of the same persons are made citizens of the States in which they respectively reside. By the command, then, of national constitutional law, the respective States must take and treat as their citizens all their residents who are also citizens of the United States—all citizens of the United States, that is to say, except for a few residing abroad or in transit (and these, by taking up residence in any State, thereby become its citizens)—whether the State wants them as its citizens or not. State citizenship, then, is since 1868 a status explicitly conferred by national constitutional law.

What does it mean to be a "citizen?" Do you get anything for it, except immunity from prosecution for fraud if you sign yourself "citizen" on an application for credit? Is the national command of state citizenship a mere brutum fulmen? Is it nothing more (in final absurdity) than a regulation of the diversity jurisdiction of the lower federal courts?

Doesn't the Declaration of Independence, as a huge and doubtless completely serviceable minimum, give the answer? If you are in relation to any "government," as one of its people, you are entitled to have that government "secure" to you the rights named in the Declaration; that, says the Declaration, is government's reason for being.\(^{33}\) If you meet the simple fourteenth amendment standards for state citizenship, the State is commanded both to

\(^{33}\) See supra note 28 and accompanying text.
receive you and to treat you as one of its people—as a matter of national law and right.

More broadly, does not the mere existence of this national command to the States—"You are to take and treat all these people as your citizens whether you like it or not"—surround the whole subject with a tone more than just emotionally hospitable to the working-out of national rights, as against the States, for these state citizens? After all, the mere grant to the federal courts of judicial jurisdiction over admiralty cases resulted in its being held—so broadly and so long ago that few recall that it was something that had to be "held"—that the substantive law applicable to such cases is national law, prevailing over state law—though the Constitution said nothing about that.\(^4\) Is it not naturally then to

\(^4\) It is to be noted that the prevalence of national maritime law is distinctly a prevalence over state law created by state or local "majorities," just as the national rule that couples are free to practice contraception is one that prevails over state law and "majorities." This conflict with state authority did not in early days go unreproved. Dissenting from an 1857 decision upholding admiralty jurisdiction on the Alabama River above tidewater, Jackson v. Steamboat Magnolia, 61 U.S. (20 How.) 296 (1857), Mr. Justice Daniel spoke his heart's fear in words that have a hauntingly modern ring:

Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water-courses, which is not liable to be arrested on its way to the next market town by the high admiralty power, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles . . .

In truth, the extravagance of these claims to an all-controlling central power, their utter incongruity with any just proportion or equipoise of the different parts of our system, would exhibit them as positively ludicrous, were it not for the serious mischiefs to which, if tolerated, they must inevitably lead—mischiefs which should characterize those pretensions as fatal to the inherent and necessary powers of self-preservation and internal government in the States; as at war with the interests, the habits and feelings of the people, and therefore to be reprobated and wholly rejected.

Id. at 320-22 (emphasis in original) (Daniel, J., dissenting).

Have you heard any complaints lately about the tyranny of the admiralty, its repugnance to "the habits and feelings of the people," its pretensions "fatal to the inherent and necessary powers of self-preservation and internal government in the States"?\(^5\)

In Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), Mr. Justice Stewart, dealing with a case of personal injury to a social visitor aboard a ship tied up at a New York pier, laid out the 1959 black-letter law:

The District Court was in error in ruling that the governing law in this case was that of the State of New York. Kermarec was injured aboard a ship upon
be looked for that the throwing of national protection over the status of being a state citizen will create a high-political atmosphere inviting the development of a national substantive law of citizenship, binding the States? To be sure, all this is mere corroboration; the Declaration of Independence and the fourteenth amendment are sufficient without it. But such corroboration can prepare the mind to receive, without boggling, what these documents say. 

Here we ought to look too at the long, prolific, and much-praised line of Supreme Court decisions that set limits on state law

N. The court exercised its power to declare his conduct illegal. It was not that the prosecution of which he complained occurred. The legal rights and liabilities arising from the conduct were therefore within the full reach of the admiralty jurisdiction and measurable by the standards of maritime law. . . . If this action had been brought in a state court, reference to admiralty law would have been necessary to determine the rights and liabilities of the parties. Carlisle Packing Co. v. Sandanger, 259 U.S. 265; [1922]. Where the plaintiff exercises the right conferred by diversity of citizenship to choose a federal forum, the result is no different, even though he exercises the further right to a jury trial. "Id. at 628-29 (citations omitted)."

Then, for the unanimous Court, he went on to choose, for the national and supreme maritime law, a different rule from the New York rule as to the duty of care owed to a visitor—in the performance," he said, "of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts." This is the same Justice Stewart who dissented in the Griswold case on the ground that he could "find nothing in the Constitution" to invalidate the state birth-control law. See Griswold v. Connecticut, 381 U.S. 479, 528 (1965) (Stewart, J., dissenting). I wonder what he thought could be "found in the Constitution" to empower the Supreme Court to set aside the New York law as to the duty owed to social visitors, and to "declare" a different national rule for such a case as Kermarc.

The point is not that Kermarc was wrong, for it was not, but rather that the narrow textualism employed by Stewart in Griswold flies in the face of the whole development of American constitutional law method, even (or, it may be, particularly) where state law is struck down.

Nor is this text-bound narrowness of view consistently or even prevalingly maintained as to modern questions. The same Justice Stewart, the very next year after Griswold, in United States v. Guest, 383 U.S. 745 (1966), dealt with another federal constitutional right rather briskly: "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union . . . [T]here have been recurring differences . . . within the Court as to the source of the constitutional right . . . [but] there is no need here to canvass those differences further. All have agreed that the right exists." "Id. at 757-59 (footnote omitted). He added in a footnote: "The right to interstate travel is a right that the Constitution itself guarantees." "Id. at 759 n.17 (emphasis added). But he thinks it not worth the bother to address the question, "Where in the Constitution?"

Again, such examples are adduced only to show that, even to a single Justice, around the same time, textualism is a sometime thing. It crops up now and then as a methodological exotic, in a body of constitutional law which has, overwhelmingly and in all its branches, developed by other methods, of vastly more creativeness and comprehension.

I ought to add that "original intent" has played little part in the luxuriant development of the admiralty clause.
in the interest of economic nationhood; this doctrinal and decisional line bears some morphological similarity to the uniform maritime-law line. The Constitution says nothing about this "doctrine." The foundations and formulations of it are all judge-created. The rights it enforces are unnamed rights, prevailing over state and local laws, and of course over the state or local "majorities" that have put and kept those laws in place.

Consider Mr. Justice Jackson’s famous words:

The Commerce Clause is one of the most prolific sources of national power and an equally prolific source of conflict with legislation of the state. While the Constitution vests in Congress the power to regulate commerce among the state, it does not say what the states may or may not do in the absence of congressional action. . . . Perhaps even more than by interpretation of its written word, this Court has advanced the solidarity and prosperity of this Nation by the meaning it has given to these great silences of the Constitution. . . . [The] principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units.\textsuperscript{35}

Never has the absence of a constitutional text supporting a line of constitutional decisions (a very common thing) been dealt with more elegantly than in the phrase "these great silences of the Constitution!" Still, the decisions are there, and so is "the great silence" out of which they issue in steady procession.

If a "great silence" is all that is needed to generate this mass of decisions—striking down, year after year, laws of the States, and thus frustrating the "majorities" that made them—why should it be disturbing if the same thing should occur, with equal prolificity of holding and subdoctrine, in regard to human rights? As it is, there isn't even a "great silence" here; we have the three texts I have been exploring. In the passage I have just quoted from Mr. Justice Jackson, he said, "[The] principle that our economic unit is the Nation . . . has as its corollary that the states are not separable economic units."\textsuperscript{38} When we face up to the Declaration of Independence, can we think that it generates no "corollary" that the States are not to be separable moral units, with respect to their "secur-

\textsuperscript{36} Id. at 537-38.
ing" of those human rights to which the nation committed itself at our beginning?

If you think this is explained by something about "judicial capacity," you ought to familiarize yourself, at the cost of a good deal of study, with the range and nature of the questions decided in these cases on state interference with economic nationhood. Once a judge accepts that the protection of "the right to the pursuit of happiness" is judicial business, it will not be really hard to conclude that requiring married couples either to abstain from intercourse, or to have children that they do not want or think they ought to have at this time, is a savage blow to the "pursuit of happiness."

I think that there is a deeper reason for this strikingly inconsistent distribution of the energy of protest against interference with the will of state and local "majorities." Could it not be that to many minds only the material—the priceable and not the priceless—is of significance, so that economic nationhood is absolutely vital, while moral nationhood, to be attained by our seeing to the fulfillment, everywhere in the nation, of the commitments of the Declaration of Independence, is not vital at all? If that is the "hidden major premise."

It will be observed that I have not yet directly addressed the command that "no State shall . . . abridge . . . the privileges and immunities of citizens of the United States . . ."—having thus far derived rights against the States from the national command of state citizenship. Such a derivation sails clear of the decision in the Slaughterhouse Cases,\(^7\) wherein the Supreme Court held that the "privileges and immunities" guaranteed by these words to "citizens of the United States as such" were only those directly derivable from relations with the national government—citing a pitiful handful of such rights—such as the right to use the navigable waters of the United States, the right to travel to the seat of government, or the right to seek diplomatic protection when abroad. (It must be worth noticing here that none even of these "privileges and immunities" is guaranteed by a discrete constitutional text.)

But on the view I have urged of the force of the Declaration of Independence (in itself or as confirmed and given entrance into the Constitution by the ninth amendment), the "privileges and immunities" of national citizenship are vastly more inclusive than this.

\(^7\) 83 U.S. (16 Wall.) 36 (1872).
Certainly this would be true as against the national government. If this is accepted, then interference by the States with the practical enjoyment of the very same "privileges and immunities" is an interference with values that the national government was established to maintain and is obligated to maintain—to "secure." It is state interference with the effective working of a comprehensive national plan of human rights. Even if the national bestowal of state citizenship were thought not to import a command that the human rights of the designated persons be binding directly on the States, the States would nevertheless be forbidden to frustrate, to bring to nothing, the obligation and therefore the function of the national government in regard to human rights, or to the values the national plan aims at advancing. The symmetry with the "economic nationhood" cases is striking.

It is in the implications of this symmetry that understanding of the high-political place of general national protection of human rights, against the States, is to be found. The "economic nationhood" cases rest not on any particular words of the Constitution, but rather on a general concept of our national "union." Can there not also be made out a legitimate and authenticated concept of the nation, the "union," as one wherein human rights are to prevail? To deny this is total denial of the authority of the Declaration of Independence, even as a statement of the nation's goals and reason for being. Why would we do that, while at the same time finding in the "great silences" of the Constitution a concept of economic nationhood, capable of generating innumerable judicial decisions? What would support this choice of free-trade over the claim of the American people to enjoy, as a whole people, the benefits of living under a unified regime of human rights? This would be inexplicably perverse, particularly since we do not have to choose between these concepts of nationhood, but can live by both of them. Indeed, they overlap in a penumbra between them, as in the right-to-travel cases. But can a nation live by trade alone?

The three texts I have relied on express the concept of human-rights nationhood, and facilitate its working out in life. The concept reciprocally supports them, giving them an integrated political legitimacy. Texts and an overarching concept answer to one another, after the manner of harmony.

Can we really bear to say, even (and above all) to ourselves, that the unity of this Union is a unity only in governmental power
and in economic exchange, but is not a moral unity in the observance of human rights? Even the Preamble of the Constitution strongly speaks against this: "to . . . secure the Blessings of Liberty to ourselves and our Posterity."

38 We betray this very statement of purpose, uttered at the creation of the national government, if we accept and act upon the view that there is no national law of general human rights binding on the States.

These structural considerations lead to the same conclusion as the texts: "Our Federalism" need not be, must not be, the "Catch 22" of human rights—the fine-print "catch" that fatally undermines the boldface guarantee.

Before passing to an extended example, let me step back and recapitulate as to the three texts:

First, as to the Declaration of Independence: My own position is that the Declaration ought to be read simply as stating legal norms, binding on government. A minimal "lesser included case" would be that the Declaration seriously declares "rights," in words (irrevocable without ultimate national humiliation) which must at least be used as a binding gloss on the "rights retained by the people," saved by the ninth amendment from being "denied or disparaged," on the phrase "privileges and immunities" in the fourteenth amendment, on the obligations of the States to persons whom they are commanded, by national constitutional law, to take and treat as their citizens, and on the "privileges and immunities" of national citizenship which the States may not diminish or in any way impair.

There is no room whatever for not taking the Declaration's claims as applying to all governments—both national and State, together with all their subdivisions.

Second, as to the Ninth Amendment: As a matter of text, this amendment's rule clearly applies to rights against the actions of the States. There is no structural reason for reading such actions out of it. Quite the contrary. Its retrospective relation to the Declaration of Independence is made natural, and even necessary, by its own full generality. And the Declaration's words, to repeat, apply to all governments. This chimes and harmonizes with the wording of the ninth amendment, which takes as its reference all the rights enumerated "in the Constitution," without distinction as to national or state governments. The concept, in the amendment, of

38 U.S. Const. preamble.
rights “retained by the people,” also harmonizes with the Declaration’s standing as the overwhelmingly most important prior statement of human rights, as they were authoritatively asserted to be just thirteen years before the ninth amendment. How can “rights” with such 1776 credentials not be looked on as “retained,” in 1790 and forever after?

Third, as to the Fourteenth Amendment Privileges and Immunities Clause: There is no other source nearly as eligible for filling out this concept of “privileges and immunities” as is the Declaration of Independence, either by itself or in its coaction with the ninth amendment. What the fourteenth amendment most importantly adds at this point is a binding federal constitutional rule as to who are to be state citizens. State citizenship is a status the admission to which is commanded by federal constitutional law. This command, unless it be a sheer futility, must contain the command that the “citizen” be treated in a manner conforming to the original and basic commitment of the Declaration of Independence—whether that commitment contains, as I think, binding law in itself, or be “only” a supremely authoritative statement of the duties and goals of all governments regarding their people’s rights. These “privileges and immunities” are those that enter through the ninth amendment, whether from the Declaration of Independence or by some other reasoning. This line of thought also defines the general meaning of the phrase “privileges and immunities of citizens of the United States” by linking it with the two earlier texts.

These three texts, all up to now left sitting to gather dust, interlock and form a firm foundation for the protection of an open class of human rights not expressly named, against all actions of the States and their subdivisions. It is beyond all comparison a more solid ground than the “substantive due process” concept.

39 See supra note 30.

40 I have not wanted to complicate the text by treatment of the “new” equal protection, with its “fundamental interests” and “suspect categories”; this development, though very late and perhaps now capped, is in essentials a variation on “substantive due process.”

In the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), decided six years after the adoption of the fourteenth amendment, the Court’s majority, on the basis of a “recapitulation of events, almost too recent to be called history,” saw the “pervading purpose” of the post-Civil War amendments to be the protection of “the negro.” Id. at 71-72. Accordingly, it held that the equal protection clause of the fourteenth amendment was “clearly a provision for that race,” and doubted that any discrimination against any other class of persons would “ever be held to come within the purview of that provision.” Id. at 81. The affirmative side
Let me go down now to a concrete level, with a single case that raises the general problem that is common to all the "unnamed rights" cases, in their application to the States.\footnote{And of course against the national government as well. See supra note 14.}

In *Moore v. East Cleveland*\footnote{431 U.S. 494 (1977).} a grandmother had taken into her house two small grandsons, respectively the sons of two sons of hers who were absent. A zoning ordinance of the City of East Cleveland, by limiting residence in her "zone" to single families and by so defining a "single family" as to make it lawful for her to give a home to one of these first cousins but not to both, forbade this arrangement. The grandmother was convicted of violating this ordinance. (I remember still the unbelieving shock that went through an audience in Iceland when I used and stressed this word, "convicted," in stating this case.)

In the proceedings that finally reached the Supreme Court, the City brought forward justification for its law that were "marginal at best," and had "only a tenuous relation" to "overcrowding" and "traffic and parking congestion"—in the words of Mr. Justice Powell, writing the plurality opinion. Ms. Moore got to keep on giving a home to both her small grandsons.

Now let's confront that case, at first, not with legal doctrine but with the question, "Are we to live (as we boast) in a free coun-

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of this view can hardly be faulted. The negative conjecture had to give way just 13 years later, when discrimination against Chinese was found; it was by 1886 apparently too clear for argument that discrimination against one unpopular and disfavored racial group too much resembled discrimination against another such group for this clause not to be given this very short analogic extension. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Likewise, discrimination against Hispanics and other ethnic minorities has been swept into the clause's scope.

In some modern equal protection cases, the analogy with discrimination against blacks has grown faint to the point of disappearing, so that no visible link exists between the obvious original thrust of the clause, as seen by the *Slaughterhouse Court*, and many modern "equal protection" claims, some successful and some not.

I do not intend to survey this material. I would say that many of these modern cases—setting up "suspect classifications" and applying a "strict scrutiny" when "fundamental interests" are found to be adversely affected, are not rooted either in the obvious historic purpose of the clause, or in any clearly analogic purpose, and have to be looked on as not really textual in generation. They read like the "substantive due process" cases, and draw their real grounds of decision, even as these are asserted, from something other than any visible "meaning" of the clause. The use of the "equal protection" clause to reach these results is something as vulnerable as is the use of the "due process" clause to reach substantive results, though there is no such perverse transgression of plain meaning as is the metamorphosis of a "due process" clause to a "due substance" clause. Here again we need something better.
try?” Let’s be a little more concrete about what the City was trying to do to this woman and her grandsons, and on what justification.

What would Ms. Moore have had to do to comply with this ordinance? To say merely that she would have had to cease to give family shelter to these two little grandsons—either orphaned or abandoned—is too dry a description. Quite crucially, she would have had to choose between them, with all that that would have entailed, as to them and as to her. She would have had to face consigning one of them to such publicly furnished care as might be available, while depriving the other one of close family association with his own first cousin—the nearest thing he had to a brother or a sister. There might have been available some arrangement for alternating them—say, a month apiece for each of them by turn, at her home and in an orphanage—but it is not at all clear that such an arrangement would be possible, and, in any case, it would have its own steady and recurrent agonies.

Now how much “traffic” and “overcrowding” did these little boys generate? We have to consider this matter comparatively. If the boys had been brothers, the ordinance would not have forbidden their both living under the same roof with this grandmother. Another grandmother, more abundantly blessed in fact and in law, might have, say, six grandchildren, all the children of one of her own children; she could keep all six of them under the one roof. How much “traffic” and “crowding” is prevented by applying a different rule to these two first cousins? Mr. Justice Powell’s words, “tenuous” and “marginal,” seem restrained.

The strong contention I would make is that we would be talking nonsense in speaking of our country as a “free” country, a country that “secures” the right to the pursuit of happiness, if it were possible for a state governmental subdivision to inflict this much unhappiness for this much hope of public gain.

In the last sentence, I have for now generalized the problem suggested by this “grandmother” case. The case itself invites us to generalize, and the first approximation would be to ask what, on the judicial record, would have happened in this country if there were no protection, against the States, of substantive rights not named in the Constitution as binding on the States. Here I just flip the pages of the Annotated Constitution of the United States and of the casebook I use in teaching constitutional law.

The States and their subdivisions could and would have taken
private property without compensation. They could and would have sterilized people after a third felony conviction—but excluding such “white-color” crimes as embezzlement. They could and in some or many cases certainly would have made it a crime for married people to practice contraception, a crime to teach Russian, or a crime to send children to religious or military schools. Any abridgment of freedom of speech would be permitted to the States, as well as any infringement of religious freedom, because in whatever lofty terms these freedoms be eulogized, they are not textually set out as hampering the States; the enormous number of state cases that the Supreme Court has overturned on free speech and free religion grounds make it uncommonly plain what the States not only might do, but what they have tried to do, and fought in court to be allowed to do. A man and a woman, expecting a child, could not marry and thus legitimate that child, unless the man could make a showing in court (impossible to him because of his poverty) that his support obligations for a prior child had been met, and that that prior child was not then, nor likely thereafter to become, a public charge.

But it is not enough even to look over such a catalog of real cases, and ask, “Could this be called a country that respects human rights?” There is a whole lot more to the matter than that. This sampling emerges from a regime in which it is known that there is some federal protection of unnamed human rights against the States. These are the things the States have fought to do, even knowing that national constitutional objections would have to be met and overcome. We have to go further and ask, “What would be the likely effect of its being known that no such national regime existed?”

Here the “grandmother” case can serve to catalyze the imagination. This case can be seen luridly to illustrate the kind of one-sided “balance” of which governments are capable. If a city is willing to do what it tried to do to Ms. Moore and her grandsons for the “tenuous” and “marginal” public benefits claimed, then such a

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43 See Skinner v. Oklahoma, 316 U.S. 535, 536-37 (1942). Technically, this case was decided under the equal protection clause. But see supra note 40 (equal protection has developed into a variation on “substantive due process”).

44 See Zablocki v. Redall, 434 U.S. 374, 375-78 (1978). This case serves to remind us that the “happiness” not only of parties litigant, but also of children connected with them, is often at stake. I trust that no doctrine of “standing” prevents consideration of this noticeable truth, or of their “right to the pursuit of happiness.”
tendency or attitude is certain to extend to other subjects.

On the whole, and on the record of real cases as well as on the implications of that record, we would be in a sorry mess if we had no general national protection of unnamed human rights against the States. It is to be observed, moreover, that the moral level of the nation, considered as a nation, would be at the mercy of those States in which from time to time the most suppressive tendencies prevailed; the religious freedom actually enjoyed as a matter of right in this nation would be that prevailing in the States or States least tolerant, and most given to actions “establishing” religion. And so on.

As to human rights, then, we would be a nation of multiple split personality. That would doubtless be corrosive to our own sense of national purpose, of moral nationhood. But there would also be a baneful international consequence. For years we as a nation in effect permitted lynching, and a cruel and brutal racist regime, mostly in one section of the country. Who in the rest of the world was satisfied with the defense, the only one possible, “Yes, we are a nation of equality and justice, but you must understand that something we call ‘Our Federalism’ interposes certain obstacles.” How would that have played on King Wenceslaus Square, when they were reciting our Declaration of Independence? Would you like to have to go there and tell them that in East Cleveland a grandmother could not give a home to two of her grandsons, because they weren’t related to her through a single child of her own, and because there just might be an effect on available parking in the neighborhood? Sometimes, when one ponders how hard it would be to fool people abroad, one may find it more difficult to keep fooling oneself at home; this may be one of the chief benefits of travel. No general protection of human rights against the States is no protection at all; one side of the bucket leaks.

Let’s go back yet again to the grandmother. Is there a better way than our quaintly paradoxical, eternally vulnerable “substantive due process” to justify the result? What shows up as wrong with “substantive due process” as a means of solution in this very case?

The dominant flaw in the “substantive due process” approach is of course wholly general: “due process” is not a phrase or a concept that appears to have anything to do with the validation of an open series of unnamed substantive rights. But the strain on thought and language thus generated shows up, one way or an-
other, in very many "substantive due process" opinions. The opinions in the Moore case illustrates this.

Narrowly, the case seemed to pose the issue whether the grandparent-grandchild relation was within the protection already afforded (in other contexts) to the parent-child relation. This issue was framed by the contention of the City that any "right to live together as a family" was limited to the "nuclear family—essentially a couple and its dependent children."

How can you approach that question rationally, and therefore convincingly, within the bounds of the concept "due process of law?" That phrase cannot help in the choice between the two positions, because it has no evident tendency to support either one of them—unless you arbitrarily equate the phrase "without due process" to something else. This is what always happens, whether it be clearly visible or not. In this very case, Mr. Justice Powell chose "tradition," correctly noting that grandparents and grandchildren have in the past often lived together. But "tradition" may be a most perverse guide to the serving of human-rights values. It used to be "traditional," for example, that a married couple, fallen into poverty, was to be separated and sent to different poor-houses, usually for the rest of their separate lives. On the other hand, it is certainly "traditional" that friends, or persons united in some common interest, live together—in cloisters, colleges, or residential fellowships of kinds innumerable. The association of members of one sex or the other in phratries, clubs, and so on, is one of the most venerable and widest spread of "traditions"; so we are assured by all social anthropology.

Of course, if the idea of "due process of law" contained or implied a mandate that courts distinguish, for decision, among "traditions," then the courts would have to try to do that. But the concept "due process of law" does not seem to contain any such mandate. The inevitable result must be that every substantive "due process" decision has to fudge a little, stay a little vague around the edges.

Justice Powell's opinion for the Court's plurality contains what sounds almost like an apology:

Substantive due process has at times been a treacherous field for this Court. There are risks when the judicial branch gives en-

hanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. As the history of the Lochner era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.46

I am irresistibly reminded here of the famous (possibly apocryphal) criticism of an actor appearing in Hamlet: “He played the King as though he were afraid somebody else might be about to play the ace.” But Justice Powell is not to be faulted for this. “Substantive due process” is thin ice; you walk warily, and listen for cracks. The opinion goes on:

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural. Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.47

This is all very true and very civilized, but it does not focus on the crucial question, “How does this regulation offend against a definitely established commitment of the nation?” It could hardly bring that question into focus, because the “substantive due process” concept cannot be shown or felt to be such a relevant commitment.

The relevant commitment, I insist, is in the Declaration of Independence. The trouble with this ordinance, as here applied, is not that it violates “tradition,” but that it crushes happiness with no showing or suggestion of any proportionate public good to ensue. The “due process” clause has no appearance of guaranteeing substantive fidelity to “tradition”; the Declaration of Independence, on the other hand, asserts the supreme importance of the

46 Moore, 431 U.S. at 502 (emphasis added).
47 Id. at 503-04.
“right to the pursuit of happiness,” as against all government. (Again, this right is not an “absolute”; if one of these little boys had a dangerous communicable disease, calling for his removal to a hospital, of course the right to the pursuit of happiness would have to yield—to yield, it must be remarked, whatever “tradition” might be found to be.)

Since the real trouble here is the production of deep unhappiness by governmental fiat, and since the Declaration of Independence speaks in terms to just that trouble, why should we not welcome the chance—a chance law should always thankfully welcome—to ask the right question?

A passage in Justice White’s dissenting opinion in Moore contains a mirror image:

I cannot believe that the interest in residing with more than one set of grandchildren is one that calls for any kind of heightened protection under the Due Process Clause. To say that one has a personal right to live with all, rather than some, of one’s grandchildren and that this right is implicit in ordered liberty is, as my Brother STEWART says, “to extend the limited substantive contours of the Due Process Clause beyond recognition.” The present claim is hardly one of which it could be said that “neither liberty nor justice would exist if [it] were sacrificed.”

MR. JUSTICE POWELL would apparently construe the Due Process Clause to protect from all but quite important state regulatory interests any right or privilege that in his estimate is deeply rooted in the country’s traditions. For me, this suggests a far too expansive charter for this Court and a far less meaningful and less confining guiding principle than MR. JUSTICE STEWART would use for serious substantive due process review. What the deeply rooted traditions of the country are is arguable; which of them deserve the protection of the Due Process Clause is even more debatable. The suggested view would broaden enormously the horizons of the Clause; and, if the interest involved here is any measure of what the States would be forbidden to regulate, the courts would be substantively weighing and very likely invalidating a wide range of measures that Congress and state legislatures think appropriate to respond to a changing economic and social order.48

These words rest on a hardly hidden major premise of virtually boundless negative judicial discretion as to the protection of human rights. What they say is “I really think this is going rather

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48 Id. at 549-50 (White, J., dissenting) (citation omitted).
too far. It will be the means of letting in upon us a flood of litiga-
tion.” Such words would be impossible to write (or so I should
hope) against any other background than that of perceived or felt
fundamental weakness in the concept of “substantive due process.”
Justice White obviously thinks of that concept as one that may
perhaps, now and then, justify a little protection of unnamed
rights, but not very much—a concept easily malleable, not to solid
arguments of law, but to intuitions of convenience. The passage is
a perfect illustration of what you can lose when you rely on a
highly vulnerable general theory—such as “substantive due
process.”

We need something better.

Once we turn to the mode of the Declaration of Independence,
traced out in its relations to the ninth amendment and to the priv-
ileges and immunities clause of the fourteenth amendment, there
is a great change, a new orientation toward the right questions.

Suppose our law had developed to the point where Justice
White had to ask himself publicly these two questions, and offer
reasoned answers for public perusal: (1) Is this, or is it not, a very
serious blow to the “pursuit of happiness” by this grandmother
and her grandsons?; (2) Are the Justifications of the City for its
inflicting this blow on “the right to the pursuit of happiness” of a
size or a quality anything like in proportion to the severity of the
blow? I cannot guarantee what his answers would have been,
though I can have hopes. But I do know that if, for example, he
answered the first question in the negative, he would have some
tall explaining to do. And the questions would have been just the
right questions, in any society that claims to be doing its best to
respect the commitment of the Declaration of Independence.

I think I will not argue further the issue whether the action of
the City of East Cleveland lays a sharp axe to the roots of the
“happiness” of the grandmother, of at least one of her grandsons,
and in all probability of the other. I can only hope that people who
would need such argument never get into a position of deciding
anything as to the scope of other people’s “right to the pursuit of
happiness.” There seems to be a prima facie breach of the commit-
ment of the Declaration of Independence. How do we go from
there to law?

Widely throughout the fabric of law, the answer is generally
pretty clear. When we ascertain that a validated interest has been
invaded, we do not immediately conclude either (1) that a legal
right has been infringed, or (2) that it has not been infringed. We turn to justification, and judge of its sufficiency in the context (the context, in this case, of the enormous authority of the Declaration of Independence). There's a lot of that in contracts and torts. But let's stay close to constitutional law, and once again observe that that is exactly what we do, over a huge range, again and again, as to "freedom of speech." If we can do it there, we can do it here. If, in regard to the "right to the pursuit of happiness" we won't admit any governmental justification at all, then we have simply gone off the track of possibility. If we will allow as valid any justification the State proffers, then we've gone off the track of the Declaration and all that flows from it—valued it at zero. We have not had to do either of these things as to "freedom of speech"; why should we think we have to do either of them, or ought to do either of them, as to "the pursuit of happiness"?

Once we accept this ongoing and never completed systematization through judgments of quality and degree, as a characteristic of most if not all civilized law, the solution of the "grandmother" case doesn't even have to be spelled out. We have finally asked the right questions. Nor, in view of all I have said before, is it necessary to trace again the involvement of the ninth amendment, and of the fourteenth amendment "privileges and immunities of citizens."

When "[y]ou have learnt something," says a character in Major Barbara, "[i]t always feels at first as if you had lost something."49 This may happen in the learning of mathematics; perhaps some students, on first looking into calculus, and encountering there such concepts as "limit" and "function," experience a sense of loss of the plain truths of addition and multiplication; even the extension of the system of natural numbers to the negative side can produce such feelings—until one gets used to handling negative numbers. This would be psychologically comprehensible, as a feeling, when someone first is brought to face the possibility that our constitutional law is committed, by the affirmations of the Declaration of Independence and by the latitudes opened up by the ninth amendment, to bringing into the legal order such a concept as "the right to the pursuit of happiness."

It may be that one of the best ways to get past this hitch is to

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49 G.B. Shaw, Major Barbara, in The Complete Plays of Bernard Shaw 492 (P. Ham-lyn ed. 1965).
consider what constitutional judges have already done. Summarily, the history is one of acceptance, in particular contexts, of tasks that would be made easier rather than harder, more rather than less susceptible of rational solution, by the forthright use of the Declaration of Independence concepts.

Perhaps the best clue to this is the concept of “fundamental values” that has played so large a part in the development of actual judicial enforcement, against both national and state power, of unnamed human rights.\textsuperscript{50} Most of this has been done under the flawed “substantive due process” concept, but what it illustrates is that judges, even very conservative judges, have not flinched from the very same task—that of identifying and evaluating government incursions on “fundamental” values and rights, and the justification proffered for the infringement of these—that would be theirs if they accepted the Declaration’s establishment and designation of such rights.

In 1925, for example, Mr. Justice McReynolds, in striking down a statute which required that all children go to public schools, used language that could be transposed without change into the “pursuit of happiness” key\textsuperscript{51}: the difference is not in the nature of the judicial task in forming the minor premise, but in the solidity of the foundation of the major premise. As to that, it is the Declaration of Independence against an oxymoron.

When the Court had finally accepted the “incorporation” of the first amendment free speech guarantee under the fourteenth amendment “due process” clause, it seems to have been felt that perhaps some explanation should be given, other than the truism that “liberty” to speak was a “liberty”—without much thought about the problem that the fourteenth amendment did not forbid “deprivation of liberty” simpliciter (how could it have?) but “deprivation of liberty without due process of law.” In Palko v. Connecticut,\textsuperscript{52} Justice Cardozo addressed himself to the question,

\textsuperscript{50} There has been an enormous agony over the problem of locating and authenticating the “fundamental values” of this nation. I’m sure I must have missed something, but I do not recall an instance, in modern times, in which a writer, judge or not, has said the obvious thing: “The fundamental values of the United States of America are stated with the highest possible seriousness and authority in the Declaration of Independence.” If the discernment and recognition of “fundamental values” is relevant to law at all, then the Declaration of Independence is the first and best place to look for them. After that, try the Preamble to the Constitution.


\textsuperscript{52} 302 U.S. 319 (1937).
“Which guarantees in the Bill of Rights are incorporated in the fourteenth amendment, and which are not?” He first eliminated certain procedural guarantees from such incorporation, then proceeded:

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress, or the like freedom of the press, or the free exercise of religion, or the right of peaceable assembly, without which speech would be unduly trammeled, or the right of one accused of crime to the benefit of counsel. In these and other situations immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states. . . . The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed. This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal. So it has come about that the domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judg-
ments to include liberty of the mind as well as liberty of action.\textsuperscript{53}

It is very important to note that this passage, which contains doubtless the most famous and most often-quoted justification for applying first amendment free speech law against the States, exhibits in just this regard a huge inconsequence of thought. (I raise this because it affords yet another insight into the dangers to clear thought that threaten, when the mind is directed to establishing that the phrase, “due process of law,” incorporates substantive law.)

The \textit{Palko} case itself concerned criminal procedure. Every \textit{single example} given by Cardozo, on either side of his “line of division,” concerns \textit{nothing but criminal procedure}—jury trial, a real trial instead of a sham trial, and so on—\textit{except} for the free speech guaranty. This latter is inserted in such a way as to suggest that the question as to “free speech” is much the same sort of question as the one about “right to counsel.”

But the questions are not in the same part of the world. It is very clear that “due process of law” refers to criminal procedure. The only question is then, “To what aspects and kinds of criminal procedure?” At the least, the original Bill of Rights guarantees, which are largely about criminal procedure, can suggest possibilities to the mind. And that is the use Cardozo makes of them—a very natural use, when one is asking, “What \textit{procedure} is \textit{due}?"

But the question as to “free speech” is not, “What \textit{procedures}, named in the original Bill of Rights, are requisite to ‘right \textit{procedure}’ under the fourteenth amendment ‘due process’—that is to say, ‘due procedure’—clause?” The question here could hardly be more different: “Does the ‘due process’ clause of the fourteenth amendment ‘incorporate,’ and so make applicable to the States, the \textit{substantive law} of the free speech guaranty?” It has to be added that this is a particularly difficult “incorporation,” because the first amendment in terms addresses its prohibitions \textit{only to Congress}. It is an enormous leap. Who said, “[J]udges are confined from molar to molecular motions”?\textsuperscript{64} \textit{Quandoque bonus dormitat Homerus}!\textsuperscript{65}

\textsuperscript{53} \textit{Id.} at 324-27 (citations omitted). For a sampling of the enormous influence of Cardozo’s formula, “the concept of ordered liberty,” see Justice Harlan’s concurrence in \textit{Griswold}, 381 U.S. at 499-500 (Harlan, J., concurring), and Justice White’s dissent in \textit{Moore}, 431 U.S. at 541-52 (White, J., dissenting).

\textsuperscript{54} \textit{South Pac. Co. v. Jensen}, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

\textsuperscript{65} \textit{Horace, Ars Poeticae}. 359 (trans. J. Hynd 1974).
Still, this bit of what might in a lesser man be called misdirection did bring Cardozo (and his brethren joining the opinion) to consider the question, “What is and what is not of the very essence of a scheme of ordered liberty?”

Now how do you think that question differs in texture, in level of abstraction, in accessibility to reason, in necessary invocation of judges’ intuitions of life and value, from the question, “What are the implications of the liberty the Declaration of Independence proclaims as a human right?”

I put it to you again that the difference is not in the sort of question, but in the authority that forces its asking. On a matter of substantive law, the Court’s authority to ask the question it did, and to act on the answer, is not satisfactorily to be spelled out from the “due process” clause. It is satisfactorily to be derived from the clear commitment of the Declaration of Independence, at the least—and I mean at the very least—through the ninth amendment and the fourteenth amendment “citizenship” and “privileges and immunities” clauses. We would lose nothing in accessibility of answer, and gain all the legitimacy there is on this earth, by tying our question to an authority to which we are definitely committed as a nation.

Let me give one more instance, out of dozens or hundreds.

Justice John Harlan the younger had and deserved the name of being a careful lawyer, quite traditional in technique, and was one of the most conservative members of the Court on which he sat (1955-1971). Faced with the Connecticut statute criminalizing birth control, he said:

However it is not the particular enumeration of rights in the first eight Amendments which spells out the reach of Fourteenth Amendment due process, but rather, as was suggested in another context long before the adoption of that Amendment, those concepts which are considered to embrace those rights “which are . . . fundamental; which belong . . . to the citizens of all free governments,” Corfield v. Coryell, for “the purposes [of securing] which men enter into society,” Calder v. Bull. Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it
certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. . . . And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.  

Justice Harlan five years later reiterated this position:

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U.S. 319, 325. For reasons stated at length in my dissenting opinion in Poe v. Ullman, supra, I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands in my opinion, on its own bottom.  

Once again, how can the question, "What is meant by the rights to 'liberty' and to the 'pursuit of happiness' set up by the Declaration?," draw any more on the judge's insights and values than do the questions asked by Justice John Harlan here?

I have included his words because he committed himself to the idea that unnamed substantive human rights form a rational continuum rather than a series of isolated points. He would fill in that rational continuum quite differently from the way I would; I am

57 Griswold, 381 U.S. at 500 (Harlan, J., concurring).
exceedingly wary of "tradition" as a guide to human rights; I would not choose to "attempt the future's portal with the past's blood-rusted key." I am not persuaded that the "English-speaking world" is the only or always the best place to look for answers to questions about either liberty or the pursuit of happiness. But these are differences discovered after it has been accepted that unnamed human rights form a "rational continuum," and not (like textually named rights) a series of isolated points. It is that acceptance that frees the law of human rights. The difference, again, is in regard to the source of the commitment. I don’t know why John

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Bowers v. Hardwick, 478 U.S. 186 (1986), is a good case to think about here. The Court therein held (on "historic" grounds harking back to days when "sodomy" like "witchcraft," or the disgusting business of marrying your deceased wife's sister, was forbidden and universally reprobated), that a Georgia statute criminalizing homosexual acts was valid. Id. at 191. The decision can one day be overruled on better grounds than those the Court noted as having been invoked.

Such a case as Bowers yields readily to solution once one takes seriously the Declaration of Independence is commitment "to the pursuit of happiness" as a human right. The right to live and to love as a homosexual, with a willing adult partner, for many persons goes to the absolute essence of the "right to the pursuit of happiness." Happiness without it can be for these people as far out of reach as it is for others without love between a man and woman. The threat of such a statute as the one in Bowers is a threat of the crushing of happiness.

On the other hand, there are few if any lines of conduct that can be seen to threaten society less than the conduct with which the respondent in Bowers was charged. Heterosexual activity, with its dangers of unwanted pregnancy and illegitimacy, is in a very much higher-risk class.

A statute like that in Bowers therefore strikes at the heart of happiness for many people, with no palpable gain to the society as a whole. It should therefore be one of the most obviously unacceptable things conceivable in a nation that is committed to "the right to the pursuit of happiness." It makes no difference what Blackstone may have thought about the matter. Whether a law violates the right to "the pursuit of happiness," by destroying the possibility of happiness for some without any palpable gain to others, is a 1991 question in 1991. The Declaration of Independence was a huge break with "tradition"; its working out into life has been and will be a slow process, a process that can be made rational only by asking the Declaration of Independence questions, and not by asking the Blackstone questions.

On marrying your deceased wife’s sister, an all but unbelievably tenacious fight was waged in Britain by bishops and other religious people, from 1850 to 1907, to prevent legalization of such marriages; there was, it seems, something like a Biblical prohibition involved. I count some twenty or twenty-five attempts in Parliament, all unsuccessful, to legalize such marriages. Nearly six decades of effort finally resulted in the Deceased Wife's Sister Marriage Act of 1907. I always think about that course of events when I consider "tradition" and "the English-speaking peoples" or irrational Biblical taboos. All this learning is from Marriage, The Encyclopaedia Britannica 756 (11th ed. 1911).

59 See Poe, 367 U.S. at 548 (Harlan, J., dissenting).
Harlan felt committed to give special constitutional weight to the ways of the English-speaking world; I would hesitate a long time before I did that. But I do know why I believe American judges should think themselves committed to exploring and maintaining "the right to the pursuit of happiness."

I want to add a word about the intentions and hopes that have guided the writing of this paper.

First of all, it has seemed not to be generally understood that an amply developed human-rights system, good against the States, is absolutely essential to the moral unity and integrity of the whole nation. This is a thing so obvious that one ought not to have to write about it at all. But much exposure to public discourse has brought home to me that it does need to be written about. As many citizens as possible should be brought to realize that without such a corpus of national human rights law good against the States, we ought to stop saying, "One nation indivisible, with liberty and justice for all," and speak instead of, "One nation divisible and divided into fifty zones of political morality, with liberty and justice in such kind and measure as these good things may from time to time be granted by each of these fifty political subdivisions." (It is a bemusing fact—comic to those who only think, tragic to those who both think and feel—that there are two schools of opinion as to our "Pledge of Allegiance"—those who want to pressure schoolchildren to recite it, and those who believe in what it says.)

Secondly, I have sensed a necessity for stressing, and for establishing as far as a look at the basic material can establish it, that those texts in the Constitution and its amendments that designate particular guarantees are entirely inadequate as a foundation for a regime of human rights. (Here I can only say, "Read them over for yourself.")

Thirdly, I have written from a long-formed conviction of the inadequacy of the doctrinal grounds on which human rights not particularly named in the Constitution and its amendments are at the present time supported—only partially supported, it must be said—and with a continually exposed vulnerability. There is never a wrong time for intellectual honesty, but now is a particularly good time, in my judgment, for clearing the ground, to make room for a better theoretical basis for that new progress in human rights law whose hour, despite present discouragements, may come around.
Fourthly—and I suppose chiefly—I have written in the hope of helping to build that better theoretical foundation.

Who can doubt that these things should be considered with the highest seriousness, in freedom from those conceptual and methodological prejudices in which our legal culture has gotten itself entangled?

I will close with a recommendation as to the set of mind appropriate for that consideration. In a second paper I presented in Moscow last September, referring to the virtually unbounded scope of the powers of our national government, I said that both the concept and the reality of such a fully empowered government come to us “out of a great deal of history. That history, in my own view, is a history of realization—often, like all the deepest realizations, creative, imaginative and bold.”

Though I don’t remember for sure, I must have been influenced there by the seminal thought of Justice Holmes in Missouri v. Holland:

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

The present paper is a call for just that kind of realization—realization that we have by our earliest commitments and in our history created a nation unified in political morality as well as in narrowly political or economic fact—unified in its indelible dedication to the concept of general human rights, as a part of law, actually prevailing throughout the national territory over every form of governmental power. The Declaration of Independence, the ninth amendment, and the fourteenth amendment “privileges and immunities” clause do more than point the way; they clear the way to attainment of a solidly intelligible, publicly acceptable jus-

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tification for such a national regime of human rights, named and unnamed, good against the States as well as against the national government.

As every day shows, it is not always true that where there is a way, there is a will. But it is true that where there is known to be a way, the development of the will to go that way may thereby be nurtured, because perceived not to lead into mere futility. Perhaps we may one day—though not tomorrow—find the will to move on to what we prepared for ourselves so long ago—to enter into our ancient inheritance, to be what we have always said we were.