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Book Review: The American Language of Rights by Richard Primus

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BOOK REVIEWS

The American Language of Rights. By Richard A. Primus. (Cambridge: Cambridge University Press, 1999. Pp. 280. \$54.95.)

Richard Primus's *The American Language of Rights* is a well-reasoned and thoughtful response to those scholars (such as Bruce Ackerman, Ronald Dworkin, John Rawls, Joseph Raz and Cass Sunstein) and practitioners who use American rights as reasons, meaning that they are often employed as if they have no normative underpinnings, and/or regard rights as a philosophically sophisticated and consistent doctrine, the meaning of which has unfolded over time to envelop all members of the political community and many of its demands. Instead, according to Primus, rights are a social practice informed by substantive political commitments. Those commitments are embodied in the rights we create which then change in response to social and historical conditions. If rights, Primus inquires, do not hail from God, nature, or abstract human reason, for example, and they have not meant the same things over the course of American history, then why is it that certain claims enjoy the status of rights? Moreover, why have the form and content of rights changed over time, and what factors influenced the ways in which we talk about, construct, and apply rights? Rights discourse thus develops "through a pattern of adversity, reaction, and synthesis" (129), which is illustrated, he argues, in three critical historical periods that have altered rights in fundamental ways: the Founding, Reconstruction, and World War II. If rights are in fact a social practice (as opposed to a formal understanding of rights such as those premised on a universal set of moral or normative imperatives) that have the capacity to change in response to historical circumstances, it would stand to reason that the "language of rights does not attach to only one kind of political outcome" (2). Instead it has been a "versatile tool, suitable for many different

agendas" (3), in opposition to many of the critical legal studies and communitarian scholars who want to argue that rights discourse has a tendency to "favor one set of political outcomes over another" (2)—a claim Primus considers "widely overstated" (2).

Hence Primus argues that during the Founding, there were multiple sources of rights: traditional English liberties, natural rights, reason, benefit and God. The founders and other politically engaged individuals drew upon those sources to speak about rights in ways that would justify opposition to specific adversities, such as the abuse of legislative power, as well as "remembered" adversities, like the forced quartering of British troops in private homes.

As Americans progress into the Reconstruction era, what gets counted as a right and to whom certain rights ought to be expanded changes substantially in response to the conclusion of the Civil War and the signing of the Emancipation Proclamation. Again, the language of rights is partially embedded in earlier understandings but also creates new ones to accommodate responses to unique historical occurrences—and Primus argues persuasively in this chapter that the Reconstruction era saw much less in the way of rights claims made from abstract principle than in any of the other two key periods. Instead, many of the Northern whites who became active abolitionists did so at least partially because of their fear of what denying or limiting the free speech and labor opportunities of former slaves, for example, might do to their own rights to the same.

It is during this period as well that political scholarship and practice begin to refer to rights as belonging to one of three categories: civil, political or social. This division, which is by no means stable, was an attempt to legitimate selective application of rights to African-Americans, where early on they were to enjoy only civil rights, or "the minimum basic requirements for

distinguishing free persons from slave laborers" (155), but not political and social rights that would guarantee the suffrage, the right to hold office and equal access to public accommodations (particularly white educational facilities). As the denial of a certain "political" or "social" right to African-Americans became politically untenable, it was simply re-categorized as a civil right until "civil rights" became "synonymous with legal or constitutional rights in general" (160).

The third period that demonstrates a definitive shift in how we talk about rights in the American context, according to Primus, is the years immediately following World War II, during which the primary adversary was totalitarianism as informed by the practices and ideologies of Nazi Germany and the Soviet Union. It is during this period that a "new vocabulary of 'human rights' arose to carry the content of those political commitments and to link them with a broader idea rarely seen in the generation before the war but ascendant thereafter: that certain rights exist and must be respected regardless of the positive law" (178).

I was surprised, however, to encounter virtually no careful discussion of the individual character of rights. That is, we are indeed a culture of rights, and those rights, as Primus deftly points out, have changed in important and fundamental ways due to social and historical conditions. Yet American rights are not just this. If we can say anything that is distinctive about American rights it is that they almost always only accrue to individuals. Primus clearly and persuasively illustrates the ways in which the Founding, Reconstruction, and World War II altered how we think about rights—what we say about them, what gets counted as a right, etc.—but there is almost no mention of to whom those rights are to apply. I find this perplexing because if American rights have predominantly been individual rights, might not such an understanding privilege a certain kind of political outcome? It might very well favor liberal political arrangements to the ex-

clusion of other types, but it is not at all clear that liberalism can satisfy the demands of justice and/or democracy.

Early on Primus states that the language of rights does not favor only one kind of political outcome because (1) the relationship between language and politics is reciprocal, and (2) it is historical fact that "people with all sorts of differing political views can use the language of rights to their advantage" (2). Generally speaking, rights need not engender excessive individualism, as some communitarians allege, but they can operate to privilege rights over responsibilities and self-interest over cooperation when they function in an already individualistic political culture dominated by a language that prioritizes claims made on behalf of individuals (as opposed to groups, for example). In such a climate, citizens with very different ideas (i.e. non-liberal ideas) may very well be able to employ the language of rights to make their claims, but some claims will not be heard—and even if heard, will continually be dismissed (because the claims entail non-liberal solutions for the satisfaction of justice and/or require a recognition of demands made by citizens as members of some group). To put it more directly, Primus is keenly aware of the ways in which American rights have been conditioned both by inherited understandings of rights and the novel uses to which they can be put to stave off undesirable political outcomes, yet he fails to interrogate the ways in which rights are too often formulated by those who already enjoy a privileged status in the polity (and presumably want to retain that status). For the privileged, an ethos of individualism and individual rights has the capacity to work almost flawlessly. For those marginalized due to their race, class, gender, and/or sexuality, such an ethos often functions to justify that marginalization on the basis of misperception of interests or simple laziness—but not as the result of a systematic flaw.

With that said, Richard Primus's *The American Language of Rights* ought to be required reading for anyone interested in the practice of American rights. His analysis of historical documents to bolster his claims about the construction and reconstruction of rights is exemplary and persuasive. Furthermore, his arguments illustrating the erroneous ways in which rights are often used as final justifications for political propositions—and even more often referred to as if they have always meant the same things—are well-informed and convincing.

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