Women's Rights Talk[1]

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A special issue of the *Journal* of *American History,* intended to mark the bicentennial of the United States constitution in 1987, made "the study of rights" the natural starting place for examination of American constitutionalism. The editor's introduction focused on rights consciousness, calling it a pivot of "identity for social groups as they have organized." Although he aclmowledged objections to viewing the Constitution as a vehicle for extending access to groups excluded from power, nonetheless he saw rights consciousness as having been a central means for them "to define, assert, and validate their groups' distinctive identities and claims."[2]

I want to assess the rights claims made by women in particular, in the context of the past few decades' criticism of rights discourse. Unprecedented controversy over the suitability of constitutional rights claims to advance democratic access has arisen, focusing on the very character of rights claims and rights consciousness and the ways these have inflected the political order of the United States. I will summarize, hoping for forgiveness of my distillations and elisions.

Critical legal studies began this trend in the late 1960s and 1970s, with the perception that rights claims were a double-edged sword, having just as much capacity to preserve existing powerful interests as to give new legitimacy to the powerless. For a long period of American history from

1. This paper is based on a talk given at "Rights – Civil, Human, and Natural," a Ph.D. Seminar of the Consortium for American Studies held at the Center for American Studies at the University of Southern Denmark in Odense, in October 1999.

2. David Thelen, "Introduction" to special issue "The Constitution and American Life," of *The* Journal of *American History,* 74:3 (Dec. 1987), p. 795.

approximately the 1870s to the 1930s, the principal "natural" rights successfully defended in courts were *property rights*, in the hands of individual and corporate wealth-holders.[3] The Supreme Court in that era embraced the doctrine that "there are individual rights resting on a natural basis, to which courts must give effect," in the words of one Progressive-era critic. Yet the Court offered no opposition when states kept women from being lawyers or voters as men were, or white mobs prevented blacks from voting, or Congress excluded Chinese immigrants while allowing in Europeans.[4] The Court's record in this period on the civil rights of minority groups, women, and workers failed to accord with the universalistic pretensions of rights theory. The defense of property rights, especially as embodied in the doctrine of "liberty of contract" between employer and employee, trumped group rights claims, serving to curtail expansions of state power on behalf of the dispossessed and to limit the latter's ability to assert collectively-or individually-claimed rights.

Following the legal realists of the 1920s and 1930s, critical legal theorists emphasized that so-called private rights did not emerge from "nature" but resulted from social and legal construction that had to be maintained by the state in order to exist. If rights and freedoms could be exercised, that was not because they sprang up naturally or privately but rather because the state protected these rights and freedoms, either generally or selectively – by recognizing and upholding the rights and thereby privileging their possessors. Critical legal analysts declined to accept the picture of the world in which private and public realms were clearly discernable and separate, the former the realm of exercise of rights and freedom, the latter the realm of coercion by state power. Since the exercise of so-called private rights or freedoms by their possessors had *social* consequences – consequences for all in the society – to see these rights as

3. The following precis of Critical Legal Studies draws on my general reading in the work of many scholars, especially Robert W. Gordon, Morton J. Horwitz, Duncan Kennedy, Frances W. Olsen, and Robin West; my historical emphasis here is especially indebted to Horwitz' brief "Rights," *Harvard Civil Rights/ Civil Liberties Law Review*, 23:2 (Summer 1988), 393-406. I have also learned much from Elizabeth M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement," *New York U. Law R.*, 61 (Oct. 1986), pp. 589-653.

4. See *Bradwell v. the State*, 83 U.S. (16 Wall.) 130 (1872); the *Civil Rights Cases*, 109 U.S. 3 (1883); *Fong Yue Ting* v. *U.S.*, 149 U.S. 698 (1893). The Progressive-era quotation is from Roscoe Pound, "Liberty of Contract," *Yale Law Journal*, 18 (1909), 454, at n67.

a private matter was to mask the operations of state power and the relative advantages and disadvantages for different groups in the existing system.

According to this line of argument, liberal rights discourse had encouraged several counterproductive dichotomies – not only dividing private from public, but also self from other, individual from community. Critical legal theorists deplored the individualism of rights claims. Rights were premised on "ownership," on the model of the possessive individual, the model which underlay capitalist accumulation and separated the individual from social networks. If the legal system posited a world of atomistic individuals who defended or asserted rights for themselves in relation to the public realm of the state, that prevented a more accurate portrayal of the way that interest groups (of unequal power) contended with one another and jockeyed for power and leverage within the state framework. Such a model also reified rights, so that one person's or group's rights were set against another's, offering no guidance on how to resolve conflicts between competing rights.

Also, critical legal theorists contended that from the point of view of disempowered social groups intending to mobilize for change in the system, strategies reliant on claims of rights had a boomerang effect. These strategies were counterproductive and undercut disempowered groups' own stated aims, because rights claims in a liberal framework could promote only formal or procedural gains and not substantive justice. The adoption of rights claims put the brakes on militancy, it was argued – by inducing the disempowered to accept the state's predefined goals and to become more passive, awaiting the state's grant of entitlements. The translation of transformative political vision into the legal argumentation necessary to attain rights whittled down the process of political mobilization itself. Instead of transforming the system, the dissident group was coopted into it.

In the later 1970s and 1980s, feminists and critical race theorists contested some of the starkest of these accusations and countered the bleakness of this vision of rights, in part, while extending the critique in other directions by focusing on the *chavacter* of the individual envisioned in earlier liberal rights claims. In American political theory (as in the Western canon generally), the "individual" who is seen as endowed with inherent rights is abstractly conceived. Abstracted from social context,

this "individual" has no social referents and social situatedness. The political theory of social contract underlying this theoretical move posits a pre-social human individual, a human who arose without there being a group or society (to say nothing of a specific mother and father) sustaining him or her; it imagines an individual who need not be specified as him or her, indeed, because the individual has no gender, no race, no other marking attributes. It imagines that this abstract individual stands for, serves as a proxy for all varieties of actual human individuals.

Yet, as feminists pointed out in the 1970s, a neuter being is logically and historically impossible; an abstraction such as this dodges the reality that any individual is situated socially and historically. The abstract individualism of Western political theory has masked the (actual) particularity of the "individual," who is not "man" in the most general and inclusive sense of all humanity but a man, and undoubtedly a white man, and, traditionally, a grown man, a head of household. The scalpel of gender analysis has peeled back the logic of abstract individualism to reveal that the theorized individual is not neuter, but situated, himself.[5]

The larger point here – in critical race theory as well as in feminist critiques – is not simply about neutrality vs. situatedness or unmarkedness vs. descriptive markings. It is about relative power. The individual rights-holder is unmarked in theory, yet what allows him to appear as such is his being an adult white male head of a household, who has power over others. This remains unacknowledged in canonical rights theory. Moreover, the subordination of those who are not "in the place of the individual" is part of what constructs the very position and (unacknowledged) power of the normative individual. Those who are not white male heads of household are not only differently situated; their subordination is part of what gives the abstracted rights-holder his independent position.

Sharp criticism of the individualism of rights claims unites critics such as these with critics who in other respects seem far more conservative, such as Mary Anne Glendon.[6] Perhaps Glendon's insightful and often

5. Landmarks in the extensive feminist political science literature on this issue are Susan Moller Okin, *Women in Western Political Thought* (Princeton, Princeton U. Pr., 1979) and Carole Pateman, *The Sexual Contract* (Stanford, Stanford U.P., 1988).

6. Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (N.Y., Free Press, 1991).

eloquent analysis of rights discourse in *Rights Talk* does not belong on the "right" wing conventionally conceived. Indeed, the spectrum of criticisms battering rights discourse measures the unsuitability of "right" and "left" terminology to demarcate current distinctions in American political discourse. As compared to critical legal theorists, critical race theorists, and feminists, however, Glendon's (and also communitarians') criticisms of rights discourse fall on the conservative side. They are conservative in expressing (implicitly if not explicitly) a nostalgia and yearning for past times when there weren't so many disparate individuals and groups jostling in the open, stating their own injuries and pressing their own claims; a time when it was expected and more likely for the disempowered to accept the disparity of power in the hands of others as though it were for the common good-- as though their own subordination fostered the interests of a common good, whether the commonality was the family, the neighborhood, or the nation.

Glendon laments and condemns the individualism of rights discourse, focusing on the cost or sacrifice not to the politics of the disempowered but rather the general civility of society, the mutual obligations of each to all. She invokes the touchstones of conservative lament, words such as responsibility, morality, virtue, family. Yet Glendon is no standard conservative; her critique has more in common with the republican values of the founders of the United States, when they exalted civic virtue over private aims. Her views have much in common with the Scottish school of moral philosophy of the late eighteenth century also influential among American revolutionaries – a school of thought since labeled the "conservative Enlightenment." These thinkers believed in natural rights, but saw natural rights as holding sway only in tandem with corollary duties. Rejecting the individualism of contractarian thinking, they stressed moral obligation and the preservation of social harmony over individual autonomy – duty, over liberty.[7]

Glendon can be seen as their descendent, for she also puts the interests of social harmony first, though she does not accept the extent of inequality in its service that they did. Her critique, while it is carried on

7. On the Scottish moralists, see Henry May, *The Enlightenment in America (N.Y.,* Oxford, 1976), pp. 342-37; Rosemarie Zagarri, "Morals, Manners and the Republican Mother," *American Quarterly,* 44 (June 1992), pp. 192-215, and Rosemarie Zagarri, "The Rights of Man and Woman in Post-Revolutionary America," *William and Mary Quarterly* 3d ser. 55:2 (April 1998), pp. 213-16.

mainly with respect to law, thrusts into the heart what might simplistically but conveniently be called Reaganism, the attitude toward society and progress that asks only one egoistic and inevitably dollar-laden question, "am I better off than I was?" (Ronald Reagan, running for a second term as president of the United States, advised citizens to look back over the four years he had served and ask themselves this question in order to assess whether to keep him in office for another four years.) Glendon puts the specimen of late twentieth century American society on the table and makes it squirm for celebrating self-development, free choice, and personal advantage while neglecting social relationships, cooperation, and communication, although this latter triad is as vital as the first is to achieving democracy in a heterogeneous society.

This has been a long way around to the question of rights claims by women. Despite the astute objections I have recounted, I would nonetheless contend that rights claims have been absolutely essential to the emergence of women to full citizenship in the United States. (I mean the word citizenship here in the broadest sense, to refer to formal empowerment and to public participation.) The critical perspectives I've alluded to have been very salutary. They have opened eyes and sharpened thinking. Debates over the limits and the pitfalls of rights claims beckon toward multifaceted thinking and lead toward renovation. It is always advantageous to see accustomed strategies in a critical light, so as not to assume that they are the inevitable or only route. But rights claims must be considered historically as well as logically. The discourse of rights has a praxis as well as a theory. Abandoning rights discourse would risk throwing out the baby with the bath water, to use a very peculiar colloquial phrase that seems to fit. Am I simply saying (to use another liquid metaphor) that rights claims are not a half empty glass, but one that is half full? No. I want to argue that rights discourse has been more generative and energizing than that image implies. It is a full glass, but taking it in, like drinking anything potent, may have unanticipated consequences.

Let me discuss some of the history that brings me to my view. To the ears of most people in the United States, "women's rights" and "equal rights" are more or less interchangeable phrases – with "equal rights" meaning the same rights men have. This equation has been fairly standard since the nineteenth amendment to the U.S. Constitution in 1920 prohibited sex discrimination in enfranchisement. The question hovers in

the shadows, nonetheless, whether the rights women want *are* the very same rights that men have. When Mary Wollstonecraft in England followed the French revolution's declaration of the rights of man and Thomas Paine's book called *The Rights of Man* with her own treatise in 1792 called *A Vindication of the Rights of Woman,* she portrayed these rights as distinctive, while drawing on a common fund. She condemned the "tyranny of man" in confining the "rights of humanity . . . to the male line from Adam downward," thus indicating her belief in the existence of shared, universal, human rights; yet her treatise focused on improving women's access to education and occupations, in order for them to be lcnowledgeable mothers, companions of men, and members of society. Wollstonecraft saw rights as "inseparable" from duties – and she assumed that the duties of women were different from those of men. Yet she had made a great leap, in figuring women as rights-bearers who were unjustly excluded from public life and from public structures of opportunity.

As Rosemary Zagarri has emphasized, Wollstonecraft's very "invocation of rights language ... heightened the power of her claims" by endowing women with "the *moral* authority to criticize existing institutions" and to demand more opportunities than they had. Her conservative opponent at the time, Hannah More, sniffed that Wollstonecraft had adopted "the imposing term of rights" in order "to sanctify the claims of our female pretenders." In the new United States, citizens began to speak of women's rights after Wollstonecraft published her book – not before. They so often conflated the rights of women with particular female duties and destiny, however, that "the rights of woman" *differed* from those of man.[8] A New Hampshire minister expressed this leaning in his democratic confidence that in the United States, "Every man, by the constitution, is born with an equal right to be elected to the highest office. And every woman, is born with an equal right to be the wife of the most eminent man."[9]

8. This is Zagarri's argument in "The Rights of Man and Woman"; she quotes Wollstonecraft and More, pp. 207-08.

9. John Cosens Ogden, *The Fenzale Guide* (Concord, N.H., 1793), p. 26, quoted in Nancy F. Cott, *The Bonds of Womanhood* (New Haven, Yale Univ. P., 1977), p. 109 (also quoted by Zagarri, "Rights of Man and Woman," p. 218).

The discourse of inherent rights did offer the solidest ground to argue for extending political and economic privileges to all white men. So relied upon for that purpose, the discourse of rights was like a genie let out of the bottle when once it was applied to women – it could not again be properly contained.[10] When organized claimants for women's rights appeared within the anti-slavery movement in the 1840s, they had the moral authority and the political indignation of rights discourse at their fingertips. In conjunction with abolitionists' demand for slaves' natural rights to possess themselves, women's rights claims, too, began to flow in an individualist mode. Elizabeth Cady Stanton wrote in 1857, "When we talk of woman's rights, is not the right to her person, to her happiness, to her life, the first on the list? If you go to a southern plantation and speak to a slave of his right to property, to the elective franchise, to a thorough education, his response will be a vacant stare . . . The great idea of his right to himself, to his personal dignity, must first take possession of his soul."[11]

This emphasis on self-possession (an idea that critical legal theorists deplore in rights discourse) arose among antebellum advocates of women's rights in part from the abolitionist context but also from their understanding of the position of wives under the Anglo-American common law. Lucy Stone repeatedly objected to the common-law doctrine of marriage for giving "the 'custody' of the wife's person to her husband, so that he has a right to her even against herself."' To her friend Antoinette Brown Blackwell, Stone wrote that "the real question" for their movement, underlying all "little skirmishing for better laws" was, "has woman, as wife, a right to herself?" To her, property and voting would mean "very little ... if I may not keep my body, and its uses, in my absolute right. Not one wife in a thousand can do that now, & so long as she suffers this bondage, all other rights will not help her to her true position."[12]

After the Civil War, women's rights leaders began to focus more inten-

10. This is Zagarri's metaphor in "The Rights of Man and Woman," p. 224.

11. Quoted from an 1857 letter of Stanton to Susan B. Anthony in Hendrik Hartog, "The Constitution of Aspiration and 'The Rights That Belong to Us All,'" *Journal of American* History 74:3 (Dec. 1987), p. 1018.

12. Quoted in Leslie Wheeler, ed. Loving Warriors: Selected Letters *of Lucy* Stone *and Henry B. Blackwell, 1853* to 1893 (NY, Dial, 1981), p. 186.

sively on the vote. The political context – the ending of slavery by constitutional amendment, and the Radical Republicans' moves to put civil rights and then political rights for the freedmen into the constitution – was crucial here too. The contest over slavery did more than anything else, as Hendrik Hartog has noted, to invest the constitution with a rights-conscious interpretation. The small but determined group of women's rights advocates were inspired by the thirteenth amendment's abolition of the centuries-long bondage of African-Americans to imagine that the constitution should also remove the civil and political incapacities of women. Elizabeth Cady Stanton and Susan B. Anthony took to heart the Radical Republicans' assertion that voting was a fundamental right of freedmen as citizens and argued that voting was a fundamental right of women citizens too – the right from which all others would flow.

The American polity was founded on emancipatory premises and promises in which the discourse of individual rights was embedded. Yet the fundamental political texts of the United States had not spelled out who are the rights-holders, nor actually defined their rights. The abstraction and putative universalism of the founding documents of the United States have sponsored aspirations as much as they have masked inequalities, and have made it inevitable, necessary, and rewarding for individuals or groups who see themselves excluded to use rights claims. This has been crucial in the many phases of women's movements.

The fact that the quantity and content of rights are not fixed has helped to goad the liberatory efforts of many newcomers. New groups who come into voice have visualized rights and needs from unconventional perspectives and have pushed for new definitions. In the early twentieth century, more kinds of women than ever before became interested in "rights," for many reasons – wage-earning women, to push for labor legislation; African-American women, to fight against lynching; middle-class social reformers, to solve urban problems; aspiring professionals, to push sex discrimination from their occupational paths. During the height of the suffrage movement in the 1910s these diverse types all asserted their equal right to the vote, and the younger generation (some of them college graduates, some political radicals), announced further demands in the language of rights: a woman's right to work, the right to equal wages, the right to her own name, the right to sexual expression, the right to a single standard of sexual morality. These women, in the 1910s, grouped their

demands together and called their approach feminism, a word unknown to Stanton or Anthony.[13]

In retrospect, we can see that the outcome of this invigorating period of women's rights agitation was not revolutionary. It could be said that the aftermath of the woman suffrage movement is a case in point for critical legal theorists' objections to rights strategies. Feminists' more venturesome definitions of rights (intended to address sexual and economic inequalities between women and men) were not written into the constitution, and women's formal access to the ballot by itself did not transform the gender order. The aftermath to the nineteenth amendment (like the aftermath to the fifteenth amendment which was supposed to guarantee the vote to black men) pointed up the disparity between rights stipulated and rights enacted. Black women followed black men in suffering the indignities and the terrors of disfranchisement, despite what the amended constitution said. Women of all descriptions found that formal admission to full citizenship did not even mean they would be called to serve on juries on the same terms as men; nor mean they could gain political office, when major parties would not run them. Enfranchised women were supposed to have had their demands satisfied, thus be equally assimilated into the existing political structure-- yet they were still lesser citizens.

During the process of mobilization, however, rights discourse had been enormously enlivening and empowering to women in the movement. Claims to "women's rights" however defined had been essential to women's seeing themselves as a group and forming a mass movement through strategic coalition. Although neither the suffrage nor other surrounding liberatory aims before 1920 revolutionized the public sphere, it would be a mistake to weight too lightly the accomplishments that were gained. The shape of most women's lives in the twentieth century has differed vastly from their forbears in the nineteenth, and a hefty part of that difference has been due to the reshaping of public discourse and life possibilities by women's claims to equality of rights.

For women (and perhaps for all who have been prevented from seeing themselves in the abstract individual and from *being seen* thus, because their subordinate otherness has been implied in the construction of that

13. See Nancy F. Cott, *The Grounding of Modern Feminisnz* (New Haven, Yale U.P., 1987), chapter 1

individual) – individualistic rights claims have been the necessary route to graduate, so to speak, into consciousness of entitlement and public voice. Individualistic rights claims operating in tandem with a sense of group oppression have been the main engine of modern social movements in U.S. history.

Women activists have been among the most creative on the shifting landscape of rights definitions. The women's movement of the 1960s and 1970s catapulted still more rejuvenated concepts of rights on to the political stage: reproductive rights; welfare rights; the right to equal pay for comparable worth, for example. Freedom from sexual harassment on the job; maternity leave; equal educational and athletic facilities – all these demands were pursued in the language of rights, and to the extent they were accomplished, it was through claims to rights (usually those expressed in the Civil War-era fourteenth amendment).

This seemingly infinite extension of the horizon of rights – the mapping of rights language on to all demands or desires by all self-defined groups – is exactly what Glendon finds pernicious. It seems to me that when the group in question is called "women" the greater stumbling block is not "rights" themselves but the notion of "equality" in them. Many people assume "equal" means "exactly the same." The notion that women's rights should be the *same* as men's makes people uncomfortable, when they feel that women are different from men. This was the core reason that the Equal Rights Amendment, passed by both houses of Congress in 1972, failed to be ratified by two-thirds of the states to become part of the constitution. The dilemma of sameness and difference that dogged the women's movement in the 1970s and 1980s was exacerbated, no doubt, by the ideological structure of rights discourse itself. In truth women are both the same as men *and* different from men. (I remember the 1970s slogan: women who want to be equal to men lack imagination.) The abstract individualism on which rights claims are premised has a very hard time accommodating that paradox.

Yet, with history the context for my view, I agree with Elizabeth Schneider's assessment that rights claims have not been counterproductive or self-exhausting in feminist political mobilization but have operated in fruitful dialectic with it.[14] Rights claims have effectively

14. Schneider, "The Dialectic of Rights and Politics;"

expressed the political and moral aspirations of feminist social movements, fostering collective consciousness among women and also very importantly shaping larger public discourse. As individualistic as rights claims are, they have been a bonding glue for social movements. While Glendon deplores rights talk for leading away from sociality and cooperation, it is this very way in which rights talk has served as social glue – for particularized movements – that rankles her, as it rankles other critics who blame "identity politics" for fragmenting the political culture of the United States. Hartog's insight offers a better perspective: if so many fractious groups in the United States all translate their goals into the language of constitutional rights, that is something that binds them together.[15] It unites them in a shared constitutional culture.

15. Hartog, "The Constitution of Aspiration," esp. 1015-16.