Early-Modern Rights Regimes: A Genealogy of Revolutionary Rights

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Abstract

Most histories of early-modern rights focus on particular concepts of rights: for instance, notions of subjective vs. objective right, or on the presence/absence of particular rights (e.g., self-preservation). But focusing on specific rights has led scholars to pay less attention to what happens to rights as a whole when individuals enter into a political state, and also to miss the fact that historical actors tended to think about rights within broader conceptual regimes. In this paper, I identify three major early-modern rights regimes: the abridgment regime, which emphasizes the abandonment or alienation of rights (e.g., Hobbes); the transfer regime, in which natural rights are transferred to the state, and can only be retrieved under specific conditions (e.g., Spinoza and Locke); and the preservation regime, which insists that we should be able to enjoy the individual exercise of our natural rights even under government (e.g., Jefferson). After laying out the historical origins and conceptual bases of these regimes, I sketch a brief history of their respective trajectories between the early sixteenth and the late eighteenth centuries, focusing in particular on the rather curious and contingent reasons why the preservation regime shot to success after the 1760s.

Introduction

The history of human rights has recently exploded as a field, but it is a field that, ironically, exhibits a curious anxiety about history. More specifically, this anxiety concerns the chronological depths that historians should, or shouldn’t, plumb. One group, following the lead of Samuel Moyn, argue that our contemporary understanding of human rights has shallow intellectual roots: in *The Last Utopia*, Moyn pointed to the 1970s as the “breakthrough” moment; more recently, he extended that chronology back to the 1930s, in his study of *Christian Human Rights*. Other historians have called attention to other pivotal moments, such as the decolonization movement of the 1960s, or nineteenth-century slave-trade courts. But even those who are more willing to recognize the parallels between, say, the 1789 Declaration of the Rights of Man and of the Citizen, and the Universal Declaration of Human Rights hesitate to extend the history of rights much farther back. Lynn Hunt, for instance, situates the “invention of human rights” in the

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eighteenth century, and rejects the earlier history of rights as irrelevant, claiming that “natural right(s)’ had too many possible meanings.”

In contrast to these historians who draw a line in the past and refuse to pass plus ultra, there is a second group that plunges far deeper, and situates the critical turning point for human rights in the late medieval period. One of the most influential scholars in this group is the French legal historian Michel Villey, who left a strong mark on many of the Cambridge school historians, Richard Tuck in chief. According to Villey, the critical moment in the history of rights was the introduction of the concept of “subjective” rights in the fourteenth century—at that point, a right (ius) became reconfigured as an entitlement that granted a “legal power” to individuals. Villey contrasted these rights with an “objective” right, the universal justice that classical philosophers, most famously Aristotle and Cicero, placed at the foundation of natural law. Confusingly, this concept was also expressed as ius, most famously in Ulpian’s definition of justice as the “constant and perpetual will to give to each his due” (constans et perpetua voluntas ius suum cuique tribuens). A political conservative, Villey lamented the transition from classical-objective to modern-subjective concepts of right; the Cambridge historians, for their part, mostly celebrate this evolution. But both parties agree that the critical turning point in the history of rights lay in the late Middle Ages (with William of Ockham often serving as a convenient marker), before culminating in the seventeenth century. Indeed, for these historians, the post-seventeenth-century history of rights is often given short shrift. A similar historical logic can be found in Leo Strauss’s equally influential account of modern natural right, which he defined as the moment when natural rights became prioritized over natural law. For Strauss, this shift also culminated in the seventeenth century, with Hobbes and Locke.

So where the first group of historians rarely looks back before 1700, the second group tends not to move beyond that date. Accordingly, both have blind spots: it is hard to justify Hunt’s claim that the earlier history of natural rights is irrelevant to Enlightenment and revolutionary rights talk, given the close intertwine of human and natural rights. After all, the French Declaration of Rights itself refers to “les droits naturels, inalié-nables et sacrés de l’Homme” (Preamble, emphasis added). Conversely, the fixation on the seventeenth century, and particularly on English natural law theorists, is equally problematic. Hobbes may well have distinguished right and law (ius and lex) more explicitly than his predecessors, but he also argued that we must “lay down” most of our natural

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6 See Michel Villey, La genèse du droit subjectif chez Guillaume d’Occam, 9 Archives de philosophie du droit 97 (1964).
7 Institutes 1.1.
rights when entering into society (he makes an exception for the right to self-preservation). \(^9\) Even Locke agreed to some extent on this point, insisting that when we gather in a body politic, we must “give up” our two natural powers or rights, namely the right to self-preservation and the right to punish. \(^10\) The revolutionary proposition that, in the words of the 1789 French Declaration, “the goal of every political association is to conserve the natural and imprescriptible rights of man” (art. 2)—an idea also found in the Virginia Declaration of Rights and in the United States Declaration of Independence \(^11\)—was far from an established idea in the seventeenth century.

The missing chapter in the history of rights therefore concerns the transition between the early-modern and modern periods, or roughly speaking, the two centuries between 1600 and 1800. At stake during this period is not so much the emergence of a subjective concept of rights (the Villey question), or even the preponderance of this concept during this time (the Strauss question), but rather the establishment of a particular “regime” of rights over rival regimes, a regime that stressed the inalienability of rights in political society.

The concept of a rights regime is common in discussions of contemporary human rights practices, where it refers to the “systems of norms and decision-making procedures accepted by states as binding.” \(^12\) It is taken for granted that different rights regimes can coexist at the same time, though generally this diversity is driven by geography. In an age before human rights tribunals, there were fewer opportunities for “decision-making procedures,” but the observation that there were competing “systems of norms” still holds true. Other factors differentiating these regimes in early-modern Europe were the political narratives in which the regimes were embedded. Most theorists agreed that we possessed natural rights in the state of nature, but conflicts arose over what happened to these rights when we contracted into political society. There were three main possibilities: rights could be preserved (the “revolutionary” understanding, which remains our basic definition today); rights could be abridged, or even renounced entirely; or rights could be transferred, either to the body politic as a whole, or to a civil government. These three rights regimes were not always exclusive, and some accounts of natural rights in political society drew on more than one conception. But together they map out the basic frameworks available for thinking about rights in the seventeenth and eighteenth centuries.

Identifying these different rights regimes can help dispel a number of misconceptions about the early-modern history of rights. First, their lengthy coexistence draws attention to the fact that this history cannot be told as a linear (or worse: teleological) narrative. The rise of “subjective” rights talk between the fourteenth and seventeenth centuries did not inevitably lead to our current understanding of rights as “trumps,” valid

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10 John Locke, Second Treatise of Government §§ 128-130 (1690) [hereinafter Second Treatise].

11 Virginia Declaration of Rights § 1 (1776).

at all time and in all places. On the contrary, at different moments in this history, the preservation regime was dismissed as politically dangerous and philosophically naïve. Other historical and political processes also had to come into play for this regime to prevail.

If (and secondly) this regime did ultimately win out over its rivals in the eighteenth century, however, it was not because the Enlightenment facilitated a conceptual breakthrough that was unthinkable in prior centuries. On the contrary, as I argue below, the basic idea that natural rights carried over into political society had been around long before, and was a cornerstone of revolutionary movements in the sixteenth and seventeenth centuries. To ask when, exactly, human rights emerged in their “modern” form is a question mal posée.

Finally, on a more methodological level, thinking about the history of natural and human rights in terms of competing regimes, rather than of specific concepts, not only underscores the limited payoff of asking origin questions, but also encourages us to focus more on the unpredictable twists and turns of a longer historical process. It forces us, in a word, to embrace genealogy, and to seek “the accidents, the minute deviations . . . that gave birth to those things that continue to exist and have value for us,” and to “reestablish the various systems of subjection” that at different historical junctures conditioned or even silenced certain arguments about rights.

This article tells the story of how the preservation regime won out over its rivals to become the standard rights regime still in place today. I begin by recounting how this regime was first mobilized in the context of two political crises: the French wars of religion and English Civil War. These upheavals in turn spawned two sophisticated responses to the preservation regime: the abridgment regime (with Hobbes) and the transfer regime (with Spinoza and Locke). Finally, I conclude with the preservation regime’s revival in the American colonies, where it took the form of “natural constitutionalism,” and in France, at the hands of the Physiocrats, before reflecting on the implications of these regional differences for the respective courses of the American and French Revolutions.

I. Weaponizing Natural Rights: From the Saint-Bartholomew’s Day Massacre to the English Civil War

By the end of the eighteenth century, it no longer was current to think of rights in any other way than in accordance with the preservation regime. The question of when rights became “rights” can thus be phrased as: when did it cease to become common to argue that rights could be transferred or abandoned? When we approach the history of rights from this angle, the most surprising observation we can make is that the preservation regime, which in many respects is the most contemporary, is in fact very old.

Already in sixteenth-century France, there were authors who employed the language of natural rights to describe the political liberties and privileges that individuals

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could claim in society. For instance, in his famous discourse “on voluntary servitude,” written around 1550, Etienne de La Boétie argued that “if we live with the rights that nature gave us [les droits que la nature nous a donnés] and according to her lessons, we will naturally obey our parents, follow reason, and be enslaved to no-one.” These rights, as this passage clearly indicates, were meant to remain in force in civil society; to abandon them was to alienate ourselves from our very humanity. As La Boétie wrote elsewhere, “man must . . . retrieve his natural right [se remettre en son droit naturel], and, so to speak, revert from beast to human.”

Montaigne would remark many years later that La Boétie’s argument was not particularly original. The essayist was in part seeking to defend his friend from accusations of Protestantism (see below), but the premises of his treatise can indeed be traced back to conciliarist and scholastic theories, which had been developed over the previous four hundred years. As Quentin Skinner has shown, these ideas had enjoyed a rebirth at the beginning of the sixteenth century in Paris, where the Scottish theologian John Major led a revival of Thomist natural law.

By the late sixteenth century, the preservationist argument would be caught up in the religious conflict then engulfing France—it was revolutionary Huguenots who first published La Boétie’s treatise, and they advanced similar ideas in their own pamphlets (such as the 1574 Le Revelle-Matin des François, or Théodore de Bèze’s 1575 Du droit des magistrats sur leurs subjets, where Bèze repeatedly speaks of “droits humains”). This confessional association would in fact continue to color the preservation regime up through the early eighteenth century. After the revocation of the Edict of Nantes, in 1685, Protestant exiles would again brandish the language of natural rights to defend themselves against a despotic Catholic monarch: we find this argument, for instance, in Jean Claude’s Les Plaintes des protestants cruellement opprimés dans le royaume de France (1686), Jean Tronchin du Breuil’s Lettres sur les matières du temps (1690), and Jean Jennet’s four-volume history of the Dutch Republic (1704).

For most of the seventeenth century, however, the preservation regime vanished from France. The reason for this may, ironically, have more to do with Catholic zealots. The ligueur Jean Boucher had applauded the Jesuit-educated Jean Châtel’s attempt on the life of Henri IV (in 1594), arguing that “we know what has always been said in judgment of tyrants . . . Cicero wrote . . . that all natural rights vanish before tyrants [tous droits de

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16 Michel de Montaigne, De l’Amitié, in Essais bk. I, ch. 28 (1580).
17 For this history, and the other details in this paragraph, see 2 Quentin Skinner, Foundations of Modern Political Thought (1978); see also Ralph E. Giesey, Rulership in France, 15th-17th Centuries (2004); John Witte, The Reformation of Rights: Law, Religion and Human Rights in Early Modern Calvinism (2007); Paul-Alexis Mellet, Les Traités monarchomaques: confusion des temps, résistance armée et monarchie parfaite, 1560-1600 (2007).
18 Théodore de Bèze, Du droit des magistrats sur leurs subjets 87 (1575).
nature cessent envers les tyrans.” When François Ravaillac murdered Henri IV in 1610, it was his purported Jesuit connection (and the recent justification of tyrannicide by the Jesuit theologian Juan de Mariana, in *De Rege et regis institutione*, 1598), that led to a purge of Jesuit authors along with any scholars who had advanced what was now viewed as a regicidal doctrine. The emergence of an absolutist political culture in France thus corresponded with a silencing of natural rights talk.

But it was not silenced everywhere. Across the Channel, during the English Civil War, another group of rebels latched on to the idea that all men conserved natural rights in society. This group was commonly known as the Levellers. Two of their leading pamphleteers in particular, John Lilburne and Richard Overton, combined the natural rights arguments of the French Huguenots with more traditional claims about English “rights and liberties.” Lilburne refers to them in one breath as “naturall, rationall, nationall, and legall liberties, and freedoms,” while Overton made this identification even more explicit in *An Arrow Against all Tyrants* (1646), where he argued that the charges on which he was held in the Tower of London were “illegal, and contrary to the natural rights, freedoms and properties of the free Commoners of England (confirmed to them by Magna Charta, the Petition of Right, and the Act for the abolishment of the Star-chamber).” The effect of this identification was double: on the one hand, it gave greater legitimacy to civil rights, and even left open the possibility of extending them beyond those spelled out in ancient-constitutional documents; on the other hand, it inscribed natural rights in a constitutional framework, which in turn “confirmed” them. The merger of natural rights theory with constitutional liberties—a political discourse that I call “natural constitutionalism”—would remain an Anglo-American idiosyncrasy, and would be one of the main differences between the American and French revolutionary rights regimes in the late eighteenth century.

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24 Richard Overton, *An Arrow Against all Tyrants* (1646), reprinted in *The English Levellers* 69 (Andrew Sharp ed., 1998); see also the subtitle of this pamphlet, which announces its subject: “Wherein the originall rise, extent, and end of magisterial power, the natural and national rights, freedoms and properties of mankind are discovered, and undeniably maintained.” Id. at 54. By the same author, see also *To the high and mighty states, the knights and burgesses in Parliament assembled* (1646).
But the Levellers’ ideas were not representative of political thought on the Parliamentary side. Cromwell and his entourage remained skeptical of natural rights, which never became part of the official discourse: they are missing from the “Act Declaring and Constituting the People of England to be a Commonwealth and Free-State” (1649), as well as from the constitution that Parliament eventually did pass in 1753, the Instrument of Government. Politically, the Levellers were swiftly disbanded and even physically eliminated after 1649. Their ideas resurfaced now and then during the Restoration, most notably in the writings of William Penn, and then after the Glorious Revolution, in pamphlets by radical Whigs. But by the late seventeenth century, the preservation regime of rights had largely been displaced by two others.

II. The State Strikes Back: The Abridgment and Transfer Regimes of Rights

The first of these other regimes was most explicitly formulated by Thomas Hobbes in De Cive (1642), and then again in Leviathan (1651). Hobbes began by fully accepting the premise of the preservation regime, namely that we hold from nature certain rights. He even argued that some of these rights (chiefly those dealing with the preservation of our lives, bodies, or physical liberty) could be enjoyed under any circumstances. But he rejected the conclusion that we could maintain all of our natural rights in society, insisting instead that we had to “lay them down.” With Hobbes, then, we encounter an “abridgment” regime of rights: where the Levellers had insisted that a legitimate political order must preserve the natural rights of subjects, Hobbes countered that the very condition for political order was the renunciation of most of these rights.

Hobbes’s position was not entirely new. An antecedent for it can be found in legal interpretations of the lex regia, the Roman law theory of sovereignty, according to which the people alienated their political rights after electing a new emperor. It was precisely this situation that Grotius had in mind when he, too, discussed the alienation of political rights:

> It is lawful for any Man to engage himself as a Slave to whom he pleases . . . . Why should it not therefore be as lawful for a People [who] are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reserving any Share of that Right to themselves?

25 See, e.g., William Penn, The Peoples Ancient and Just Liberties Asserted in the Tryal of William Penn, and William Mead 58 (1670); John Toland, A Letter to a Member of Parliament, Shewing, That a Restraint on the Press is Inconsistent with the Protestant Religion 7 (1698).


27 Hobbes, supra note 9, ch. 14.


As the Levellers and other rebels insisted, on the contrary, that natural rights must always be retained, Hobbes did give the abridgment regime a distinctive and defining new twist. Before Hobbes, the state of nature and civil society tended not to be viewed as such existentially different conditions. By driving an ontological wedge between them, he made it far easier to imagine that something natural, like rights, might not persist in society. As we will see, one of the preconditions for restoring the preservation regime in the eighteenth century would be the re-joining of nature and society. But the split that Hobbes consumed between the two states would have a lasting effect: even authors who disagreed with his rights claims often accepted this division.

Hobbes was a controversial author, but his abridgment regime proved politically expedient in Restoration and Williamite England. Many Tory authors, including Jeremy Taylor, Samuel Parker, William Sherlock, and (in the early eighteenth century) Richard Fiddes adopted this argument about rights to defend a more powerful figure of the sovereign. Even some of Hobbes’s philosophical opponents could agree with him on rights. Richard Cumberland, who became Bishop of Petersborough in 1691, and devoted many chapters of his *De legibus naturae* (1672, English trans., 1727) to assailing Hobbes, nonetheless granted him this point: “I own, indeed, That the various Vicissitudes of Human Life and Actions, do necessarily introduce various Alienations of antient Rights, and many new Regulations concerning them.” Hobbes’s great challenger on the continent, Samuel von Pufendorf, also strongly criticized his definition of a “right,” but similarly allowed for civil laws to curb our natural rights in society.

The strongest challenge to the Hobbesian thesis came not from the preservationists, but from a third rights regime. Hobbes himself had disclosed its possibility, arguing in *Leviathan* that there were, in fact, two ways of “laying aside” a natural right: the first was by “renouncing it,” in which case the right simply disappears; but the second was by “transferring it to another,” in which the case “the benefit” of the right is granted “to some certain person, or persons” (ch. 14). This “transfer” hypothesis would be taken up shortly thereafter by Spinoza in his *Theological-Political Treatise* (1670).

Spinoza famously distinguished his argument in this work from Hobbes’s own political thought, claiming that “I always preserve natural right in its entirety [ego naturale jus...
This statement has led some commentators to conclude that Spinoza argued that individuals could preserve their natural rights in society, or that he "leaves the citizen with his natural right intact." But this conclusion rests on a misreading of what Spinoza meant by "natural right." Spinoza used the expression *jus naturale* in this letter in the singular: he is therefore not claiming that individuals preserve their subjective natural rights (singular entitlements) in their entirety, only that his own argument does not contradict objective natural right (universal justice). And he believed it possible to remain faithful to the principles of natural right all the while obliging citizens to renounce the individual enjoyment of subjective natural rights.

The mechanism for this process lay in Spinoza’s concept of a rights transfer. By means of the social contract, Spinoza argued, “each individual hands over [transferat] the whole of his power to the body politic,” after which “the latter will then possess sovereign natural right over all things” (16.45). There is no question that this transfer amounts to a loss: “[I]t is clear that by transferring, either willingly or under compulsion, this power into the hands of another, [the individual] in so doing necessarily cedes also a part of his right” (16.44). But in Spinoza’s account, our original rights do not just go up in smoke, as they did for Hobbes. Instead, they are assumed by the collectivity: we “enjoy as a whole the rights which naturally belong to [us] as individuals.” By transferring our rights, however, we can no longer enjoy them on our own. Indeed, for Spinoza, we do not preserve, as individuals, any of our original natural rights in society, not even the right to self-preservation. There are no “rights provisions” in Spinoza’s social contract theory, unless they were clearly specified at the time the contract was established: “[I]f [men] had wished to retain any right for themselves, they ought to have taken precautions for its defence and preservation” (16.48). But such “precautions” were the exception, not the norm.

Identifying this third type of rights regime can help clear up a confusion in the history of rights, namely the place of John Locke in the genealogy of the revolutionary declarations of the late eighteenth century. The influential, libertarian interpretation of Locke, advanced for instance by Robert Nozick or Michael Zuckert, casts him as the fore-
father of the preservation regime of rights.\textsuperscript{39} Much of the debate over Locke’s theory of rights has taken place among philosophers, who focus on Locke’s own internal arguments. When considered from a broader historical perspective that spans the work of generations of theorists, however, it becomes clearer that Locke’s arguments about rights are more closely aligned with the transfer rather than with the preservation regime. Like Spinoza (whom he read and annotated), Locke argues that we transfer our rights when entering into political order.\textsuperscript{40} There were some exceptions to this rule: he does affirm that we preserve a natural right to religious freedom at all times,\textsuperscript{41} and Locke’s labor theory of property can be read as extending into society (though this case is less clear, since civil law and money disrupt the natural economy of property). But to describe Locke as a strong and clear advocate for the preservation regime is ungrounded: Locke does not adhere to the later revolutionary belief that political associations have as their goal the protection of rights, but rather he argues that the very reason we enter into society in the first place is because natural rights are insufficient for protecting our life, liberty, and fortune.

Locke is explicit about the fact that we must “give up” our natural rights when joining a body politic. He discusses this point in the Second Treatise of Government, chapter 9, “Of the Ends of Political Society and Government.” Here he sums up the situation of man in the state of nature, where “to omit the liberty he has of innocent delights, a man has two powers” (§ 128).\textsuperscript{42} These powers are (1) “doing whatsoever he thought fit for the preservation of himself, and the rest of mankind,” and (2) the executive “power of punishing” (§§ 129-30); both of these “powers” are elsewhere described as “rights” (see, e.g., §§ 8-11). He then describes what happens to these powers or rights when we contract into society: “Both these he gives up, when he joins in a private, if I may so call it, or particular politic society, and incorporates into any common-wealth” (§ 128). This “giving up” is construed, in part at least, as a loss, as Locke’s further comments about the effects of this transition suggest: “[H]e is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require” (§ 130, emphasis added). Parting with our natural rights is the price to pay for society’s greater guarantees.

\textsuperscript{39} The classic libertarian interpretation is Robert Nozick, Anarchy, State, and Utopia (1974), esp. ch. 3; for an overview of his argument, and other libertarian views on Locke, see Natural Rights Liberalism from Locke to Nozick (Ellen Frankel Paul et al. eds., 2005). For a typical expression of this interpretation, see Zuckert, supra note 8, at 302 (“the institution of government” for Locke is designed for “the securing of rights”).


\textsuperscript{41} As Locke noted elsewhere, in A Letter Concerning Toleration and Other Writings 53 (Mark Goldie ed., 2010). (“Liberty of Conscience is every mans natural Right.”).

\textsuperscript{42} The fact that our natural right to private property is not also listed here implies that for Locke, this right falls under the more general right to self-preservation; hence, it follows that it, too, is given up when we enter into society. Support for this interpretation can be found in his Second Treatise, supra note 10, § 25: “[M]en, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords for their subsistence.” Let us also not forget that for Locke, our first property is our “own person,” id. § 27; therefore, it is logical that his theory of property should be folded into his broader ideas about self-preservation.
of security: “[M]en unite into societies, that they may have the united strength of the whole society to secure and defend their properties . . . .” (§ 136).

As for Spinoza before him, “giving up” in Locke thus has the double sense of resigning and transferring: we give up, but we give up to.43 Therein lies the principal difference between the transfer and the abridgment regimes: in the former, we hand over our rights to the community, whereas in the latter, they just vanish. But what happens to these rights once they’ve been transferred? Locke writes that the government has a “fiduciary power” with regards to the people (§ 156), an expression which could be read as implying that government manages our rights on our behalf, as a trustee.44 But as Peter Laslett has pointed out, Locke never literally defines government as “a trust,” but rather describes the process through which we place trust in the government: see for instance, “the community put the legislative power into such hands as they think fit, with this trust, that they shall be governed by declared laws . . . .” (§ 136, underline added).45

This is an interesting and important passage, as it underscores how natural rights do not really continue to be operative in any practical capacity in the political order. The legitimacy of government comes from the trust placed in it, and the rights given up to it, but governments do not exercise power directly on the basis of rights. Rather, it is through “declared laws,” or as Locke writes elsewhere, “stated rules,” or “established and promulgated laws.” As Alex Tuckness has argued, Locke believed that the legislature takes the natural “powers” we transferred to it and transforms them into a new, legislative power.46 The institution of government is thus less the result of a fiduciary than of a quasi-alchemical process, turning individual rights into collective laws.

This discussion of Locke’s theory of rights in society could be developed further, notably with respect to the right of resistance. But the broader point I would stress is that, even if there are some preservationist elements in Locke’s theory of rights—and there clearly are, most notably the right to religious conscience—Locke certainly did not stress overall a preservation regime of rights.

What’s more, there’s strong evidence that he was not read, at the time, as doing so. One of his friends and fellow Whig theorists, Matthew Tindal, modeled his own political arguments on Locke’s, and similarly emphasized the transfer regime. Tindal steered close to the Lockean line in his Essay Concerning the Power of the Magistrate (1697), a work that he sent to Locke in their first recorded correspondence, and where he summarized the transfer thesis in terms that left little place for the preservation of rights:47

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43 Locke also uses the language of transfer: see notably “[N]o body can transfer to another more power than he has in himself.” Second Treatise, supra note 10, § 135.
44 See, e.g., Ruth Grant, John Locke’s Liberalism 69 (1987).
46 Alex Tuckness, Locke and the Legislative Point of View (2002).
47 See Tindal to Locke, Jan. 20, 1697, and also his letter of Oct. 9, 1701, in Electronic Enlightenment Scholarly Edition of Correspondence (E.S. de Beer ed., 2008).
The only Difference between being in a State of Nature, and under Government, consists in this, that under Government Men have debarred themselves from exercising their natural Rights, and intrusted the Magistrate to do those things that in the State of Nature every one of them had a Right to do; so that the Magistrate's Power is not larger, but theirs more contracted than it was in that State.48

But it wasn't only Locke and friends who thought about rights in accordance with the transfer regime. It would continue to attract supporters well into the eighteenth century. One publication that ensured that the transfer regime would resonate throughout the eighteenth century, both in Britain and in the American colonies, was Cato’s Letters (first published 1720-23). In letters authored by Thomas Gordon, we read, for instance, how “[t]hat right which, in the state of nature, every man had, of repelling and revenging injuries . . . is transferred to the magistrate, when political societies are formed, and magistracy established”; he also writes about how “men quitted part of their natural liberty to acquire civil security.”49 Rather than “understanding the purpose behind the institution of government” as “the securing of rights,” as Michael Zuckert has argued, Gordon’s Cato (and Trenchard’s Cato wasn’t always on the same page) affirmed on the contrary that in society we exchange natural rights for civil laws, again in accordance with the transfer regime.50

At the dawn of the Enlightenment, therefore, there were essentially three different “rights regimes,” or frameworks for thinking about rights, that shared the stage. To some extent, these were rival theories, particularly in the case of the abridgment and the preservation regimes. The transfer regime was more ambiguous: on the one hand, it could be combined with preservationist arguments, as we saw with Locke and others who wanted to retain some, if not all rights; on the other, it shared a resemblance with (and in many respects began as a revision of) the abridgment regime, since it similarly insisted on our loss of rights. But perhaps the most relevant point to make from a historical perspective is that nothing suggested, in the early 1700s, that the preservation regime would come to dominate the landscape of political thought later that century. If anything, the opposite was true: the voices who argued for the preservation of rights in society tended to simply state this claim and then move on. The preservation regime was indeed the least theorized of the three; accordingly, it is found more commonly in polemical writings, such as those of the French Huguenot exiles or the English radical Whigs, and less so in works of political theory.

In the second half of this paper, I address the question of how the preservation regime rose to prominence in the eighteenth century. But first I would like to consider a central irony in the history of rights. As we have seen, the preservation regime was behind the early bursts of rights talk in the (French) sixteenth and (English) early-seventeenth centuries, and would then again become the dominant paradigm for the revolutionary


49 See respectively letters no. 55 (Dec. 2, 1721) and no. 33 (June 17, 1721), in Cato’s Letters (Ronald Hamowy ed., 1995).

50 See Zuckert, supra note 8, at 302. Interestingly, John Trenchard’s letters tend to describe rights in light of the preservation regime. See letters no. 20, 90, and 91, in Cato’s Letters, supra note 49. But Trenchard does not delve into social contract theory in the same way as does Gordon.
rights regimes of the American colonies and France. But it was largely missing from the period in the middle, which corresponds to the canonical moment of “high theory” in the history of natural rights—roughly speaking, from Hobbes to Rousseau. Viewed from this perspective, the classical period of natural right theory ceases to appear as the crucible of modern rights thought (which is how most contemporary rights theorists depict it), but instead stands out as a curious parenthesis, which ultimately had little bearing on the theories and practices of rights in revolutionary times. The reason for their irrelevance lies in the fact that these were the theorists, as I noted earlier apropos of Hobbes, who placed the greatest distance between the natural and civil states of humanity, thereby facilitating arguments about renunciation or transfer. It took the Enlightenment’s rejection of this natural/social divide, and predilection for more “natural” theories of society, to make the preservation regime emerge as the most appealing and only plausible approach to thinking about rights.

III. Rights Regimes in the Age of Revolutions

The story of how the abridgment and transfer regimes fell by the wayside is very different for the British Atlantic colonies than for France, and in this third section I will briefly recount these twin tales. While the Declarations that capped off the eighteenth century bore a strong family resemblance, they were fraternal twins at best, and possibly even *faux amis*. What becomes apparent as we carry this study forward is how the preservation regime in France stayed close to its natural law origins, whereas the American colonists adopted a more idiosyncratic version, fusing natural law and English constitutionalism.

Perhaps the most striking observation to be made, when considering the American history of natural rights, is that in the Atlantic colonies—and particularly in the province of Massachusetts Bay—natural constitutionalism thrived from early on in the eighteenth century. During the first Great Awakening, in the 1740s, Bostonians were already framing their arguments in terms of natural, constitutional rights. Elisha Williams, a minister, Harvard graduate, and rector of Yale College, argued in 1744 that “The Rights of *Magna Charta* depend not on the Will of the Prince or the Will of the Legislature; but they are the *inherent* natural Rights of *Englishmen*.” He also drew heavily on natural law theory, in this case on “the celebrated Mr. *Lock*” and “his *Treatise of Government*.”

A few years later, on the centennial of Charles I’s execution, the Boston reverend Jonathan Mayhew offered a full-throated defense of Parliament’s actions, as necessary “to vindicate their natural and legal rights: to break the yoke of tyranny, and free themselves and posterity from inglorious servitude and ruin.” John Adams would later point to this sermon as one of the earliest expressions of “the principles and feelings which produce[d] the Revolution.”

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51 Elisha Williams, *The Essential Rights and Liberties of Protestants* 64, 5 (1744).

But the most famous and sophisticated theorist of natural constitutionalism was James Otis, one of the early New England leaders of the American Revolution. Otis was a lawyer, and was very well versed in the continental tradition of natural law theory. Hence, in his famous pamphlet on *The Rights of the British Colonies Asserted and Proved* (written in response to the Sugar Act of 1764), Otis grounded his arguments in natural law: “There can be no prescription old enough to supersede the law of nature, and the grant of God almighty; who has given to all men a natural right to be free, and they have it ordinarily in their power to make themselves so, if they please.” But he was equally passionate about the constitutional rights of British subjects:

> The common law is received and practiced upon here, and in the rest of the colonies; and all antient and modern acts of parliament that can be considered as part of, or in amendment of the common law, together with all such acts of parliament as expressly name the plantations; so that the power of the British parliament is held as sacred and as uncontrollable in the colonies as in England.53

Clearly, for Otis, the source of rights wasn’t an either/or question—*both* natural law and English constitutionalism were essential ingredients to his defense of the colonists’ rights. Constitutionalism provided Otis (and his fellow Americans) with specific examples of rights, particularly in criminal procedure; but natural law allowed him to extend rights to the broader political power of self-government. Most of the historiography of American rights privileges one source of rights to the detriment of the other, when in fact both were critical for producing the American revolutionary discourse of rights.54

Indeed, it was both in terms of natural law and English constitutionalism that the Americans would march toward independence. Congress made this very explicit in its “Declaration and Resolves of the First Continental Congress,” which asserted that “the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS.” What’s revealing about this declaration, and would set a precedent for subsequent ones, is that the juxtaposition of natural and constitutional sources of rights would be teased apart in the articles or resolves. Here, the first resolve draws clearly from natural law, and refers to the universal rights of all individuals (“they are entitled to life, liberty and property”). But the second resolve moves specifically to “all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.”

As these two sources become untangled in the enumeration of specific rights, we can better appreciate why the American and French declarations had a superficial resemblance, yet differed so much in detail. Both sets of revolutionaries asserted their most basic political rights in the name of natural law, but the Americans then pivoted to re-

53 *The Rights of the British Colonies Asserted and Proved* 12, 71-72 (1764).

54 I deal with this issue in more detail in the book version of this article. The importance of constitutionalism for American rights has been emphasized in particular by John Philip Reid, notably in *Constitutional History of the American Revolution* (1995); whereas the natural law influence was stressed in the older “liberal” historiography, as well as by Straussian theorists: see, respectively, Louis Hartz, *The Liberal Tradition in America* (1955), and Zuckert, supra note 8.
asserting their (soon to be former) English constitutional rights. The Maryland declaration took a revealing and blunt approach to this effort, simply importing English common law rights wholesale:

[T]he inhabitants of Maryland are entitled to the common law of England, and the trial by Jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, . . . and of such others as have been since made in England, or Great Britain, and have been introduced, used and practiced by the courts of law or equity.55

As this passage highlights, what the Americans wished to preserve above all were the common law rules of criminal procedure, chief amongst which was the trial by jury.56 American revolutionaries waxed lyrical over this right, and every state declaration secured it by name. But if trial by jury was the centerpiece of this system, it was not the only part. The state declarations overflowed with other criminal procedural rights, again all taken from English common law. They forbade warrantless searches and excessive bail, and insisted on the quintessential English right of \textit{habeas corpus}. In this respect, the Americans continued to be good followers of Blackstone, who had similarly insisted on the unique importance of the English justice system for preserving English liberties and natural rights: the trial by jury was “the principal bulwark of our liberties” and “a privilege of the highest and most beneficial nature.”57

Many of these procedural rights would be enshrined in the Bill of Rights: indeed the fourth, fifth, sixth, and eighth amendments all deal with the criminal justice system. If one adds in the seventh amendment, which deals with civil trials, then a full half of the original ten amendments concern “judicial” rights and criminal procedure. The larger point here is that these rights are wholly foreign to natural law theory, and derive solely from English common law tradition. It is no surprise, then, that none of these features of American rights talk would appear in the French Declaration of Rights. No other common law countries, let alone civil law ones (like most of France), enjoyed such detailed criminal procedural rights, or the precedent of an earlier Bill of Rights (i.e., the 1689 English Bill of Rights). Anglo-American rights talk thus stands out as an anomaly in the longer history of early-modern rights.

How did the French, then, come around to insist on the preservation regime of rights in their revolutionary declarations? Were they modeling their claims on the Americans, as Georg Jellinek suggested over a century ago?58 The French were certainly well attuned to political developments across the Atlantic. Benjamin Franklin and the duc de La Rochefoucauld d’Anville (himself a future member of the Assembly) had published a translation, in 1783, of the major political documents of the American Revolution, including

55 Md. Const. of 1776, Decl. of Rts., art. III. More broadly, see Forrest McDonald, Novos Ordus Seclorum 40 (1985).
the thirteen state constitutions or colonial charters, six of which were preceded by declarations of rights. 59 Shortly thereafter, in 1788, the revolutionary enthusiast Filippo Mazzei came out with a very popular history of the American Revolution, which dealt at length with the Virginia Declaration of rights (included there in translation as well). 60 Some transatlantic connections were even more direct: the marquis de Lafayette began collaborating with Thomas Jefferson on drafts for a French declaration in January 1789, and would continue to consult with his American friend up through July. 61

But other historians have pointed out the significant differences between “rights of man” and droits de l’homme. Writing at the time of the bicentenary, Marcel Gauchet and Lucien Jaume both questioned the extent to which the 1789 Declaration really afforded full-blown rights at all. The French document was equivocal, far from absolute, and not even wholly concerned with rights: half of the articles in the Declaration deal with laws, not rights. Taking their inspiration from Alexis de Tocqueville, Gauchet and Jaume saw in this légicentrisme a congenital Gallic obsession with a strong, absolutist state, purveyor of the law. 62

While I agree with Gauchet and Jaume that French rights talk was no mere translation or imitation of Anglo-American rights claims, I present here a very different account of their differences. French revolutionary rights talk, I argue, can be traced back to continental natural law sources, not of the Hobbesian, absolutist variety, but rather of a far more liberal sort. Indeed, if the preservation regime of rights regained prominence in the eighteenth century, it was in large part thanks to a small group of economists known as the Physiocrats. 63 Given the revolutionary associations of this regime in the sixteenth century, it is somewhat surprising that a group of writers with such strong ties to the French crown revived it in the eighteenth; but then again, it is actually not all that surprising, since Physiocracy, more than any other eighteenth-century school of political thought, brought nature and society back into close proximity. To quote the title of one of their best known statements, the Physiocrats preached L’Ordre naturel et essentiel des sociétés politiques (a work by Pierre-Paul Le Mercier de La Rivièrè, published in 1767). They also placed the question of natural rights in society at the heart of a very real and pressing issue that consumed public attention in the 1750s and 1760s: the grain trade.

59 Constitutions des treize États Unis de l’Amérique (1783).
Before 1750, very few French writers had paid much attention at all to natural rights: Montesquieu, for instance, does not discuss natural rights in any of his major works; they are largely missing from Voltaire’s pre-1750 writings, as well. But in 1747, the future leader of the Physiocrats, François Quesnay, was already developing the preservation regime in the second edition of his *Essai physique sur l’économie animale*. Here we find a section entitled “La Liberté,” in which we read that “Men have natural and legitimate rights in the social order.” He also claimed that the advent of civil society did not require a social contract, but came about naturally.

Quesnay’s arguments seem mostly to have been fashioned against Hobbes, whom he alludes to on various occasions. He may also have been familiar with Locke, though there is little in Quesnay’s thinking about rights that can be traced directly back to him. Quesnay’s thought appears mainly to have been influenced by more classical sources: he had read Cicero at a young age, and possessed a copy of *De officiis*, in French translation, where he could have learned about the Stoic belief that “the sovereign good is to live according to what nature demands of us.” This text may have further encouraged his natural rights talk, as it contained strong language about those who dared to “strike at the rights of humanity [blesses les droits de l’humanité].” More generally, the basic Physiocratic narrative about the origins of the state closely follows Aristotle’s, which similarly progresses, in a natural, stadial development, from the family, to the village, to the community, then to the state.

Once Quesnay moved to Versailles, where he was Mme de Pompadour’s private physician and became premier médecin ordinaire du roi, he largely ceased to publish under his own name, with the exception of three articles in the *Encyclopédie*. The 1750s and ’60s was the period when Quesnay’s collaborations with other Physiocrats, in particular the marquis de Mirabeau, were most intense, and in the second half of the 1760s, they began publishing their doctrine vigorously. Quesnay himself signaled the charge, with the (anonymous) publication in 1765 of *Le droit naturel*. Again, he insists here that no transfer, exchange, or abridgment of rights can or should occur: “[N]atural right, understood in the natural and legal spheres, extends to all states in which men may find themselves.” Society is the ultimate preserve of natural rights, as it is the function of positive laws to secure, even to expand, them: “[M]en who place themselves under the rule, or rather the protection, of a tutelary authority, extend their natural right a great deal [étendent beaucoup leur droit naturel], rather than restricting it.”

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64 From the table of contents, in 3 François Quesnay, *Essai physique sur l’économie animale* 609 (1747); see also id. at 369: “This power [i.e., government] does not destroy every man’s natural right [le droit naturel de chaque homme]; on the contrary, it affirms [assure] and regulates it according the most fitting and relevant needs of society.”


67 François Quesnay, *Le Droit naturel* 13 (1765) (emphasis added).

68 Id. at 28-29.
The other card-carrying Physiocrats who defended the preservation regime in these years were joined by a number of Physiocratic sympathizers, including Mirabeau’s son, the future revolutionary Honoré-Gabriel de Riqueti; the marquis de Condorcet, who took up his pen to defend his mentor Turgot’s liberal grain-trade policy, in the name of natural rights; and the abbé Morellet, who rebutted Ferdinando Galiani’s mocking attack on Physiocracy, the *Dialogues sur le commerce des blés* (1770). What is most interesting about the adoption of this Physiocratic argument, however, is the way that it evolved from a liberal economic claim to politically liberal one. Quesnay did not consider political rights at all in his defense of natural rights; for him, we retained property rights, but sovereignty resided in a “legal despot.” Condorcet and Mirabeau fils, however, broadened this economic angle, and used the same arguments about rights to attack political injustices, such as slavery (in the case of Condorcet) and *lettres de cachet* (for Mirabeau). This gradual drift from economic to political logic also explains the irony that it would be the man Louis XV referred to as “my thinker” who revived the rights regime that would be enshrined by the revolutionaries.

If Physiocracy ended up having such an impact on the French history of rights, it is also because even those who challenged or were indifferent to its economic conclusions (the derivation of all value from agriculture) often accepted its political premises (the preservation of natural rights in society). This was particularly true of the group of *philosophes* who congregated at the salon of the baron d’Holbach in the 1760s and ’70s, most of whom are not usually considered “Physiocrats” (with some exceptions), but who did the most to ensure that what started out as the Physiocratic account of natural rights would become commonplace by the time of the French Revolution.

The Physiocrats and the *holbachiens* are rarely discussed in the same breath or even in the same books, but their social ties ran deep and strong. Diderot, a close friend of the baron’s and a fixture of his salon, first met Quesnay in the early to mid-1750s, when he was fishing for contributors to the *Encyclopédie*; according to Jean-François Marmontel, also a member of the coterie, Quesnay routinely hosted Diderot, d’Alembert, Helvétius, and himself in his Versailles apartment. Another habitué of d’Holbach’s salon was Charles-Georges Le Roy, also a close friend of Diderot, and one of Quesnay’s collaborators in the 1750s. Morellet first heard Galiani’s arguments against Physiocracy in the baron’s salon, where the Neapolitan rehearsed them before publishing his attack.

In addition to the considerable overlap between the Physiocratic and *philosophe* social networks, there is an abundance of textual evidence showing that the *philosophes*

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70 The classic study of d’Holbach’s coterie is Alan Charles Kors, *D’Holbach’s Coterie: An Enlightenment in Paris* (1976), but it does not mention the Physiocrats; conversely, most work on the latter (including Liana Vardi’s recent book: see above) does not consider the coterie.

71 See Kors, supra note 70, at 17-18 (and passim); on Le Roy’s relations with Quesnay, see Théré & Charles, supra note 66.
incorporated the basic political tenets (if not the precise economic doctrines) of the Physiocrats in some of the best known and most widely read books of the late Enlightenment. These include the baron d’Holbach’s own *Système de la nature* (1770), one of the top “forbidden best-sellers” of the late eighteenth century.72 One of the chief accusations d’Holbach leveled against priests and tyrants was that they stripped us of our natural and human rights: he railed against “despotism, tyranny, the corruption and licentiousness of Princes, and the blinding of the people who are forbidden, in heaven’s name, from loving liberty and . . . to enjoy their natural rights [user de leurs droits naturels].”73

These ideas were also echoed in the work that rattled the old regime to its very core: the abbé Raynal’s *Histoire des deux Indes* (first edition, 1770), a collective work with roots, once again, in d’Holbach’s salon, where Raynal was a regular.74 A leitmotiv of its indictments of marauding colonial powers was their violations of the natural rights of peoples around the world. The extermination of native Americans in Spanish colonies, for instance, was explained by the fact that “they felt the natural right they had to be free, because they did not want to be slaves.”75 European tyrants and oppressors must face the threat of a legitimate resistance, as had happened in the American colonies:

If peoples are happy with their government, they will keep it. If they are unhappy . . . it will be the impossibility of suffering any longer that will determine them to change it. The oppressor will call this salutary uprising a revolt, even though it is only the legitimate exercise of the natural and inalienable right of the oppressed.76

Natural rights, in this reading, now extended beyond property and liberty to include the most politically subversive right of all—what the French revolutionaries were soon to call the right of “resistance to oppression.”77

Two decades before the French National Assembly issued the Declaration of the Rights of Man and of the Citizen, and some years before the American Revolution, French writers had already outlined a theory of natural rights (sometimes even referring to them as “les droits de l’homme”)78 that stressed the importance of preserving rights in society, singling out liberty, security, and property—as well as, more rarely, resistance from oppression—as key inalienable rights.79

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74 On these relations, see Kors, supra note 70, at 21-22 & passim. A great deal has been written about Raynal’s book: among recent works, see Sankar Muthu, *Enlightenment Against Empire* ch. 3 (2003); and Anoush Fraser Terjanian, *Commerce and Its Discontents in Eighteenth-Century French Political Thought* (2012).
77 Declaration of the Rights of Man and of the Citizen § 2 (1789).
78 See, e.g., 4 Raynal, supra note 75, at 271 [8.22].
79 See 1 d’Holbach, supra note 73, at 96.
In 1789, the belief in “les droits naturels, inaliénables et sacrés de l’Homme” was hardly radical, and did not require a shadowy network of atheistic philosophers to gain passage in the National Assembly. The desire for a Declaration of Rights featured in number of Cahiers de doléances that were compiled in the run-up to the gathering of the Estates General. During the debates, Mirabeau himself commented on the key contributions of the Physiocrats—including his father—to the ideas and ideals expressed in the Declaration: “Everything is contained in that elevated, liberal, seminal principle that my father and his illustrious friend, M. Quesnay, celebrated thirty years ago.” This history of rights thus confirms Emile Boutmy’s response to Jellinek that the Declaration’s sources could just as well be found in the French Enlightenment as in American political documents or Protestant natural law books.

Of course, the American Revolution had solidified the connection in French minds between natural rights and political legitimacy—Jellinek was not all wrong, either. But the rights afforded by the French Declaration nonetheless differed significantly from their American counterparts. Most importantly, we find none of the criminal procedural rights that were so dear to the Americans. As opposed to the five out of ten amendments in the U.S. Bill of Rights that deal with due process, the French Declaration has but one article (§ 7), which provides a limited set of guarantees (since they depend on the content of the law). The purpose of this article, as we know from the debates, was to abolish the dreaded lettres de cachet; so the appeal to “the law” here should not be read in terms of some atavistic commitment to absolutism. At the same time, this reliance on a law-based protection of citizens is revealing, as it underscores the persisting faith among French revolutionaries that aligning natural and civil law, rather than establishing stand-alone rights provisions, would lead to a fairer justice system. But it would be hypocritical to fault the French for turning to law rather than procedural rights in their first efforts at reforming the justice system. Not only did the continental tradition of natural law, on which they drew, encourage this direction, but they also simply did not have the same English common law tradition as the Americans at their disposal.

What this meant for the French, however, was that the connection between natural rights and criminal procedural rights was very tenuous. Natural rights hovered, untethered, above the French legal system, largely disconnected from laws, the criminal code, legal practices, and jurisprudence. As a result, over the subsequent years, it would prove far more difficult for the French revolutionaries to define and, more importantly, to integrate rights into the fabric of law and society. Conversely, it would also prove far easier to unmoor rights entirely and, in troubled times, to use the law, not to protect, but to

82 8 Archives parlementaires 453 (Aug. 18, 1789).
83 See Emile Boutmy, La Déclaration des droits de l’homme et du citoyen et M. Jellinek, 17 Annales des sciences politiques 419 (1902).
repress. When the Adams administration in the United States passed the Alien and Sedition Acts, in 1798, a robust legal culture centered on rights ensured that they would be short-lived (for the most part). But when the French government faced similar concerns about foreign nationals and seditious print material, there were fewer legal bulwarks to provide much resistance. This is not to say that the French emphasis on legality was somehow inherently totalitarian, but rather that when political crises occurred, there were fewer legal provisions in place to prevent authorities from instituting the new legislation of the Terror.

Conclusion

What does this genealogy of early-modern rights regime teach us about the broader history of human rights? First, it drives home the inconvenient fact that the history of human rights cannot be separated from the longer, torturous history of natural law. The change in nomenclature, from natural to human rights, was never clear cut, and took different paths in different languages. The French today still speak of les droits de l’homme; when Pius VI criticized the French Declaration of Rights, he disputed their definition of jura hominis. The shift in English from “rights of man” to “human rights” may appear more substantial than it seems, particularly since authors had used a wide variety of synonymous expressions for this concept throughout the seventeenth and eighteenth centuries. Between 1789 and 1948, natural law theory may have receded into the background, but recent work on the Church’s role in promoting human rights in the 1930s and ’40s, and the very drafts of the Universal Declaration of Human Rights (UDHR), clearly indicate that the rights regime embraced by the United Nations remains dependent on the framework of natural law.

Secondly, this genealogy reveals the extent to which the post-WWII human rights regime drew from the Anglo-American common law tradition as well. The emphasis in the American state declarations, as well as in the U.S. Bill of Rights, on criminal procedural rights was not reflected in the French Declaration of Rights, but would be found in the UDHR. Articles 5-12 all deal with the criminal justice system, and echo the fourth, fifth, and eighth amendments (on unreasonable searches and seizures: UDHR art. 12; habeas corpus: UDHR art. 9; against cruel and unusual punishment: UDHR art. 5). I do not mean to suggest a direct line between these documents, but rather that by the mid-twentieth century, human rights doctrine had fully incorporated this common law tradition, as well.

Finally, do the Enlightenment and the age of Revolutions enjoy a privileged place in the history of human rights? Even if human rights were not invented during this time, Lynn Hunt is right to highlight the extent to which they were broadly publicized and democratized. Rights had already been conceptualized as universally applicable (one need but think

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85 See the papal encyclical Adeo nota, in 2 Collection générale des brefs et instructions de Notre Très-Saint Père le Pape Pie VI, at 70 (M.N.S. Guillon ed., 1798).

of Vitoria on the Native Americans), but this applicability was not universally recognized. With some polemical exceptions—e.g., the French wars of religion or the English Civil War—rights talk remained a predominantly scholarly dialect. By freeing rights talk from the domain of erudite disquisitions, Enlightenment authors brought it to the disposal of a broader readership, which would accordingly latch onto it in revolutionary times.

But the same period also left its mark on the conceptual history of rights. In part, this mark was conceptual: the Enlightenment understanding of human rights departed from earlier, juridical definitions by stressing their connection to feelings, rather than reason. But mostly, this mark was achieved through erasures. After 1789, it became exceedingly infrequent for political theorists or actors to consider human rights as entitlements that did not carry over from a pre-political state into a political one. It did not take the Enlightenment to imagine this concept of rights, but, by shoving older rights regimes into the dustbin of history, the philosophes and the American patriots did ensure its long-term success.

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