

Primus, Richard A. *The American Language of Rights*.
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Richard Primus's main complaint is that academic philosophers have paid insufficient attention to the way in which conceptions of rights are shaped by substantive political commitments and responses to social and political crises. He develops this account by examining rights discourse during three periods in American history: the Founding, Reconstruction, and the World War II period, and by arguing that reactions to adversity during these periods affected the prevailing conceptions of rights. Primus contrasts this outcome-driven account of rights with more formal approaches that proceed as if the existence, content, source, and subjects of rights can be determined by applying some politically neutral formal criterion, definition, or principle to particular cases.

As an example of a formal approach to rights, he cites Ronald Dworkin's analysis of whether there is a "right to know," a right that journalists claim on behalf of society to support their efforts to publish guarded information, for example, government documents or courtroom records. According to Primus, Dworkin merely appeals to his definition of rights as trumps to argue against the right to know. If rights are trumps that only individuals can have, then society, which is not an individual, cannot have a right to know or any other rights. This case against the right to know is formal because the conclusion is entailed by the definition of rights. Another example he offers of a formal approach to rights is Joel Feinberg's case against attributing rights to rocks and human vegetables, and his case for attributing rights to animals. According to Primus, Feinberg assumes that only beings who have interests are conceptually suitable subjects for the attribution of rights, and he concludes that rocks and human vegetables cannot have rights since they do not have interests, while animals can have rights because they do have interests.

As political actors rather than philosophical or academic actors, the Founders did not allow formal criteria or definitions to shape their conceptions of rights. Instead, their use of rights was guided by their practical political interests whether it was to claim general authority for specific propositions, to attempt to entrench politically precarious practices, or to declare particular practices or propositions to be of special importance. Consequently, they attributed rights to a diverse range of subjects including but not limited to individuals—for example, legislatures, gov-

ernments, cities, colonies, and the people—depending upon whether this served their interests and was necessary to respond to adversity. In addition, their views about what rights individuals had was also driven by similar considerations. According to Primus, the Third Amendment to the federal Constitution, which provides a right against the quartering of soldiers in private homes, was established as a reaction to a very specific threat, namely, the threat posed by an executive branch of government having the sole authority to authorize quartering. The drafters were not simply seeking to protect the autonomy of the individuals by offering them immunity from having their homes violated, rather they were guaranteeing that any such violations must be approved by the legislature.

So, presumably, the legislature could approve quartering in private homes in the name of social utility. Primus contends that someone who espouses the formal Dworkinian view of rights as trumps held by individuals against the majority will be reluctant to classify as a right a claim that can be overridden by the legislature in the interests of social utility. Thus he concludes that the formal approach of modern academic philosophers does not provide an adequate framework for historically reconstructing conceptions of rights at the Founding. While the former is driven by reasoning from formal definitions and criteria, the latter is driven by reactions to adversities and the promotion of substantive commitments.

Just as the Founders' rights discourse had been influenced more by reactions to the adversities of their time than by the application of formal criteria, the rights discourse of nineteenth-century Americans followed the same path. Here Primus takes on the "underlying principle" approach, which views the Reconstruction rights (the Thirteenth, Fourteenth, and Fifteenth Amendments) as resulting from the proper application of the principles of freedom and equality which supported the rights proclaimed by the Founders. Thus, the rights against slavery, the rights of due process and equality before the law, and the right to vote were established to bring America closer to the fulfillment of its Founding ideals. But this reading suggests that there was a contradiction between the Founding ideals and the practices of slavery. Yet Primus points out that many leading Americans at the Founding saw no contradiction between their revolutionary ideals and their slaveholding. Indeed many thought that their commitment to freedom of property firmly justified their slaveholding. Primus concludes that this ambiguity among the Founders is one major reason why the Reconstruction rights cannot be understood as the proper race-blind application of Founding principles to areas where the Founders neglected to apply them.

Moreover, Primus argues that much of the rights discourse that set the stage for Reconstruction grew not from the application of timeless normative principles but from strategic reactions to specific adversities that were not present during the Founding. In particular, he contends that Northern whites viewed themselves as erecting a system of rights against what they perceived as Southern "Slave Power" encroachments on their own liberties, powers, immunities, and entitlements. Although some abolitionists asserted rights against the Slave Power as matters of universal justice, the concrete regard of many Northerners for their own rights was a crucial factor shaping the discourse that was instrumental in dismantling the Slave Power. Primus offers several examples that show how perceived threats to their liberty pushed Northerners to support the Reconstruction Amendments. In December 1835, a South Carolina Representative proposed that Congress adopt the Gag Rule, a provision prohibiting Congress from hearing

antislavery petitions. Northerners saw this rule not only as protection of slavery but also as an abridgment of First Amendment rights, including legislators' rights to free speech and the public's right of petition. Other perceived threats to their liberties included both the Fugitive Slave Laws, which were seen as potential threats to trial by jury and habeas corpus, and violent attacks on abolitionists' presses and mailings, which were violations of freedom of the press.

Substantive commitments not only dictated the specific rights that Northerners were prepared to recognize but it also shaped their formal theories. During Reconstruction Northern Republicans used the terms "civil rights," "political rights," and "social rights" to reconcile emancipation and black suffrage with continuing opposition to full black equality. While most Republicans were willing to grant blacks the rights necessary to a free labor system, such as the right of contract, property, movement, and access to courts of law, few saw a need to grant them rights to vote and hold office, or rights of access to all institutions and spaces occupied by whites. To justify this selective extension of rights to blacks, they developed an ostensible formal tripartite typology that offered formal justification for their prejudice. While "civil rights," understood as ones that people must hold to act as private individuals in civil society (e.g., making contracts, owning property, being able to benefit from laws protecting persons and property) were taken to attach to all persons equally, "political rights" (e.g., rights to hold public office, sit on juries, and to serve in the military), and "social rights" (e.g., rights of access to institutions, services, and spaces) were not taken to apply to all persons equally. Adopting this formal typology enabled Republicans to dismantle the Slave Power without conceding that blacks were to be treated on equal terms with whites. Hence, the adoption of the formal typology was driven by a specific set of substantive political commitments and not the other way around.

A seemingly devastating objection to the view that conceptions of rights are shaped by substantive political commitments is that it undermines the long-standing practice of using rights for critical purposes. Appealing to rights as universal moral standards to criticize social practices, institutions, and the conduct of nations and individuals will seem suspect if our views about the nature, content, subjects, and function of rights are shaped in the way that Primus suggests. The problem with this objection, however, is that it wrongly presumes that the conception of rights as universal standards of moral criticism is not itself shaped by substantive political commitments. According to Primus, the chief adversity of the twentieth century that shaped conceptions of rights was the totalitarian threat posed by Nazi Germany and the Soviet Union. One main reaction to this threat was the introduction of a conception of rights as precepts outside of and prior to positive law that could be used to criticize the practices of totalitarian regimes, to justify military intervention, and to justify the punishment of war criminals. The vocabulary of "human rights" emerged during this period to capture this idea that people had certain rights no matter where they lived, no matter what kind of government they lived under, and regardless of their race or religion; they had these rights simply in virtue of their humanity. The other main reaction to the totalitarian threat was an emphasis on and expansion of the rights of free expression, racial equality, and individual privacy, which were seen as vital protections against the kind of political repression carried out under totalitarian regimes.

So while rights can be used to condemn as morally wrong governments that

violate individuals in certain ways, Primus contends that this conception of the function of rights was itself informed by aspects of the confrontation with European totalitarianism. It is not an a priori truth discovered by academic rights theorists. But, if this conception of the function of rights is itself shaped by practical political purposes, then the foregoing objection loses its force.

Moral philosophers may contend that Primus's account entails that we cannot morally condemn slavery or the Holocaust; however, I do not think that it does. Rather it entails that we must offer substantive reasons that go beyond simply asserting rights when we wish to establish normative conclusions. During his discussion of Dworkin's case against the right to know, Primus accuses Dworkin of relieving himself of having to defend a set of normative commitments by "cloaking them in the banner of rights" (p. 16). Rather than simply trying to deduce a normative commitment from a formal definition of rights, Primus contends that a more appropriate case against the right to know requires engaging with substantive questions such as whose interests are served and harmed by having access to guarded information, which of these interests have greater weight, and why they ought to have such weight. Presumably, Primus would contend that a more detailed defense of moral condemnations of slavery and the Holocaust beyond the mere assertion of rights is also required. Unfortunately, Primus does not offer us much guidance on the best justification of our normative commitments, though what he does say suggests that he is willing to allow for a variety of approaches (p. 235).

Finally, academic philosophers may wonder whether a more historically sensitive approach to rights entails that philosophers need to abandon abstract philosophizing about rights and immerse themselves in the study of history and politics. I certainly hope that this is not the case since it is much too late for me to change careers. I think that Primus's real challenge to academic rights theorists is not to abandon philosophy for history or politics but to study the history of rights discourse with an eye toward developing conceptual analyses of the nature, source, and value of rights that take past and present social realities seriously. Philosophy can only profit from meeting this challenge.

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