Introduction

History, historicism, and the culture of rights

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Nothing is more deeply rooted in the American political tradition than the vocabulary of rights. In part because of its role in the founding and grounding of that tradition in the eighteenth century, the language of rights has been worked especially hard in political debate ever since. Slaves cited violations of their natural rights in hopeless petitions to Congress. Abolitionists and their states' rights adversaries both spoke in rights terms. Later on, when leaders of the union movement invoked labor's right to organize as the key to securing social justice for the new industrial working class, their opponents in the corporations invoked the individual's right to work free of union obligations.

As these examples indicate, the stakes in arguments over the proper use of rights claims have been high,[1] and the importance of the objectives sought through the rhetoric of rights has not diminished over time. The major social movements of recent decades have been steeped in that rhetoric as evidenced in the continuing conflicts triggered by the civil rights movement as its reach extends deeper into the life of the workplace, by the long and narrowly unsuccessful drive of the women's movement for an Equal Rights Amendment, by environmentalists' assertion of rights on behalf of threatened species of plants and animals, and by the claims

[1] For an important and wide-ranging set of essays on the significance of the Constitution for American development and on the impact of changing conceptions of rights related to the problems of minorities, women, labor, and other groups in American culture, see the special bicentennial issue of the *Journal of American History* on the Constitution and American life, vol. 74, no. 3 (December 1987).

of people who advocated women's right to choice regarding abortion and the counterclaims of those who advocate a fetal right to life.

Although Western in its origins, the language of rights is now a virtually global phenomenon. Woodrow Wilson at Versailles spoke of the right to self-determination. The ideals of decolonization and nation building after World War II were typically formulated in rights terms. And after each of the world wars many nations made concerted attempts to strengthen and elaborate the legal framework of the international community, attempts in which charters of rights played an important role, as in the post–World War II development of an integrated European community. In the recent upheavals in the Communist world the revolt against oppression and incompetence and the assertion of aspirations of suppressed nationalities and ethnoreligious groups have been voiced routinely as rights claims. Apart from the ideal of democratic self-government—itself often understood as a basic right—there is no more universal feature of politics in the late twentieth century than rights.

Although talk about rights is common, its meanings are commonly ambiguous and unconstrained, used by individuals and groups deeply divided in their basic perspectives on events. No one observing the contemporary American scene would suggest that the pervasiveness of the language of rights points to the existence of a coherent underlying philosophy of morals and politics shared by those who use the terms, even by those who use them most carefully. Quite the contrary. To ask for the difference between rights and wants is to open up difficult problems of reasoning, problems that are poorly served by the appeal to common sense. The dominant intellectual institutions in contemporary culture are academic, and few truths are held to be self-evident in the postmodern university. Exactly this point is made in an influential article on the paradox of the persistence of rights talk in a cultural environment that is profoundly skeptical of its metaphysical rationale.[2] The article begins with the observation that what long served as the basic premise for rights discourse—the existence of an objective moral order accessible to reason and amenable to formulation in terms of rights and duties—has become a highly controversial assertion in the contemporary American university setting. There, as some of the chapters that follow show, traditions of inquiry indifferent or hostile to rights concepts have long held sway.

[2] See Thomas Haskell, "The Curious Persistence of Rights Talk in the 'Age of Interpretation,' " in ibid., 984–1012.

Despite skepticism about the philosophical grounding of rights, however, we continue to talk of these rather mysterious, intangible entities as if we were thoroughly familiar with them, never more so than in the day-to-day affairs of politics and public policy. One of the many reasons for this characteristic way of performing in the drama of our politics is the special symbiotic connection that was established between ideas of rights and American institutions at the nation's founding. The United States Constitution and its first ten amendments, the Bill of Rights, not only are potent symbols of nationhood based on American understandings of the political ideals of the Enlightenment but also are working charters for the operation of increasingly powerful institutions—charters that are referred to constantly for guidance in sorting out social and political conflicts. In other words, the American institutional setup—given the prominence it accords the Supreme Court and the practice of judicial review—strongly encourages the persistence of ideas of rights, both popular and professional, and virtually requires that foundational questions regarding rights be asked from time to time by anyone seriously concerned about the relationship between social theory and practice.

We mention the ambiguities and contradictions of popular understandings not to disparage commonsense usage or to suggest that the more theoretically self-conscious academic uses of the language of rights have resolved those ambiguities and contradictions but, rather, to draw attention to the inherent complexity of rights thinking and consciousness as subjects for study. The title of this volume was selected to convey a sense of orientation among the complexities of the subject. "Culture of rights" can be interpreted in two ways: The phrase can refer to a way of life informed by a set of beliefs and values in which the language of rights plays a prominent role; as already indicated there are many such cultures of rights. Alternatively, culture is also the activity of cultivating—in this case, of developing a rights-related, philosophical jurisprudence adequate to meet the practical problems of providing for both continuity and change in the evolving legal order.

Taken either way, the culture of rights poses difficult questions for historical understanding. One of the principal aims of this book is to indicate and illustrate why this is so. The chapters that follow examine the ambiguities of the American culture of rights at two points in time, the late eighteenth century and the late twentieth. The authors have tried to point out the inherent complexity of the subject, the relations between rights discourse and other powerful cultural idioms, and the continuing

pluralism of perspectives about the grounding and utility of rights. Reporting such pluralism faithfully is possible only by calling on scholars from different academic disciplines—law, philosophy, history, and political theory.

The Wilson Center's project that produced this book was undertaken as a scholarly contribution to the bicentennial of the Bill of Rights (15 December 1991). The project probed the current state of scholarship on several of the contexts in which the Bill of Rights has been read, including a few particularly important ones. Care has been taken to ensure that the notes to each chapter give guidance to the scholarly literature on the broad subjects covered. Even so, the book does not aim at unraveling the many meanings of the first ten amendments as they might have been understood in 1791 or may be understood today. And the book is emphatically not a potted collective history of the Bill of Rights. It is concerned only with two broadly conceived moments in the cultural history of that document. There are three reasons for this choice of focus: One has to do with the historiography of the Bill of Rights; one, with its history; and one, with its historicity.

The historiography of the Bill of Rights is large but in various respects uneven. Some important analyses of discrete provisions of the document have been published—on the freedom of religion and the press, for example—and some provisions remain neglected as subjects of study.[3] And yet, taken in the round, historical scholarship on the Bill of Rights is not as rich as one might expect, given its present importance in the American scheme of things. The historical trajectory of the document—its changing placement within the dynamics of American constitutionalism as a whole—is well known. This knowledge is such as to give pause to the historian who would trace the vicissitudes of the document's provisions as if to do so were a simple matter, calling for no more than close observation of a rather straightforward march of official interpreters and their findings through the decades, one at a time. No such march occurred, and this brings us to the second reason we have limited ourselves to two moments in the history of the document.

Through most of American history the Bill of Rights played little if any role in the broader scheme of national development. The preparation and adoption of the Bill of Rights were vital and perhaps decisive acts

[3] For a review of historical research on the birth of the Bill of Rights, see James H. Hutson, "The Birth of the Bill of Rights: The State of Current Scholarship," in *Prologue: Quarterly of the National Archives* 20, no. 3 (Fall 1988): 143–61.

of political maneuver that made possible the ratification of the Constitution itself, but thereafter the Bill of Rights fell into a kind of oblivion, as many well-informed contemporaries, Federalists and Anti-Federalists alike, thought it would. It did so because, by design, its provisions did not reach to the sovereign legal doings of the several states, and under the federalism of the Constitution, the states were entrusted with the vital powers affecting civil liberties and much else. We often forget just how sweeping the powers of the states were in pre–Civil War America, and how minimal the powers of the national government. Jefferson, to take but one example, took the federal division of labor to mean that the states were concerned with domestic policy, the federal government with foreign affairs. "The federal is, in truth, our foreign government, which department alone is taken from the sovereignty of the separate States," he wrote to a correspondent in 1824. "I recollect but one instance of control vested in the federal, over the State authorities, in a matter purely domestic, which is that of metallic tenders."[4]

An extreme view of the autonomy of the states, particularly as connected to the problem of slavery, was, of course, the issue that finally brought about the Civil War, and it was the post–Civil War amendments to the Constitution, particularly the Fourteenth, that settled, or at least put on a new footing, the underlying problem of the reach of federal jurisdiction. It did so via clarification of the meaning of citizenship. Whereas the exact locus of citizenship was not addressed in the original Constitution and had proved problematic in the compound republic, the Fourteenth Amendment made it clear that American citizenship was dual citizenship, applying to both national and state governments, and that the national government was primary with respect to any problems of securing the rights of citizenship.

Centralization of authority proceeded, though slowly. Today it seems to many observers that federalism, once the potent principle, has become rather like a vestigial organ among the living tissues of the Constitution, while the Bill of Rights, once something of a useless appendix, has become a symbol of the Constitution itself. It was the twentieth-century "nationalization of the Bill of Rights" by the Supreme Court via its "incorporation doctrine," a series of complicated and increasingly far-reaching interpretations of the requirements of the Fourteenth Amendment, that

[4] Quoted in Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Vintage, 1987), 59.

brought about this basic shift in perspective. A recent account of the changing character of constitutionalism in American culture describes the pattern of change as a movement from a constitutionalism of powers to a constitutionalism of rights.[5]

In short, while certainly not denying that the Bill of Rights showed signs of life between the end of the eighteenth century and our own time—and while acknowledging especially the importance of the Fourteenth Amendment—we are convinced that our two chosen moments are indeed the momentous ones. What is more, they are in a sense inherently connected, and this brings us to the third argument behind our chosen scheme of things.

Major movements in American public life almost inevitably refer to origins and foundations. In the American Republic the understanding and justification of function can hardly be divorced from the understanding of foundation, and foundation cannot be separated from validating origin. The fact that the origin *was* the foundation at a particular, discernible time will always lend great attraction to attempts at seeing new foundations and directions as validated by some relation of fidelity to the origins.

One of the most remarkable features of the United States is that, alone of the major democratic states, it has an assignable beginning in history. It emerged not from the mist of ancient custom but from self-conscious design, a design solemnly recorded and expressed in the founding documents themselves. All countries feel the need for a usable past in the sense of agreed, sustaining traditions, but America's search for a usable past has an additional element of specificity and design. It must be usable with reference to these known origins, to the foundational myth in which the Founders bestowed on subsequent generations their vision of liberty and the common good. Any quest for understanding of the Bill of Rights and its role in the transformation of American constitutionalism is therefore inevitably a historical quest. Whatever view Americans may adopt on the great questions of the day concerning the relationship between the original intention and the current meaning of the Constitution and the Bill of Rights, they will be united in seeing the special authority of these great instruments of government as in some sense deriving from the fact that they were foundational.

[5] See Morton Keller, "Powers and Rights: Two Centuries of American Constitutionalism," *Journal of American History* 74, no. 3 (December 1987): 675–94.

The tension between foundational myths and the changing perceptions of historical truth has given American historiography much of its peculiar energy. The founding event and its dramatis personae are now venerated, now vilified in the continuing search for a past that speaks to the exigencies of the present. Accusations of mistaking myth for history have often had a peculiarly paradoxical ring to them, because they have in fact been criticisms for not getting the "meaning" of the foundation "right." The fact is that the past is past, and in the deepest sense it can never be rendered perfectly clear "as it actually happened." We see the evidence of the past from particular points of view, and we can detach the mythical, or parts thereof, from the historical in those points of view only when new perspectives, suggested by the strains of our contemporary experience, have been adopted and tried out.

If the Bill of Rights and the Constitution to a significant degree are contextualized by their own history as perceived at any given time, and if such history is inevitably in a dialectic tension with the demands for a workable foundational myth, then the choice of focus for a scholarly inquiry into the culture of rights is easy. The eighteenth-century moment is unavoidably fundamental and must be selected, and our own moment is simply unavoidable. So far as the long period in between is concerned, it would certainly have been interesting to revisit and refine our knowledge of all the turning points that, since the Civil War, have contributed to the nationalization of the Bill of Rights and added to its increasing potency as a shaping factor in American life. But exploring this large and so far only imperfectly charted terrain would require work different in scale and kind from that undertaken here.

The reader will also note that this book focuses on the constant reshaping of the relationship between rights enshrined in a legal instrumentality such as the Bill of Rights and rights as extralegal entities. This concern with the philosophical foundation of rights runs through the discussion at various levels and turns up repeatedly as a question of great practical and theoretical importance. The relationship between legal rights written into a text and "higher" rights may appear to some readers to be one of the perennial questions in political philosophy and thus above historicization. And yet one of the favorite ways of seeking out the timeless character of this relationship has been to point to its formulation in earlier periods, especially at the founding period. This tendency to seek historical warrant for truths supposed to be *above* the flux of history—something more fixed and universal, permanent, and reliable

as a guide to action than the particularities and contingencies of history can of themselves disclose—is, of course, neither new nor exclusively American, but it has become a pervasive feature of American rights culture.

What went into inventing the Bill of Rights? As indicated by the text that follows, particularly Chapters 2 and 3, by James Hutson and Jack Rakove, the Founders seem to have combined in a process of bricolage the selective use of old traditions, elements of makeshift, and gambles on the future. The Bill of Rights was not added to the Constitution as a display of doctrinal agreement on matters of first principle. Its provisions are too curious a mixture of the obviously fundamental and the oddly specific and time-bound to suggest otherwise.

Then, too, there was an adventitious and tactical quality in stories of what went into the construction of the Bill of Rights—a quality forced by the bitter struggle of the Federalists and Anti-Federalists, as each impugned the motives and vision of the other. It was a document, as James Hutson puts it, "that could not stand in the esteem of either its sponsors or opponents." The push of expediency that went into the composition of the Bill of Rights, however, and the elements of bungle and murk that hovered over its passage and adoption should not be taken as signs that the Founders were not genuinely solicitous of rights. On the contrary, it is abundantly clear that concepts of rights played a central, constitutive role in shaping their outlook on morals and government.

Perhaps it is best, therefore, to start not with politics but with philosophy. Whereas the political historian is necessarily concerned with bringing to the forefront of consciousness the tactics, expediencies, and practical difficulties involved in the invention of the Bill of Rights, the philosophical historian is concerned with capturing how rights concepts held together and with understanding the conceptual structure of the prevailing tradition of thought. In doing a different *kind* of history, such a thinker provides a different kind of access to the broad tradition of rights thinking in which the Founders lived. The philosophical historian asks, What kinds of rights theories would have been intelligible to the Founders? The answers, provided in this instance in Chapter 1, by Knud Haakonssen, suggest the need for revising to some degree our understanding of the ideological context of the founding.

Much current scholarship on the ideology of the Revolutionary and early national period typically distinguishes the strains of liberalism, republicanism, Scottish realism, and evangelical Christianity as the prin-

cipal elements in the picture. Relations among these outlooks are generally unclear, although an atmosphere of battle for the soul of American politics hovers over much of the writing. Precisely because each has a bearing on present-day evaluations of what was "really" going on in the founding period, and thus plays a part in the continuing search for a usable past, each has its scholarly champions. Too often, however, the outlooks are assumed to have been so incompatible and opposed to one another in rather simple ways that one wonders how the contemporaries could have conversed. Liberalism, for example, and liberalism alone, was seen as connected to the natural-law tradition. For too long liberalism was taken as the legacy of John Locke's natural-rights ideas and was generally viewed as inadequate for serving the public good, because of its individualistic emphasis and its concern for rights of property. In contrast, republicanism, though equally concerned with autonomy and property, was seen as a workable alternative inheritance that favored the requirements of the common good over the claims of individualism.

It is increasingly doubtful whether this characterization of liberalism is fair to John Locke, who was unquestionably influential in American life; more to the point, it is clear from Haakonssen's opening chapter that reducing the natural-law tradition to the confines of Locke's second *Treatise of Government* would be deeply unfair to that tradition. It was a far richer, more complex and influential body of thought than has often been appreciated. Haakonssen provides a brief historical dictionary of rights concepts and their interrelations for the seventeenth and eighteenth centuries that suggests how central to the thought and practice of the period was the framework of natural law, rights, and duties he outlines. This variegated body of thought, profoundly influenced by the theological currents of its time, was both the outcome of a search for a supraconfessional basis for politics and morals and a response to the recurrent challenges to the notion that there were universally valid grounds for politics and morals. The framework encompassed prescriptive and descriptive elements, and it served as a kind of proto–social science for scholars throughout early modern Europe.

Although generally ambitious of transcending confessional divisions, natural-law theory was firmly anchored in natural religion. It was part of the overall arrangement of nature by "nature's God" to which reason and science gave humanity access. The source of natural law was God, who imposed it on rational beings as an obligation to pursue the common good. And the subject of natural law was the proper discharge of each

person's duty or office or station in life as a contribution to the common good. Natural rights were derived from natural law as correlatives to such natural duties, and thus they were by no means the hallmark of the "atomic" individual of liberal lore.

Natural law was altogether less individualistic and less antiauthoritarian than it was subsequently taken to be and thus more compatible with other contemporary currents of thought. More particularly, it was quite capable of encompassing various forms of traditionalism, including British constitutionalism. It was important precisely because of its ecumenical ambitions and its character as a formal body of thought. Although liberalism, republicanism, and evangelicalism were not taught as academic subjects, natural jurisprudence *was*. As far as the *cultivation* of this mainstream view of the proper context of rights thinking was concerned, the institutions that mattered were those that educated the young gentry of the period: the Scottish universities, latitudinarian Cambridge and the dissenting academies in England, and the colonial colleges in America.

Gradually, of course, this secularized religion itself was further secularized, and in a complex and subtle fashion cleared the way for the later emergence of subjective-rights theories proper—those holding that rights are the primary moral features of humanity. This point of view, as Haakonssen indicates, was anticipated in different ways, but it could not become part of mainstream thought so long as it was seen as a source of moral anarchy and, in effect, as a denial of the divine origins of morals. Eighteenth-century anxieties on this point are comparable to doubts within the community of twentieth-century liberalism—treated in Chapter 5 of this volume by William Galston—over its distinction between politics and morals as separable domains. In both cases it is thinking about the foundations of rights claims that is at issue.

The Founders, Haakonssen suggests, rather unwittingly contributed to the mechanics of this process of secularization. The new civil order they established spurred its development, helping to usher in a more recognizably modern culture of rights and eventually modernity itself. In their attempts to formulate a position from the materials available in the received tradition, to make the past usable in the predicament in which they found themselves, the Founders—most famously, Jefferson—gave a new individualistic "spin" to the old idea of the inalienability of rights. The formerly communitarian aspect (i.e., people had been understood to have an inalienable right and duty to be sociable and to provide for the