

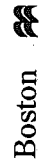
THE BEDFORD SERIES IN HISTORY AND CULTURE

**Declaring Rights**  
A Brief History with Documents

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BEDFORD BOOKS



Boston New York

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## 2

### Puzzles about Rights

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Historians face an easier task in talking about rights than their colleagues in philosophy, political theory, or law. Often all that historians need to do is to describe some incident or episode or legal case in which claims about a particular right were asserted, resisted, and finally resolved. But scholars in other disciplines such as philosophy or political theory or law face more vexing questions of principle and theory. Here there is general agreement that the subject of rights is both enormously important and highly perplexing. Even as “the language of human rights plays an increasingly important part in normal political debate,” Richard Tuck, a historian of political thought, has observed, “academic philosophers find it on the whole an elusive and unnecessary mode of discourse.” A long line of thought, dating to the seventeenth century, has held that the claims of rights we make on our own behalf are better understood as the duties owed to us by someone else. “If this is true,” Tuck continues, “then the language of rights is irrelevant, and to talk of ‘human rights’ is simply to raise the question of what kinds of duty we are under to other human beings, rather than to provide us with any independent moral insights.”<sup>1</sup>

If philosophers find it difficult to define just what they mean by rights, legal scholars face a similar dilemma in sorting out the multiple claims of rights that swirl through our politics and legal culture. The modern American legal system operates amid a breathless Babel of voices all claiming or asserting rights, often in direct conflict with each other. The right of a mother not to carry an unwanted pregnancy to term is met by the counterargument that the fetus has a right to life from the moment of conception. The rights of accused and convicted criminals are met by

<sup>1</sup>Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, Eng.: Cambridge University Press, 1979), 1; and see Knud Haakonssen, “From Natural Law to the Rights of Man: A European Perspective on American Debates,” in Michael Lacey and Knud Haakonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law: 1791 and 1991* (New York: Cambridge University Press, 1991), 19–61.

countervailing claims of the rights of victims and their families. The right of religious minorities or atheists not to be subjected to public expressions of faith (school prayer or invocations at graduation ceremonies) is met by the claim that majority groups have a right to see their religious values acknowledged in a public setting. The right of racial minorities to enjoy preferential programs of affirmative action to remedy past discrimination encounters the contrary claim that all individuals have an equal right to be judged solely on the merit of their talents and abilities, regardless of race, gender, or history of discrimination. And so it goes.

This tendency to translate claims of interest into the language of rights has produced a backlash against the popularity of “rights-talk” itself. Because claims of rights are often presented as absolutes, critics like Mary Ann Glendon argue that rights-talk impoverishes “our political discourse” through “its starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities.”<sup>2</sup> Too great an emphasis on rights, Glendon concludes, discourages the political deliberation and compromise that democracy requires. And because the judiciary has played a leading role in extending and enforcing constitutional rights, the ensuing controversies have raised questions both about the proper role of courts in a democracy and about their capacity to enforce the new rights they have recognized.<sup>3</sup> On the other side of the question, a legal philosopher like Ronald Dworkin can plausibly argue that the law and politics of an egalitarian constitutional democracy ought to be concerned with *Taking Rights Seriously* (the title of Dworkin’s best-known work) or that judicial decision-making in “hard cases” inevitably involves morally grounded claims of rights.<sup>4</sup>

At first glance, these contemporary questions may seem irrelevant to the task of considering how rights were regarded in the eighteenth cen-

<sup>2</sup>Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991), x.

<sup>3</sup>For two examples, see Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: The Brookings Institution, 1977), and Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). For a principled defense of judicial discretion in enlarging rights, see Michael J. Perry, *The Constitution, the Courts, and Human Rights* (New Haven and London: Yale University Press, 1982). This is only the tip of an iceberg of literature by legal scholars, political scientists, and historians.

<sup>4</sup>Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); for the most recent statement of his ideas, see Dworkin, *The Moral Reading of the Constitution* (Cambridge: Harvard University Press, 1996).

tury. But if the concerns of people living two hundred years ago obviously differed from ours, confusion about the definition, sources, nature, and protection of rights was as much a part of their discussions as it is of ours. And to make sense of the American debates of the 1770s and 1780s, we have to explore what their sources of uncertainty were. For then as now, the ease and frequency with which Americans and Britons invoked rights did not answer a host of questions about the nature, extent, and sources of those rights.

Consider, then, the variety of problems they faced in trying to appeal to the authority of rights.

## DEFINING A RIGHT

Perhaps the most basic problem involves the deceptively simple matter of defining a right. What does the word *right* literally mean? Before the seventeenth century, this now-potent word had a surprisingly limited meaning in English usage. In the legal sense, a right was nothing more than a valid title of ownership, especially as it related to real property (land). All the other activities that later generations came to associate with the concept of rights were more frequently and familiarly described as “liberties and privileges.” These words embraced not only the legal guarantees that protected individuals against the arbitrary power of government but also the benefits that the state conferred on particular groups within the larger society: members of guilds, stockholders in trading companies, the voting citizens of chartered communities.<sup>5</sup> Nor was the difference between the traditional idea of liberties and privileges and the modern idea of rights merely a matter of usage. Many liberties and privileges were regarded not as inherent qualities or attributes of individuals but rather as legal powers granted by the crown. The liberty or privilege of doing something did not belong to individuals as a matter of course; it was a specific power allowed or permitted by the state—and as easily revocable by the same authority.

But amid the great political and religious disputes of the seventeenth century, the word *right* shed its original limited meaning and began to acquire its bewildering modern associations. When the Stuarts attempted to raise public revenues without parliamentary consent, their opponents insisted that the crown must act lawfully through Parliament, because the

<sup>5</sup>James H. Hutson, “The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey,” *American Journal of Jurisprudence*, 39 (1994), 197–201.

citizens it represented had the right to be governed only through laws enacted with Parliament's consent. When the Stuarts prosecuted and imprisoned their critics, in Parliament and out, their opponents responded with new arguments asserting the political privileges of legislators and the civil rights of ordinary subjects. And when both the crown and, on occasion, Parliament persecuted members of the radical religious sects, the defenders of these dissenters asserted that a fundamental right of conscience empowered individuals to form their own religious opinions, uncoerced either by established churches or by the state.

The seventeenth-century debates thus transformed the concept and usage of *right* in at least two major ways. First, the concept of right now expanded in meaning to embrace and even subsume the variety of claims and activities formerly classified as "liberties and privileges." Second, the notion of ownership that lay at the core of the original meaning of right now described just what it was that the holders of rights enjoyed. A right was something more than a liberty or privilege that the state could offer or revoke. It was literally something that individuals owned. And this ownership was not merely a matter of casual purchase; it was a *birthright* to which the English people were entitled by virtue of living in a realm where monarchy was limited, not absolute; where Parliament and trial by jury provided effective checks on royal power; and where Protestant traditions of dissent and toleration had supplanted Roman Catholic demands for orthodoxy and uniformity of religious belief.<sup>6</sup>

When the great philosopher John Locke (1632–1704) published his *Two Treatises of Government* in 1689, he revealed how radically the concept of right had grown since the previous century. Locke grounded his entire theory of government on the right of property. Just as men left the state of nature and formed civil societies and governments to protect the property they created through their labor, so too they enjoyed a property, an ownership, of their rights and faculties—including the right to a free exercise of religious conscience. But society as a whole also had a right to protect its property and its rights against tyrannical government. It had, that is, a right of resistance. And that right was something more than a mere matter of private choice; it was, at bottom, a collective duty that a society owed to itself and its posterity.<sup>7</sup>

<sup>6</sup>For a brief but illuminating discussion of this aspect of the idea of rights as property and birthright, see John Phillip Reid, *The Authority of Rights* (Madison: University of Wisconsin Press, 1986), 96–113.

<sup>7</sup>The scholarly literature on Locke is enormous. For an introduction to his thinking about rights, see A. John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992); James Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge, Eng.: Cambridge University Press, 1993); the introduction to John Locke, *Two*

The crucial statement of the theory of revolution under which James II was deposed and William and Mary crowned in his place, however, was the Declaration of Rights that Parliament presented to William and Mary as a condition of their accession to the throne. In this document, *rights* and *liberties* appear as interchangeable terms. From this time forward, we can trace the steady expansion of the use of *right* to the point where it would eclipse *liberty*. By the eighteenth century, liberty itself was regarded as a right, joining life and property in the trinity of great natural rights that the British constitution was widely hailed as protecting.<sup>8</sup> When Britons and Americans spoke of rights in the eighteenth century, they could apply this flexible term to embrace a staggering variety of activities and claims, ranging from such prosaic matters as *estover*, the customary right of gathering wood, to the great civil and political rights of representation, trial by jury, and free exercise of religious conscience.<sup>9</sup>

### THE HOLDERS OF RIGHTS

A second fundamental problem involves identifying the holders or possessors of the rights that constitutional government should protect. In our time we answer this question with little hesitation. Our dominant conception of rights is liberal, subjective, and potentially universal. That is, we regard the free individual as the true rights-bearer, and we aspire to extend the protection of rights to all of humankind, regardless of race, gender, nationality, class, or even age. In the modern understanding, rights belong to autonomous individuals who are presumed to be capable of choosing how they will exercise their liberty and entitled to protection against the coercive powers of government and society alike.

There were certainly important antecedents for this point of view in the new conception of rights that flourished in the seventeenth century. For example, in making the individual's natural right of self-preservation the groundwork for his entire political theory—a right that one could exercise even against the lawful sovereign—Thomas Hobbes advanced

*Treatises of Government*, Peter Laslett, ed. (Cambridge, Eng.: Cambridge University Press, 1988); and the major work of the late Richard Ashcraft, *Revolutionary Politics and Locke's Two Treatises of Government* (Princeton: Princeton University Press, 1986).

<sup>8</sup>On the valence of the word *liberty*, see especially John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution* (Chicago: University of Chicago Press, 1988); and Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge: Harvard University Press, 1992), 55–93.

<sup>9</sup>For examples, see the survey of "The Rights of Englishmen" in Forrest McDonald, *Novus Ordo Seclorum: The Intellectual Origins of the Constitution* (Lawrence: University Press of Kansas, 1985), 9–55.

an essentially subjectivist concept of rights in his great political treatise, *Leviathan* (1651).<sup>10</sup> Locke was concerned with individual rights of a very different kind when he wrote his *Second Treatise* in good measure to enable religious dissenters to hold their own beliefs, free from the coercion of church and state, and when he further argued that parents could hold only a limited trust to shape the religious convictions of their children.<sup>11</sup> Indeed, the prominent place that freedom of conscience gained in seventeenth-century thinking strongly suggests that religious concerns were a crucial foundation for the modern view of rights as the possession of autonomous individuals.

A good case can nevertheless be made that this liberal conception of rights was more a product of the nineteenth century than a mark of the ideas that flourished between the Glorious Revolution of 1688 and the American Revolution of 1776. The classic statements of a liberal theory of rights were works like Alexis de Tocqueville's *Democracy in America* (1840) or John Stuart Mill's extended essay *On Liberty* (1859), both of which were concerned with enabling free-thinking individuals to withstand the conformist pressures of a mass democratic society.

In the eighteenth century, however, many authorities would still have held that the primary holders of rights were not individuals but rather the collective body of the people. The real issue was not to enable individuals to enjoy a maximum degree of choice in their private lives—to choose their lifestyles, we might say—but to protect the people at large from tyranny. A people had a right not to be subjected to the capricious decrees or ukases of unchecked rulers; to be bound to obey only those laws and taxes enacted with their consent, through some process of representation; and to be secured against the arbitrary acts of courts and sheriffs by the “inestimable” right to trial by jury and other restraints. Of course, individuals would be the beneficiaries of the protection that these rights would secure. But the great imperative remained to prevent the revival of the forms of tyranny that Britons and Americans associated with the absolutist monarchies of the seventeenth century.

For Anglo-American whigs, absolutism was simply a synonym for tyranny, and tyranny endangered not merely the rights of individuals but also the security of the entire population. A people ruled by tyranny lived in a condition of slavery—a word that was often used as an antonym for

<sup>10</sup>The scholarly literature is, again, staggering. For a beginning, see Tuck, *Natural Rights Theories*, 119–42, and his introduction to his scholarly edition of *Leviathan* (Cambridge, Eng.: Cambridge University Press, 1991).

<sup>11</sup>See Tully, *Locke in Contexts*, 47–62, for a short statement of Locke's evolving position.

liberty, rather than to describe the exploited labor of the plantation colonies of the Americas.<sup>12</sup> And before the law, slaves lacked any individuality; they were an undifferentiated mass lacking rights of any kind — individual or collective, social or political, civil or natural. The idea that rights might one day be extended to the true slaves of the eighteenth century — the human chattels who worked the plantations of the New World — was a prospect that gradually began to emerge in the era of the American Revolution. As Americans became all too aware, they could hardly proclaim that their own rights were sacred while they were busily depriving African Americans of every claim to humanity.<sup>13</sup> Yet because chattel slavery was an entrenched and vital element of plantation society, its hold could be shaken only after free Americans grasped the meaning of their commitment to equal rights for themselves.

### THE THREAT TO RIGHTS

There was one question about rights that eighteenth-century commentators could resolve fairly readily. If the problem of rights was to protect the people from the government, the ruled from their rulers, one had only to ask which part of government was most likely to act tyrannically. The answer, again, was the crown — or rather a crown left free to act arbitrarily, unchecked by other institutions that could moderate its tyrannical impulses. That was the great lesson that the struggles of the Stuart era kept alive in the minds and hearts of eighteenth-century Britons and Americans. The Stuarts had tried to rule without Parliament, levying fees that looked much like taxes without Parliament's consent, to support a standing army that was sometimes used as a domestic police force, quelling opposition in the same way that pliant judges and sheriffs (both of whom served at the pleasure of the crown) browbeat those conscientious jurors who might otherwise acquit the opponents of Stuart rule.

<sup>12</sup>Reid, *Concept of Liberty*, 47–59.

<sup>13</sup>The question of how slavery became objectionable and the even more difficult problem of understanding how the American revolutionaries resolved their commitment to equality with the existence of chattel slavery have been a source of ongoing controversy among historians. For major statements, see William W. Freehling, "The Founding Fathers and Slavery," *American Historical Review*, 77 (1972), 81–93; Bailyn, *Ideological Origins*, 232–46; Paul Finkelman, "Slavery at the Constitutional Convention: Making a Covenant with Death," in Richard Beeman, Stephen Botwin, and Edward C. Carter II, eds., *Beyond Confederation: Origins of the Constitution and American National Identity* (Chapel Hill: University of North Carolina Press, 1987), 188–225; and Winthrop D. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550–1812* (Chapel Hill: University of North Carolina Press, 1968), 269–426.

The Glorious Revolution had presumably remedied this danger for all time. In Britain, unlike France, monarchy itself was constitutionalized and thus limited. Henceforth it would act only with the consent of Parliament. Though judges were still appointed by the crown, they now held their commissions during good behavior, which meant that they could not be removed simply because they had displeased the crown. On this independent tenure, they would no longer be the tools of the crown; and the English people still enjoyed the invaluable right to trial by jury. At the margins of British politics, a few dissenters worried that the political influence used by the crown and its ministers to control both houses of Parliament was sapping the principles of 1689. But amid the general complacency and prosperity of the eighteenth century, their views were largely ignored at home—though not in America.<sup>14</sup>

In this self-satisfied atmosphere, the Declaration of Rights of 1689 was increasingly seen as a conservative act. It had not been a clarion call to revolution, nor had it created new rights to which Parliament and its constituents had not already been entitled. The Declaration simply confirmed that the rights and liberties that the Stuarts had infringed and usurped were again secure.<sup>15</sup> They were rights to which Englishmen had always held clear title and which only a marauding band of royal Scottish ruffians, intoxicated by the example of the absolutist monarchy of France, could have dared to steal.

## THE SOURCES OF RIGHTS

If the Declaration of 1689 had only affirmed but not created rights, where, then, did rights originate? On what authority did rights finally rest—especially if they were conceived as something more than liberties or privileges granted by the crown? Some of the most powerful political thinking of the seventeenth century was devoted to this fundamental problem. The famous descriptions of life in the state of nature that generations of American students have encountered in Hobbes's *Leviathan* and Locke's *Second Treatise* were only two of the answers this question evoked. In trying to imagine why men left the state of nature to form ordered societies, both Hobbes and Locke sought to rest their divergent conceptions of gov-

<sup>14</sup>Bailyn, *Ideological Origins*, 34–54.

<sup>15</sup>Schwwoerer challenges this view in her recent book. For her summary of this conservative interpretation, see Lois G. Schwwoerer, *The Declaration of Rights, 1689* (Baltimore: The Johns Hopkins University Press, 1981), 5–6.

ernment on the idea that men voluntarily formed compacts to provide greater security for their rights.

One reason we still read Hobbes and Locke so closely is that their emphasis on the state of nature gave their writings a universalist appeal that many of their contemporaries failed to attain. The dominant form of argument in the great disputes of the seventeenth century was not philosophical but historical. Royalists and their parliamentary adversaries told two different stories about the origins of English rights, liberties, and privileges. For the opponents of the Stuarts, the history of England was essentially a tale of liberty lost. Prior to the Norman conquest of 1066, there had existed an "ancient constitution" of elective monarchy, legislative assemblies, and popular rights. The arrival of William the Conqueror ("a French bastard landing with an armed banditti," as Thomas Paine observed in *Common Sense*<sup>16</sup>) had changed all that, imposing the "yoke" of Norman feudalism on a once-free, Anglo-Saxon people. During the centuries since, some of their rights had been partly recovered through Magna Carta, in the common-law courts where trial by jury flourished, and in the efforts of the House of Commons to secure its legislative privileges.<sup>17</sup>

The idea of this "ancient constitution" was a shade less mythical than the primordial state of nature that Hobbes, Locke, and other writers imagined. It was a history of sorts, but a history that depended on belief in certain customs and rights that dated to time immemorial—time beyond memory—and which was not easily confirmed through hard documentary evidence. In many ways, the royalist critics of this story proved the better historians. The ancient constitution was, they thought, a figment of their adversaries' imagination. Their own research suggested that the rights claimed for Parliament were indeed historical in a more immediate sense: Their origins could all be traced to particular acts of royal authority for which documentary evidence survived. And this in turn suggested that what had been granted once could be revoked later.

Both the philosophical and the historical modes of tracing the origins of rights continued to flourish in the eighteenth century. Many writers invoked the idea of a Lockean social compact to explain the origins of government. It became a great cliché to hold that government originated in a compact in which the rights that individuals exercised in the state of

<sup>16</sup> [Thomas Paine], *Common Sense* (Philadelphia, 1776), in Michael Foot and Isaac Kramnick, eds., *The Thomas Paine Reader* (Harmondsworth, Eng.: Penguin, 1987), 76.

<sup>17</sup> The classic and seminal account of this debate is J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge, Eng.: Cambridge University Press, 1957).

nature were surrendered first to society and then to government. Rejecting Hobbes's naked emphasis on man's fear of death, eighteenth-century writers argued that men reasonably yielded the absolute liberty they enjoyed in nature to gain greater security in the exercise of the rights they retained. But alongside this essentially philosophical position, a belief in the distinctive historical experience of the English-speaking peoples remained an essential part of the Anglo-American understanding of rights.<sup>18</sup>

In one sense, the ability to invoke both philosophical and historical arguments for the origins of rights testifies to the richness of the sources on which eighteenth-century writers could draw. But a diversity of accounts can also be a source of uncertainty—especially when they rely upon the fictive notion of a state of nature, or upon customs dating from time immemorial, or upon the contested documentary evidence of the past. And the extension of these rights from the mother country of England to its American colonies complicated the issue further, for the question of whether the American colonists were entitled to all the rights and liberties of Englishmen was the great issue that disrupted the British empire in North America after 1765.

### THE FORM AND FUNCTION OF A DECLARATION OF RIGHTS

Our modern understanding of the nature and function of the Bill of Rights has been shaped primarily by its judicial interpretation in the twentieth century. For us, the federal Bill of Rights and its great descendant, the Fourteenth Amendment, appear as a set of legally enforceable commands. Although these clauses are addressed to all branches and levels of government, the ultimate responsibility for their enforcement is often ascribed to the judiciary. Just how broadly or narrowly these provisions should be read is, of course, the principal source of much of the controversy that has surrounded the Supreme Court since at least 1954, when its decision in *Brown v. Topeka Board of Education* signaled the end of legal segregation. But the idea that the Bill of Rights and the Fourteenth Amendment comprise a set of legally binding and judicially enforceable commands captures the modern understanding of the essential nature of constitutionally declared rights.

<sup>18</sup> Reid, *Authority of Rights*, 9–15.

That understanding, however, was not immediately or fully available to the constitutionalists of the seventeenth and eighteenth centuries. When they contemplated adopting public statements of rights, they were acting within a different legal context and responding to particular political circumstances. They had no single model of the form that a declaration of rights might take or the function it would serve, but rather a set of possibilities that illuminates the complexity and ambiguity of the concept itself.<sup>19</sup>

In 1628, for example, the parliamentary opponents of arbitrary taxation could have proposed a statute affirming the liberties of the subject against the arbitrary acts of the crown, but such a measure would never have received the assent of Charles I. Instead, the Commons "seized on a suggestion of the more antiquated parliamentary form of a petition to the king," in the hope that Charles might approve this moderate Petition of Right in exchange for the new revenues he sought. In fact, Charles did approve the Petition; but once Parliament was prorogued, he issued his own edited version of the text, one that left him free to collect the duties of "tonnage" and "poundage" against which Parliament had protested. And when Charles went on to govern without Parliament during the next decade, the crown and its royal judges largely ignored the Petition, which survived more as a beacon to an impotent opposition than as a legal text.<sup>20</sup>

The Agreement of the People of 1647 took a different and potentially far more modern form. Drafted at a point when radical revolutionaries could imagine England as a commonwealth without a king, the Agreement was a prototype for the written constitutions the Americans would begin to implement a century and a quarter later. Its protections for rights were incorporated in the body of the Agreement, not set apart as an introductory statement of principle. Equally important, these articles would have operated as restrictions on Parliament itself, the institution normally regarded as the bulwark of popular rights.<sup>21</sup>

<sup>19</sup>Here I follow Bailyn, *Ideological Origins*, 184–98; and Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 259–305.

<sup>20</sup>Derek Hirst, *Authority and Conflict: England, 1603–1658* (Cambridge: Harvard University Press, 1986), 152–59.

<sup>21</sup>There are several versions of the Agreement dating from the fall of 1647 to 1649; for a 1649 printing, see *An Agreement of the Free People of England*, in William Haller and Geoffrey Davies, eds., *The Leveller Tracts, 1647–1653*, reprint ed. (Gloucester, Mass.: Peter Smith, 1964), 318–28. On the potential influence of the Levellers on the American revolutionaries, see Michael Kent Curtis, "In Pursuit of Liberty: The Levellers and the American Bill of Rights," *Constitutional Commentary*, 8 (1991), 359–93.

The Declaration of Rights of 1689 took still another form. It had three distinct parts:

1. a list of thirteen offenses committed by James II "contrary to the known Laws and Statutes, and Freedom of this Realm," which justified the rejection of his rule;
2. a second list of thirteen "undoubted Rights and Liberties" of the English people, now being "declare[d]" by the two houses of Parliament; and
3. a resolution to extend the throne to Prince William of Orange and Princess Mary, in the expectation that the new rulers "will still preserve them from the violation of their Rights, which they have here asserted, and from all other Attempts upon their Religion, Rights, and Liberties."

In effect, the Declaration of Rights had a threefold character. Its first section formally ended the reign of James II; the second provided a formal statement of fundamental rights, all of which had been endangered by the excesses of royal power; and the third marked a tentative if incomplete step toward the idea of a written constitution, at least insofar as it specified terms under which the new monarchs would rule.<sup>22</sup>

The American revolutionaries drew on the multifaceted nature of these documents, but again in diverse ways. Their protests against Parliament and the king followed the classic form of petitions seeking the redress of grievances and invoking legal precedents and customary understandings as evidence for their validity. Once petitioning gave way to armed rebellion in 1775, statements of rights were put to more radical ends. Just as the first section of the parliamentary Declaration of Rights of 1689 renounced the authority of James II, so the Declaration of Independence of July 4, 1776, enumerated the traditional English rights and liberties that his successor, George III, was accused of infringing. But most of those charges had already appeared in the preamble to the Virginia constitution, by way of justifying the renunciation of royal authority that accompanied the establishment of a new government. More important, the preamble to the Declaration of Independence affirmed natural rights of a still more fundamental kind when it reminded "a candid world" that Americans were now entitled to exercise their "right" and "duty" to "throw off" the old regime "and to provide new Guards for their future security." The Declaration of Independence was thus not merely an act of state, announcing that a new people were about to "assume among the powers of the

<sup>22</sup>I am grateful to Professor Pauline Maier for stressing this point to me.

earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." It was also a retrospective declaration of the English rights whose repeated violation entitled them to exercise the natural right of the people "to institute new Government."<sup>23</sup>

Statements of rights, then, could take any of several forms. They might be protests couched as conciliatory petitions, appealing to legal precedents both well known (Magna Carta, the Petition of Right) and obscure. They could be emboldening declarations of resistance and revolution, justifying a shift of loyalty from one monarch to another—or to none. They might either be incorporated in written constitutions or left to hang as affirmations of great principles, possessing great rhetorical power but of uncertain legal effect. Or they could be cast in statutory form, which would give them legal authority but at the cost of leaving them subject to later revision or revocation. The idea that declarations or bills of rights could evolve into judicially enforceable, legal commands may well have been implicit in these possibilities—especially the last—but that was by no means the sole understanding of these documents that the disputers of the seventeenth and eighteenth centuries supported.

### THE POPULARITY OF RIGHTS-TALK

There is a final aspect of rights-talk that the politicians, philosophers, and lawyers of the early modern era perhaps did not grasp as well as we might—but which still links the progress in their thinking with our concerns. That connection might be simply stated in this way: Why is rights-talk such an attractive idiom?

The beginnings of an answer to this question lie in the distinction between the traditional notion of "liberties and privileges" and the modern concept of rights. A theory of liberties and privileges is perfectly consistent with a belief in inequality, for it presumes that the state often has good reasons to grant particular legal powers or exemptions to different classes of citizens or subjects. The language of rights, by contrast, is less tolerant of distinctions, and it is therefore at least implicitly egalitarian. It presupposes that the capacity to exercise liberty is an innate quality (or property) of a free people and that when the state seeks to limit the exercise of that right to some class of persons, it must have a compelling rationale for doing so. And it follows from this supposition that those who feel

<sup>23</sup>For a broader reading of the cultural import of the Declaration, see Jay Fliegelman, *Declaring Independence: Jefferson, Natural Language, and the Culture of Performance* (Stanford: Stanford University Press, 1993).

that their innate capacity to act has been denied will find the language of rights the most attractive political dialect they can speak, because it will ground their claims on the broadest foundation.

In the seventeenth and eighteenth centuries, the principal holders of rights were the free, adult, property-holding (and white) males who alone were eligible to become citizens in the full meaning of the term, including gaining the right to vote. Wives whose legal identities were subsumed by their husbands; urban artisans who worked only for wages in a master craftsman's shop; tenant farmers in the countryside; younger sons who still did their father's bidding; daughters waiting to choose a groom—all were dependent on someone else for their living, and all could therefore be said to be incompetent to enjoy a full measure of rights. Yet in both seventeenth-century England and eighteenth-century America, the resort to rights-talk worked to subvert that principle, for at least two fundamental reasons.

First, the arguments developed by leading thinkers and politicians were framed in expansive terms. Though John Locke's emphasis on the right of property has been treated as a response to the emergence of a market economy, and therefore to be interpreted in terms of certain economic interests,<sup>24</sup> his *Second Treatise* also defends the rights of mothers to have an equal say with the father in the rearing of children and the preferences of children to choose their own religious faith, regardless of the authority, the political elites who generated the English civil war of the 1640s, the Glorious Revolution of 1688, and the American Revolution of 1776 all spoke as if they were representing their entire society. The broader the mandate they could claim, the greater legitimacy their positions would seem to enjoy. Thus defenders of the legislative privileges of Parliament argued that the whole English people were somehow represented in the House of Commons, while colonial leaders made similar claims for their own representative assemblies. They were acting, that is, not in their own behalf, but as agents for whole peoples whose rights

<sup>24</sup>The classic statement of this argument is by the late Canadian political theorist, C. B. Macpherson, *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962); and see James Tully, "After the Macpherson Thesis," in *Locke in Contexts*, 71–95.

<sup>25</sup>See Chap. VI, "Of Paternal Power," in Locke, *Two Treatises*, ed. Laslett, 303–18. For a gendered reading of the same passage that emphasizes the priority of matters of inheritance over the rights of conscience, see Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (New York: Alfred Knopf, 1996), 97–101.

they were merely defending.<sup>26</sup> But once they made that claim, what was to stop ordinary people from thinking that their social superiors really meant what they said or from appropriating elite rhetoric to advance their own claims for recognition and justice?

The language of rights, then, is inherently expansive and potentially egalitarian. Once it enters into common speech, it will no longer be heard only in the salons of the gentry; it will pass into wider usage, come to be spoken in new venues, and be put to new uses. If the whole of the English or American peoples were somehow represented in their assemblies, why should the suffrage (the right to vote) be limited only to male property-holders? Why should the legal identity of women disappear beneath the authority of their fathers or husbands? Why should apprentices and journeymen not enjoy the same rights as their artisan-employers? More troubling still, how can societies whose members enjoy the birthright of liberty systematically deny not only the liberty but also the humanity of the Africans and African Americans they held as chattel slaves?

To say that the elite classes of England and America were reluctant to recognize all the claims of rights that their revolutionary politics inspired is thus only half of the story. By describing their claims as fundamental rights, the elite classes made it possible for groups outside the mainstream to appropriate the universal and egalitarian idiom of rights-talk for their own ends—which were often incidental to the original grievances that political leaders were pressing, but no less important or deserving. Much of the history of American rights since 1776 can be written as a story of the way in which new claimants of rights have appropriated an older language to their own ends.

<sup>26</sup>For an extensive development of this theme, see Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W. W. Norton, 1988).

## The Colonists' Appeal to Rights

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Claims of rights were, of course, at the heart of the dispute that carried the American colonists from resistance to revolution in the decade separating the Stamp Act controversy of 1765 from the outbreak of civil war in Massachusetts in April 1775.<sup>1</sup> The initial American opposition to parliamentary taxation drew deeply from hallowed English traditions. If taxes were the free gift of the people, conveyed through their elected legislators, Americans could not be bound to pay a tax imposed by a Parliament in which they were unrepresented. The potential scope of this debate was broadened when Parliament accompanied its repeal of the Stamp Act in March 1766 with the passage of a Declaratory Act affirming its legal power to bind the colonies "in all cases whatsoever." Should Parliament ever assert this claim in practice, the colonists would have to ask whether they were bound to obey any form of legislation, and not merely the special category of taxation. When the British ministry and Parliament responded to the Boston Tea Party of December 1773 with a set of Coercive Acts punishing Massachusetts for its defiance, it converted the threat of the Declaratory Act into a functioning policy of repression. The result was civil war and, eventually, independence.

Rights other than representation were also invoked during the controversies leading to independence. For example, one provision of the Revenue (or Sugar) Act of 1764 allowed imperial officials to prosecute violations of the navigation system regulating colonial commerce in

<sup>1</sup>Early twentieth-century historians would have questioned this statement, but ever since the publication of a seminal article by Edmund S. Morgan, "Colonial Ideas of Parliamentary History, 1764-1766," *William and Mary Quarterly*, 3d ser., 5 (1948), 311-41, the dominant view of the origins of the conflict has stressed both the sincerity and the merits of the colonists' arguments. For the further development of this interpretation, see Edmund S. Morgan and Helen M. Morgan, *The Stamp Act Crisis: Prologue to Revolution*, rev. ed. (New York: Macmillan, 1963); Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge: Harvard University Press, 1992), 160-229; and in a somewhat different key, all four volumes of John Phillip Reid, *The Constitutional History of the American Revolution* (Madison: University of Wisconsin Press, 1986-93).

vice-admiralty courts, where defendants did not enjoy trial by jury. The belief that trial by jury was as essential to liberty as representation had become an axiom of Anglo-American thinking.<sup>2</sup> Indeed, these two rights were nearly equivalent in importance and parallel in purpose. Both raised barriers against the abuse of royal power: representation by requiring the crown to govern with the express consent of the governed; and jury trial by preventing royal judges and sheriffs from willfully using the law to punish opponents of the crown.

The colonists were never hard pressed to identify the rights that Parliament and other imperial agencies were endangering. As the legal historian John Phillip Reid has observed, the real problem was to locate the sources of authority for these rights. "The rights were British rights and well known," Reid notes. "Why Americans were entitled to them was more controversial and more complicated." Like their political ancestors, the colonists could tap a potent brew of philosophical, legal, and historical arguments. Reid identifies no fewer than ten distinct sources of authority that Americans invoked as they sought to prove why they did not have to bend their knees to Parliament, ranging from "their rights as Englishmen" to the idea that the first English colonists in the New World had carried their rights with them or had repurchased their rights by the sweat and toil of making settlements. Many of these arguments were formidable, drawing as they did on essential strands of the Anglo-American constitutional tradition.<sup>3</sup>

Yet the arguments used to justify parliamentary sovereignty over America were just as strong, for they drew upon the single most profound consequence of the Glorious Revolution: the recognition that Parliament was the supreme source of law within the extended empire of which the colonies were undeniably a part. The American claim to equal rights might have merit—but only up to a point. When this claim confronted the doctrine of parliamentary sovereignty, something had to give—or so the defenders of British policy insisted. In a sense, their arguments placed American rights in the same tenuous position in which seventeenth-century royalists would have left the liberties and privileges of the English people. If those rights existed, their authority rested on the sovereign consent not of the governed but of the government.

By 1773, some American leaders began to hint that the colonies should

<sup>2</sup>Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill: University of North Carolina Press, 1960); John Phillip Reid, *The Authority of Rights* (Madison: University of Wisconsin Press, 1986), 47–59.

<sup>3</sup>Reid, *Authority of Rights*, 65–66.

seek to negotiate a "bill of rights" with the government. Such a document would specify exactly what rights and liberties Americans would enjoy within the larger framework of the British empire.<sup>4</sup> Even after Parliament answered the Boston Tea Party with the Coercive Acts, many colonists hoped that the government of Lord North would resolve the crisis by granting an American bill of rights. When the First Continental Congress met in Philadelphia in September 1774, it accordingly adopted a formal Declaration of Rights to publicize the essential principles of the diplomatic settlement it would accept. Nothing came of this initiative, however. The notions of colonial rights advanced by Congress exceeded anything that the British government was prepared to grant. In the view of King George III, his ministers, and most members of Parliament, the "first right that the colonists had to exercise was the duty of obedience.

After 1774, however, royal authority over America all but ended. In nearly every colony, legal institutions of government were in a state of collapse. Royal governors could not allow legislatures to meet, because their members would then conspire to promote the cause of resistance. At the local level of government, justices of the county courts held crown commissions, which rendered their authority suspect. In this interregnum, the colonies created an "extralegal" network of committees, conventions, and congresses to coordinate resistance and act as a surrogate government. Moreover, once civil war broke out in Massachusetts in April 1775, Americans could plausibly argue that they no longer owed the crown any obedience. In the familiar version of the social compact theory of government, obedience was something the subject owed the crown in exchange for its protection. Since a king who made war on his subjects was hardly protecting them, Americans need no longer regard George III as their lawful sovereign.<sup>5</sup>

From these circumstances, Americans drew a stunning conclusion: The dissolution of legal government had placed them in a condition akin to the state of nature that they had read about in Locke and Hobbes. Clearly they had not returned to the pure state of nature that preceded both society and government. Wives could not leave their husbands or

<sup>4</sup>Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (New York: Alfred Knopf, 1979), 12–14.

<sup>5</sup>For accounts of this interregnum, see Pauline Maier, *From Resistance to Revolution: Colonial Radicals and the Development of American Opposition to Britain, 1765–1776* (New York: Alfred Knopf, 1972), 228–96; Jerrilyn Greene Marston, *King and Congress: The Transfer of Political Legitimacy, 1774–1776* (Princeton: Princeton University Press, 1987); Rakove, *Beginnings of National Politics*, 21–86.

husbands their wives or children their parents; servants and slaves could not proclaim a jubilee and bid their masters adieu (though in the Chesapeake Bay, hundreds of slaves rallied to the promise of freedom extended by Lord Dunmore, the last royal governor of Virginia, in November 1775). But Americans believed that they were living in a society that no longer enjoyed legal government—and to restore it, some positive act was required. Some procedure had to be devised to leave this unprecedented condition and to establish new institutions of government. The old colonial charters could not simply be reinstated. One essential limb of government—the executive, representing the crown—had been lopped off. Many of the colonial councils that doubled as upper houses of the assemblies were appointed by the crown; so were the judges. These could not simply be replaced; the entire framework of government had to be designed anew.<sup>6</sup>

This was the occasion that set American constitutionalism on its innovative course, in the process raising new questions about the meaning and import of bills of rights. Americans could no longer regard a constitution as the mixture of law, custom, conventions of governance, and institutions existing at any one moment in time. As the provincial conventions individually began to form new governments in late 1775 and 1776, they naturally thought of the documents they were drafting as *constitutions* in a new sense—as charters drafted at a particular moment of time, creating the institutions that would henceforth act under the authority they bestowed.<sup>7</sup> And such constitutions could acquire deeper aspirations still: to determine what these governments could and could not do. In this sense, a constitution would become supreme fundamental law, superior

<sup>6</sup>Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), 127–61, is the basic account; the book as a whole has shaped the interpretation of this transformation for an entire generation of scholars. Also valuable on the process of constitution making is Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era*, trans. Rita and Robert Kimber (Chapel Hill: University of North Carolina Press, 1980); and Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge and London: Louisiana State University Press, 1980).

<sup>7</sup>On this fundamental development, see Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge: Harvard University Press, 1992), 175–84; Gerald Stourzh, "Constitution: Changing Meaning of the Term from the Early Seventeenth to the Late Eighteenth Century," in Terence Ball and J. G. A. Pocock, eds., *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1988), 35–54; and Horst Dippel, "The Changing Idea of Popular Sovereignty in Early American Constitutionalism: Breaking Away from European Patterns," *Journal of the Early Republic*, 16 (1996), 21–45.

to every act that government henceforth undertook in its name. Moreover, if acts of government violated the constitution, they could be judged unconstitutional and thus invalid.<sup>8</sup>

How to make these charters fully constitutional was the great challenge that Americans faced after 1776. To achieve this end, Americans gradually concluded that these documents had to be adopted under exceptional procedures: framed by conventions specially elected for the sole purpose of drafting the constitution and then approved through some act of popular ratification. But these were not the rules under which Americans acted in 1775 and 1776. Few Americans could yet grasp these questions in their full detail, and even if they could, the urgent need to mobilize the country for war and independence left little time for the fine points of constitutional theory.<sup>9</sup>

During the course of the Revolution, eleven of the thirteen states drafted new constitutions of government.<sup>10</sup> Eight of these eleven attached declarations or bills of rights to their completed constitutions. Determining the exact relation of these statements of rights to the main texts of the new constitutions was just one of the questions that could barely be perceived, much less resolved, in 1776. In Virginia, for example, the Provincial Convention approved the Declaration of Rights more than a fortnight before it adopted the constitution; neither document referred to the other; nor was it even clear that contemporaries regarded the Declaration as part of the constitution.<sup>11</sup> In 1787 no less an authority than

<sup>8</sup>This was the opposite of the prevailing British understanding of a constitution. There an act of Parliament might be regarded as unconstitutional if it departed from some existing norm or practice; but if it was legally enacted by Parliament and signed by the king, that was all that mattered. One crucial demonstration of this difference revolved around the Septennial Act of 1716. As part of the general constitutional understanding worked out in the wake of the Glorious Revolution, Parliament had adopted a Triennial Act limiting the tenure of an elected Parliament to three years. The idea that a new parliament should be elected every three years was thus part of the British constitution when the throne passed from Queen Anne to King George I, the first of the Hanoverian dynasty. Amid the intense conflict and political uncertainty surrounding this transition, however, the new Parliament adopted an act extending its own tenure to seven years. In a sense, that act was unconstitutional; but it was legal nonetheless, and thus became part of the post-1716 British constitution. See Reid, *Authority of Rights*, 75–78.

<sup>9</sup>For a discussion of the theoretical issues, see Wood, *Creation of the American Republic*, 306–43.

<sup>10</sup>Connecticut and Rhode Island did not, because under their seventeenth-century charters, all officers of government were appointed within the colony; hence there was no royal branch of government to replace.

<sup>11</sup>There are many accounts of the drafting of the Virginia Declaration and Constitution, but two of the best are to be found in the headnotes accompanying relevant documents in Robert A. Rutland, ed., *The Papers of George Mason, 1725–1792* (Chapel Hill: University of North Carolina Press, 1970), I, 274–310; and Julian P. Boyd, ed., *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1950–), I, 329–86.

James Wilson, one of the nation's most eminent lawyers and a leading framer of the Federal Constitution, seemed unaware that Virginia had a bill of rights.<sup>12</sup>

To think of these bills of rights as organic parts of a constitution may miss a more important point. Their function was less to establish rules regulating the workings of government than to remind both the people and public officials of the basic principles by which government should conduct its affairs. Rights had to be declared not because the constitutions would be defective without them but rather because that was what Americans believed a people were supposed to do when they left the state of nature to establish a civil government. This was the great lesson they had learned from their reading; they would be remiss not to apply it when they suddenly found themselves reenacting the mythic drama of forming a government.

At first glance, this belief seems so abstract and academic as to have mattered only to a small circle of well-read leaders. But in fact there is evidence that this concern did penetrate into the ranks of the citizenry. In Massachusetts, the one state where the process of constitution writing proved most arduous, a number of towns insisted that a properly designed constitution had to meet three crucial requirements. First, it had to be drafted by a body appointed for that purpose alone, because a constitution drafted by the ordinary legislature could in theory be amended, altered, or even violated by any later meeting of the same body. Second, a constitution had to gain the positive assent of the people at large; it had to be *ratified* in a way that indicated that the people truly had agreed to the compact of government. Third, in forming this compact, the rights it was meant to secure should be formally declared. Without such a declaration, the prevailing theory of legislative supremacy left a troubling implication. Would there be any limit on the reach of legislative power or the methods the legislature could use to enforce its will, if fundamental rights were left undeclared? By combining statements of the broad principles of government with such specific protection as the right to trial by jury, bills of rights could somehow erect a fence around the sovereign powers of government once it was reconstituted.<sup>13</sup>

By insisting that all three of these points be honored, the citizens of

<sup>12</sup>John Kaminski and Gaspare Saladino, eds., *The Documentary History of the Ratification of the Constitution* (Madison: State Historical Society of Wisconsin, 1976-), II, 390.

<sup>13</sup>On the drafting of the Massachusetts constitution, see Oscar Handlin and Mary F. Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Harvard University Press, 1966).

Massachusetts effectively delayed the adoption of a constitution in their state for fully four years. With the adoption of the Massachusetts constitution in 1780, American constitutionalism took a major step forward by establishing a clear precedent for procedures for drafting and ratifying constitutions. Yet the question of how bills of rights fitted into this new model of constitutionalism remained poorly formulated and unresolved. Were such declarations something more than statements of principle? Were they legally enforceable guarantees that individuals could apply against improper acts of government? If so, how were they to be enforced? Or were they better regarded as moral injunctions to citizens and officials alike (as their preference for the verb "ought" implied)? And suppose that such a declaration failed to list all the rights, liberties, and principles worth affirming. Did that omission mean that these other rights had somehow been diminished in importance? Or suppose a state failed to add a declaration of rights to its constitution (as had New Jersey, New York, and South Carolina). Would the rights of its citizens then be less secure? Why would Americans need a bill of rights at all, if they were governed by laws passed by their own freely elected representatives?<sup>14</sup>

These questions came to the fore during the debate over the Federal Constitution of 1787. But to explain why they did so, we must understand why the framers of the Constitution could have grown so skeptical about the value and utility of bills of rights, which James Madison dismissed as so many "parchment barriers" to be admired, perhaps, in principle, but not relied upon in practice. Before that perception became possible, the American revolutionaries first had to win a long and arduous war.

<sup>14</sup>Wood, *Creation of American Republic*, 271–73; Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred Knopf, 1996), 302–10. The contents of the state bills of rights are surveyed in Bernard Schwartz, *The Great Rights of Mankind: A History of the American Bill of Rights*, expanded ed. (Madison, Wis.: Madison House, 1992), 53–91. For state-by-state analyses of the history of declarations of rights in the colonial charters and revolutionary constitutions, see the essays collected in Patrick T. Conley and John P. Kaminski, eds., *The Bill of Rights and the States: The Colonial and Revolutionary Origins of American Liberties* (Madison, Wis.: Madison House, 1992), which includes a valuable bibliographic essay by Gaspare Saladino. The most closely studied state declaration has been Virginia's; see the essays collected in Jon Kukla, ed., *The Bill of Rights: A Lively Heritage* (Richmond: Virginia State Library, 1987).