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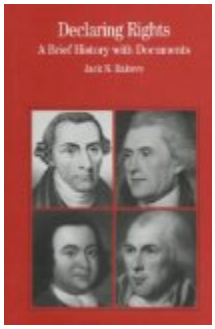
Jack N. Rakove. *Declaring Rights: A Brief History with Documents.* Boston and New York: St. Martin's Press, 1998. xiv + 217 pp. (paper), ISBN 978-0-312-13734-2; $75.00 (cloth), ISBN 978-0-312-17768-3.



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Anglo-American Rights Over the Centuries

This volume–part of The Bedford Series in History and Culture–focuses on the origins, meaning, and significance of declaring rights in England and Anglo-America, from 1603 to 1791. The series "is designed so that readers can study the past as historians do (p. v)," namely, by the location, selection, analysis, comparison, and interpretation of primary and secondary sources representing different points of view and sets of facts. The editor, Jack N. Rakove, Coe Professor of History and American Studies at Stanford University, explains why Englishmen and Americans adopted declarations of rights and what purposes these declarations served. He presents twenty-five documents linked by cogent and subtle narratives that provide historical background, supply context, define terms, extract meanings, trace origins, draw comparisons, and identify changes and continuities.

Declaring Rights is divided into two parts–"Rights in Revolution" and "The Constitution and Rights." The twelve documents in part one, traversing the period 1689 to 1786, include the English Declaration of Rights (1689); the Massachusetts resolutions protesting the Stamp Act (1765); a defense of British colonial policy by Rhode Islander Martin Howard, Jr. (1765); an explanation by John Adams of Massachusetts of British constitutional rights (1766); the declaration of rights of the First Continental Congress (1774); discussions of what roles rights should play in the first state constitutions (1776); the declarations of rights enacted by state constitutional conventions in Virginia (1776), Pennsylvania (1776), and Massachusetts (1780); and Virginia's statute for religious freedom (1786).

The documents in part two, covering the years 1787 to 1789, consist of amendments (including a bill of rights) proposed to the U.S. Constitution by Virginian congressional delegate Richard Henry Lee (1787), newspaper and pamphlet essays ("Brutus" and "Federal Farmer," both of New York) and public speeches (James Wilson of Pennsylvania and James Iredell of North Carolina) advancing the Anti-federalist and Federalist positions on rights (1787-88), correspondence between Virginians James Madison and Thomas Jefferson about bills of rights (1787-89), Madison's speech in the U.S. House of Representatives proposing amendments (1789), Madison's amendments revised by the House (1789), and the resolution of Congress forwarding twelve amendments to the states for ratification (1789). In 1791 ten of these amendments became the Bill of Rights.

An epilogue, reviewing the Bill of Rights' impact on American society, is followed by a constitutional chronology (1603–1791); seventeen questions for discussion arranged in seven clusters; a bibliography of primary and secondary sources; and an index of subjects and names. The chronology, keyed into the historical narratives and documents, includes items not found in either. The questions ask readers to define terms, compare documents, consider their form and content, and discover their constitutional and theoretical foundations. The selected bibliography is supplemented by footnotes recommending books and articles; other footnotes define con-

stitutional terms and obscure eighteenth-century expressions, translate foreign phrases, and identify individuals and events. The analytical index has many entries with numerous sub-entries.

Over time, Rakove argues, the definition of rights changed. Before 1600, what we now describe as rights were liberties and privileges, benefits that the Crown granted to particular groups. The Magna Carta (1215), extracted from King John by English barons, was such a grant. What the Crown granted, it could revoke. Hence, the Magna Carta was confirmed often and transformed into statute law in 1225. In the sevententh century, rights-talk became more common during the struggle against Stuart monarchs seeking to impose absolutism. Parliament, groups (Levellers), and individuals (John Milton, Thomas Hobbes, and John Locke) issued documents and treatises declaring rights. Rights became the birthright of free individuals that the Crown could neither extend nor revoke. The rights of representation, conscience, and trial by jury were most important. The sources of rights were the law of nature, the ancient constitution, the common law, and the growth of Parliament's legislative functions. The Crown–the greatest threat to rights–had no authority to infringe them; that concept, hearkening back to the Magna Carta, was firmly established by the Declaration of Rights (1689).

The form and function of declarations of rights also changed. In 1628 Parliament petitioned Charles I, asking him to approve its Petition of Right in exchange for granting him revenue. Charles agreed to the Petition, but then ignored it and ruled ten years without Parliament. By contrast, the Declaration of Rights (1689)–which was accepted by William and Mary as a condition for their replacing James II on the throne–enumerated James's unlawful acts and declared and confirmed the people's ancient rights and liberties. It averted tyranny, but despite its establishment of parliamentary supremacy, monarchs and ministers managed Parliament through patronage and influence.

Rights-talk spread to England's American colonies, where Americans believed that they had the same rights as Englishmen and colonial assemblies saw themselves as miniature parliaments. In the 1760s the colonies resisted imperial measures adopted by Crown and Parliament, especially those levying taxes without representation and enforcing those taxes and imperial regulations in jury-less admiralty courts. In resisting, the colonies (led by Massachusetts) enunciated their rights–British rights known to everyone. These rights had been brought to America and had been repurchased through settlement and allegiance to the empire. Parliament dismissed this argument, insisting it was the empire's supreme legislature. In 1774 the colonies unsuccessfully tried to negotiate an American declaration of rights with Parliament; nor would the Crown redress their grievances. Consequently, in 1775 civil war erupted. Britain had violated the British rights of Americans.

When war began, the colonies insisted they were in a state of nature. Therefore, most colonies called conventions to draft constitutions, but only in Massachusetts was a constitution submitted to the people for adoption. Drafted at "a particular moment of time," these state charters created "institutions that would henceforth act under the authority they bestowed" (p. 35). As supreme fundamental laws, constitutions could not be changed by legislative acts. Similarly adopted were declarations of rights, taken from Anglo-American constitutional history, that advanced fundamental principles by which governments should operate. These declarations, however, were largely advisory. Since it effectively disestablished religion in Virginia, Jefferson's statute for religious freedom (1786) was more important than these declarations.

Enter James Madison, who had shepherded this statute through the Virginia legislature. Madison was the "crucial actor" (p. 99) in the Federal Convention (1787) and the first federal Congress (1789); a federal bill of rights would not have been adopted without him. His theory of rights mostly evolved after 1785, as he watched ambitious, self-interested state legislators exercise excessive powers by enacting economic legislation pandering to the people. In the Federal Convention, Madison tried (but failed) to protect minorities by giving the central government an absolute veto over state laws because he realized that state bills of rights had not afforded such protection.

Some major issues debated in the Convention that drafted a new constitution (to replace the ineffective Articles of Confederation) concerned rights, particularly that of representation. A compromise gave the people representation in the House of Representatives, while the semi-sovereign states were granted equality in the Senate. The latter was also a nod to federalism, which Rakove identifies as the other great issue besides that of rights. The boundaries of federalism would be policed by an independent judiciary acting through the supremacy clause. The suspension of the writ of habeas corpus and passage of ex post facto laws and bills of attainder were

prohibited. Property rights were protected against the state legislatures. But the Convention rejected a bill of rights as unnecessary. The new constitution was to be adopted by the people, acting through popularly elected conventions.

People quickly took sides. Opponents of the Constitution (Anti-federalists) insisted on a bill of rights and structural amendments to curtail the power of the central government. They attacked the sweeping power of the necessary and proper clause, the binding nature of the supremacy clause, the vast tax powers of Congress, and the insufficient representation in the House of Representatives.

Led by James Wilson, a Federal Convention delegate from Pennsylvania, advocates of the Constitution (Federalists) argued that it was unnecessary to protect rights concerning which Congress lacked the power to legislate. The people retained the rights not explicitly granted to the central government. Federalists opposed all amendments, including a bill of rights, because Anti-federalist amendments would radically change the Constitution, making it more like the Articles of Confederation. Nor was it possible to enumerate all rights, and if such a effort was not properly executed, posterity would suffer. Even so, recognizing that it was the price of ratification, Federalists in 1788 acquiesced in the decision of six state conventions to adopt recommended amendments.

After the requisite number of states ratified, Madison realized that fears respecting rights had to be accommodated, but he rejected structural amendments. His position on bills of rights was softened by his correspondence with Jefferson. Although Jefferson agreed enumeration of all rights was difficult, common sense told him that any safeguards were better than none. He insisted that Americans, a race of republicans, were especially entitled to rights. Madison himself realized that a bill of rights expressed fundamental principles, which, through education, people would accept, thereby counteracting dangerous popular passions. Moreover, he supported a bill of rights to get elected to the House of Representatives.

Elected to the House, Madison discovered that his fellow Representatives were not enthusiastic about amendments. Undaunted, he managed to get Congress to consider amendments. On 8 June 1789, addressing a dual audience (House members and the people), Madison spoke brilliantly, proposing nineteen amendments (most dealing with rights) to be inserted into the text of the Constitution to give them greater force. They were to be grafted into Article I, which dealt with Congress, the most dangerous branch. Connecticut's Roger Sherman successfully opposed incorporation because it tampered with an act of a sovereign people. The House revised and adopted Madison's amendments, sending seventeen of them to the Senate. Consolidated by the Senate, the amendments were reduced to twelve. Most important, the Senate eliminated the Madisonian prohibitions against the states–the greatest dangers to rights, in his view. Only the first two amendments were structural and they would not be ratified by the states with the Bill of Rights–though in 1992 one of them was added to the Constitution as the Twenty-seventh Amendment.

These amendments were neither concessions to Anti-federalists nor acts of negotiations between the governors and governed. Nor did they appeal to natural rights or fundamental principles. They were sparse commands directed against the central government, and everyone understood their purposes and sources. They attracted little attention until the twentieth century, when they began to emerge as the most important part of the Constitution. Their emergence elevated the judiciary and protected Americans from abuses of power.

Rakove packs an impressive amount of data and number of insights into 217 pages, and it seems unfair to criticize him for omissions. Nevertheless, his splendid story of declaring rights would have been strengthened by reference to such documents, among others, as the English *Confirmatio Cartarum* (1297), the first charter of the colony of Virginia (1606), and the Northwest Ordinance (1787) and to such thinkers as the Baron de Montesquieu and Sir William Blackstone. The *Confirmatio Cartarum* established the Magna Carta as the fundamental law of the land and rendered Parliament a truly representative body by declaring that direct taxes could be raised only with the consent of the people's representatives. The Virginia charter affirmed that colonists and their children "shall HAVE and enjoy all Liberties, Franchises, and Immunities" of natural-born Englishmen. In fact, greater attention might have been paid to founding documents written for and by colonists before 1750. The Northwest Ordinance includes the first bill of rights enacted by the federal government. It contains rights already enunciated in state constitutions and declarations of rights. Montesquieu, whose *Spirit of Laws* (1748) appears in the constitutional chronology, and Blackstone, were the most oft-cited writers in the debate over the ratification of the Constitution–Montesquieu on republics and Blackstone on trial by jury.

Rakove's dating of two documents is misleading. He

places the Virginia statute for religious freedom under 1779, implying that it is Jefferson's 1779 text as it appeared in his draft revision of Virginia's laws. However, Rakove's text is the revised statute enacted in 1786, which differs significantly from Jefferson's draft. Also, although Rakove dates a "letter" of the Antifederalist "Federal Farmer" on 20 January 1788, the essay actually appeared with other letters in a pamphlet published on 2 May 1788. Rakove could have avoided the first miscue by consulting volume two of *The Papers of Thomas Jefferson*, which provides a superlative editorial note on the evolution of the statute's text and its legislative history, and the second by turning to volume seventeen of *The Documentary History of the Ratification of the Constitution*, which performs the same functions for the "Federal Farmer." Reference to these two works also afforded an opportunity (not taken) to introduce students to the substantial contributions of present-day historical editors. Rakove also could have used the editorial note in volume one of *The Papers of John Adams*, dealing with the three "letters" that John Adams (as the "Earl of Clarendon") wrote about the British constitution. In particular, Adams's use of a pseudonym provided Rakove with an opportunity (also not taken) to introduce students to the adoption of pseudonyms by political writers.

Declaring Rights is ideal for adoption in upper-level courses in the history of the Revolutionary Generation, political theory, constitutional law, and constitutional and legal history. Its close attention to the importance of language in attaining constitutional and legal goals makes it also suitable for classes in law and literature and, to some extent, even in philosophy. Books in this series are designed to be one-week assignments, but this volume is too rich in details and insights to be hurried through quickly. The author of many books and articles on the Founding, Rakove continues to enhance our understanding of a time that has much to teach us about ourselves and our own time.

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