

RIGHTS TALK IN A POST-LIBERAL AGE:
MARY ANN GLENDON'S ENDURING INSIGHT INTO THE
AMERICAN RIGHTS TRADITION*

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Gross human rights violations occur every day, often invisibly to most of us. Media coverage of Russian rights violations in Ukraine has resurfaced this issue, but even that has begun to fade months after the initial invasion. Mary Ann Glendon's classic book, *Rights Talk*, provides helpful analysis of the efficacy of rights discourse, not only in America but within the liberal order more broadly.¹

American conflicts about rights are deeply polarized, with ongoing battles over religious liberty, abortion, racial discrimination, immigration, and Covid-19 vaccines. Soaring inflation, economic turmoil, and a huge question mark over international security not only compound these issues, but press questions about them more firmly: How can we meaningfully talk about human rights today, and how are courts best placed to enforce them?

What follows is an effort to remind us of Glendon's core insights about rights as we plod our way through current politics, and to distill them into an enduring middle ground between newer critiques. Those more recent prognoses for rights run in opposite directions, even if they agree that there's a problem to be solved. Jamal Greene, on the one hand, has argued that our courts should recognize more rights claims as legitimate (rights are everywhere!) but enforce them more weakly, through something like the

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

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¹ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991), available at <https://www.simonandschuster.com/books/Rights-Talk/Mary-Ann-Glendon/9780029118238>.

proportionality model of jurisprudence in European courts.² Nigel Biggar, by contrast, discourages our reliance on the idea of natural rights (concluding, at one point, that “there are no natural rights”), which he thinks are too indeterminate to do real philosophical work in our political debates.³ We should instead stick to the concept of *legal* rights that are limited and enforceable, a practice which would scale back what he calls the “imprudent jurisprudence” of judges who either extend the reach of human rights doctrine too far—into domains where they paralyze quick and prudent decision-making (e.g. the military)—or fill it out implausibly with new meanings (e.g., a “right” to assisted suicide). Glendon’s earlier critique of rights paves a more reasonable path, calling for *renewal* of our rights tradition rather than its unbounded expansion or its abandonment.

Few scholars apart from Glendon have dedicated their lives so thoroughly to the intellectual defense of human rights. Most recently, she served as the Chair of President Trump’s Commission on Unalienable Rights, which was tasked with explaining how America’s rights tradition should inform our foreign policy today.⁴ Because of the surrounding circumstances, the commission’s report is something of a disappointment. Its contribution lies more in clarification than recommendation: it highlights the deep tensions between U.S. efforts to promote the cause of human rights abroad and the respect required for other countries’ sovereignty (and their prerogative over their own human rights policies). But apart from identifying China, Russia, and non-state organizations as chief threats to global respect for human rights, the report says little about what a truly *comprehensive* foreign policy on human rights would look like.

Any such policy will be shaped in large part by America’s domestic human rights policy, and the commission rightly draws its limited recommendations from the ways our own rights tradition is compatible with the provisions of the Universal Declaration on Human Rights (UDHR). Notably, for all of the report’s appropriate contrition over American failures to guarantee unalienable rights for blacks, women, and racial minorities, it says nothing about

² JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021), available at <https://scholarship.law.columbia.edu/books/302/>.

³ NIGEL BIGGAR, WHAT’S WRONG WITH RIGHTS? (2021), available at <https://global.oup.com/academic/product/whats-wrong-with-rights-9780198861973?cc=us&lang=en&>.

⁴ Report of the Commission on Unalienable Rights (2020), available at <https://www.state.gov/wp-content/uploads/2020/07/Draft-Report-of-the-Commission-on-Unalienable-Rights.pdf>.

Glendon's own concern, expressed in other work of hers, to protect prenatal life. Any complete foreign policy on human rights would take positions even on these controversial questions about how to understand the right to life, the most basic inalienable right.

One of Glendon's most important insights about rights does shape the report, and in a way it's the one that most distinguishes her position from newer rights critiques. The report warns against the dangers of an expansive list of allegedly universal rights. As the commission explains, the UDHR was originally constructed around a small list of rights so as to bolster the authority and credibility of each one, and not to exceed what a diverse range of countries could reasonably agree to. Pushing the scope of rights farther, the commission argues, risks undermining the goal of the Declaration's original drafters: "There is good reason to worry that the prodigious expansion of human rights has weakened rather than strengthened the claims of human rights and left the disadvantaged more vulnerable. More rights do not always yield more justice." Indeed, Glendon offered a compelling argument on this point thirty years ago in *Rights Talk*, and it is one of two features of her analysis I want to highlight. For Glendon, America's rights tradition has urged a problematic understanding of what rights are and the purpose they serve. This has led to their proliferation over time, which has in turn frustrated healthy political debate.

Glendon also recognized that what courts say (and do not say) about rights matters: in an increasingly pluralist and polarized culture with fewer shared values and norms, jurisprudence takes on more pedagogical power. And how the public and the courts ought to respond to that fact is an urgent question, on which we will see that Greene and Biggar have more to say.

Rights Talk was first and foremost a book about political conversation; it set out to diagnose the ways that "rights talk reflects and distorts our culture." In the late 1980s and 90s, Glendon could already see that the language of rights had completely pervaded American discourse in harmful ways: it "has become the principal language that we use in public settings to discuss weighty questions of right and wrong, but time and again it proves inadequate, or leads to a standoff of one right against another." Yet importantly, as if to anticipate future critiques, she insisted that "the problem is not . . . with the very notion of rights, or with our strong rights tradition. It is with a new version of rights discourse that has achieved dominance over the past thirty years." That "new version," she thought, had obscured our ability to see what justice truly requires, by fostering a hyper-individualism averse to

the requirements of civic virtue and communal responsibility. “[R]ights talk,” she contended, “encourages our all-too-human tendency to place the self at the center of our moral universe.”

This preoccupation with our individual needs and demands, and with cloaking them in rights language, Glendon argued, could be traced to the American ideal of the “lone rights bearer.” For Glendon, this ideal—of a citizen free from state interference in her pursuit of personal freedom and happiness—emerged out of the political thought of figures like John Locke and Jean-Jacques Rousseau and influenced the American founders. For these thinkers, the origin and end of government lies in the free consent of a group of individuals to the coercive power of the state, for the protection of their natural rights to life, liberty, and property. And this theory of government not only shaped the American Constitution, but in turn shaped our view that constitutional law’s primary goal is to protect each person in the exercise of her natural rights.

Yet over time, Glendon thought, this important goal had been distorted into an obsession with unrestricted personal autonomy and privacy, closed off to our pre-existing relationships and obligations to others. We had lost our founders’ attention to ideas of duty, virtue, and civic responsibility that were needed to sustain a healthy republic. And those ideas, unlike the warped vision of the lone rights bearer, were grounded in the truth about human life. We are all born into relationships and communities, with pre-existing duties of justice and care towards each other. Our rights are grounded in those duties, and true freedom and happiness are to be found in living them out.

Yet American neglect of that reality urged the proliferation of all kinds of rights claims—entrenched in an absolutism that bred deep polarization. And as Americans became more divided on questions of morals, religion, and politics, our constitutional law began to play a greater pedagogical role. Glendon saw that our jurisprudence had become a common teacher, not just on the meaning and scope of rights, but on how to think about deep debates that rights protections are supposed to conclude. The Supreme Court’s affirmation of certain fundamental rights became the starting point for political discourse, rather than its end.

Glendon offers many comparative examples of European and American jurisprudence to illustrate this pedagogical power of the law, but often with caveats and qualifications, which sometimes make it hard to determine what exactly the examples are supposed to draw out. In general, she suggests that Western European constitutional law has been more clearly guided by the

reality that human beings are born into relationships and communities, which impose obligations that make it hard to treat conflicts as a simple question of whose rights trump whose.

Her best and clearest illustration of that difference lies in her discussion of abortion. The Supreme Court's decision in *Planned Parenthood v. Casey*, she shows, helped further entrench the myth of the lone rights bearer. In *Casey's* joint opinion by Justices Anthony Kennedy, Sandra Day O'Connor, and David Souter, *Roe* was traced to a line of earlier cases recognizing "the right of the individual to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." In the same opinion's famous "mystery of life" passage, the Justices treated abortion as the ultimate free choice in a woman's quest for self-definition, totally abstracted from her other relationships and obligations: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."

Other countries, Glendon shows, took a more realistic approach to abortion. In the United States, pregnant women were left with "their constitutional right to privacy and little else." But countries like Germany decided abortion cases by giving the state more responsibility to help women fulfill their maternal obligations. Even today, a woman in Germany who seeks an abortion must be given counseling on the public benefits and social supports available to her as a single mother, which are more generous than those offered in the United States. And except in cases of emergency, she must also wait three days before obtaining an abortion, which a doctor must certify is the only possible means to relieve her of serious harm to her physical or mental health.

So Glendon astutely saw both the power of law—in particular the way courts speak about constitutional rights—to shape public discussion of deep moral questions (like abortion), and the power of mythical ideals to distort our understanding of the meaning of rights in the first place. Unfortunately, even thirty years ago, she was already pessimistic about the possibility for reform and renewal. These words still ring true for readers today:

Rights talk in its current form has been the thin end of a wedge that is turning American political discourse into a parody of itself and challenging the very notion that politics can be conducted through reasoned discussion and compromise. For the new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires. Its legitimation of individual and group egoism is in flat opposition to the great purposes set

forth in the Preamble to the Constitution . . . the possibility must be reckoned with that our shallow rights talk is a faithful reflection of what our culture has become.

Are there any solutions to the distortion and proliferation of rights? Glendon suggested a few. Chief among them is the need to ensure space and freedom for intermediate institutions like families, churches, and schools to rebuild our understanding of rights from the ground up, by instilling in young people better ideas of virtue and responsibility for the common good. In schools, Glendon's recommendation is playing itself out in a striking way she may not have foreseen. The prevailing philosophies of education today share a commitment to fostering virtues, but they disagree completely on what those virtues are. On one hand are those who wish to train our students on the despair of critical race theory and transgender ideology, forming them through an endless litany of oppression, victimization, and desire affirmation. On the other hand are those who are trying to impart hope to children through religious and classical traditions, which teach us not only to identify our faults but also to foster good habits that overcome them. These two schools of thought are both efforts to instill civic responsibility in our children, but Glendon would surely (and sadly) see the first as a "faithful reflection of what our culture has become." The other approach carries the restorative potential she hoped for, but it is still burgeoning in start-up classical and faith-based schools across the country.

It is a testament to the strength of Glendon's analysis that newer rights critiques focus less on the power of *language* than on the power of *courts*. These more contemporary analyses move quickly from echoing Glendon's original concerns to proposing what courts should do about them.

Had Glendon predicted the form of rights critiques if nothing had changed thirty years on, she would have found a good template in Jamal Greene's *How Rights Went Wrong*. Like Glendon, Greene notices that our rights conflicts usually take the form of seemingly irresolvable standoffs. And he narrows in right away on the role of courts in perpetuating this problem. It has become the special job of courts to say which right wins in a conflict. Greene calls our American affirmation of this judicial role "rightism"—an excessive preoccupation with the strength of our rights claims and the courts as the natural setting for their enforcement. Thus Greene sets out to prescribe a solution for "a common but unrecognized problem in American law: in striving to take rights seriously, we take them too literally. We believe that holding a right means getting a judge to let us do whatever the right protects."

Greene also shares Glendon's concern about the proliferation of rights, arguing that it has undermined our sense of responsibility toward each other and our communal bonds. But he is less concerned about the expansion of rights *per se* than about the divisive role we've given some "strong" rights by entrusting them so completely to the courts. "The proliferation of strong rights," he argues, "can frustrate the democratic will and erode the solidarity of communities. Judicial dominion over constitutional rights can absolve the rest of us from our responsibility to take rights seriously, leading our moral intuitions to atrophy and eventually to decay." Glendon, by contrast, thought that our warped preoccupation with personal autonomy and privacy had *bred* rights claims completely at odds with the duties and responsibilities that ground rights in the first place.

In spite of their similar diagnoses, Greene's proposal for courts is one I suspect Glendon would depart from. Glendon, like Greene, was concerned that the spread of rights claims had undermined the very credibility and authority of our rights tradition. But she was also concerned to remedy the self-absorbed conception of rights and morality that American courts had helped to foster. So for Glendon, the path forward would ultimately mean scaling back our understanding of what can legitimately be claimed as a right, and thereby putting less of a strain on courts to be the common moral teacher in a pluralist society. Greene, however, seeks to encourage the courts' pedagogical role, at least in the short term, by proposing that they enforce more rights claims in a looser fashion: "U.S. courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly."

In the long run, though, Greene hopes his proposal would foster less reliance on judges as moral arbiters. On his model, judicial enforcement of rights would look much more like European courts' proportionality jurisprudence than the U.S. textualist and originalist approach. Judges, he argues, should be guided less to find a textual or historical basis for enforcing a limited number of constitutional rights, than to determine as clearly as possible the facts of a case and the competing interests involved, in order to balance whatever rights claims have been made:

Courts should devote less time to parsing the arcane legalisms—probes of original intentions, pedantic textual analysis, and mechanical application of precedent—that they use to discriminate between the rights they think the Constitution protects and the ones they think it doesn't, and spend more time examining the facts of the case before them: What kind of government institution is acting? Is there good cause, grounded in its history,

procedures, or professional competence, to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual freedom and equality?

Greene thinks this method would be more likely to give each side some of what it is looking for and, at least in theory, would encourage government and community actors to take more responsibility. And, in line with Glendon's original aspiration, it would help break down the polarization that follows from U.S. courts always staking a clear winner and loser.

Like Glendon, Greene finds the German constitutional approach to abortion a helpful analogue to consider. ". . . [R]ather than structure abortion jurisprudence around the rights of either women or fetuses alone," as he thinks the U.S. has done, "the [German] court has consistently structured the law around *both* sets of rights." This dual recognition of "the constitutional status of fetal life" and women's interest in autonomy has made abortion politics far less controversial in Germany, and it has urged the government to take more responsibility for women in crisis pregnancies.

Yet although Greene's proposal is intended to scale back the power of judges over deep moral and political questions, it is hard to see how a proportionality-style jurisprudence would achieve that in practice. As other reviewers have noted, Greene isn't clear about the constraints on judges that should guide such a model. Pushing courts to follow a much more vaguely defined set of balancing tests in adjudicating rights would surely leave judges just as much power as they already have, albeit in a different form. In other words, while Glendon's shared concern about the power of the courts led her to urge the renewal of other sources for common values (like families, schools, and churches), Greene's proposal in the end would likely just channel judicial power differently. And it would do so in a way likely to make court interventions into our politics even more pervasive. This would do nothing to resolve the long-term harm that judicial power—by inflaming our debates—poses to the authority or credibility of rights themselves.

Nigel Biggar's recent critique of rights offers a starkly opposite approach. It shares Glendon's goals of renewing a common moral tradition and limiting judicial power over deep political conflicts, but it proposes that we abandon the concept of natural rights altogether. For Biggar, rights claims, which always arise from a prior conception of natural law or objective moral principles, should be limited to legal rights that are determinate in their content and truly enforceable. For Biggar, it doesn't make sense to speak of the

existence of a “natural” right when the terms of its guarantee are vague or simply cannot be realized by states as a matter of empirical contingency (due, for example, to limited resources). He criticizes some provisions of the UDHR, including its “unqualified assertion of rights to ‘life, liberty, and security,’” as “so indefinite as to license absurd interpretations.” At the end of five chapters outlining a series of objections to natural rights from the Enlightenment period to the present day, Biggar concludes:

In a nutshell, . . . my answer to the question, ‘Are there natural rights?’, is this. There is natural right or law or morality, that is, a set of moral principles that are given in and with the nature of reality, specifically the nature of human flourishing. There are also positively legal rights that are, or would be, justified by natural morality. But there are no natural rights.

On the more general point that rights flow from natural law or morality, Glendon would surely agree. There is much common ground between her analysis and Biggar’s in his discussion of American founding documents, many of which presupposed ideas of civic virtue and responsibility as necessary grounds for natural rights.

But Glendon would reject Biggar’s criticism of the UDHR by emphasizing its aspirational quality (a fact he briefly concedes). The commission’s report explains that the UDHR “was intentionally crafted as a moral and political document, but not as a legal instrument creating formal law. It provides a ‘common standard of achievement’ and invites a competition in excellence among nations. It aims to educate individuals about their rights and nations about their responsibilities.” So to say, as Biggar does, that rights claims found in international declarations are morally meaningless if they are not concretely enforceable, is largely to ignore the original purpose of such documents. They were meant to set moral guidelines for the content of legally enforceable rights and left ample room for states to direct their own human rights policies accordingly. Glendon’s fellow commissioner Christopher Tollefsen puts this point succinctly: “Natural rights are the standard by which legal rights are to be understood and corrected; but legal rights are the means by which natural rights are to be secured and realized in a polity.”

Biggar thinks that because claims of universal rights are often vague in content, they foster judicial overreach by moving judges either to extend the application of rights doctrine to realms where it proves harmful, or to fill out the meaning of the doctrine in ways that are contrary to the natural law (which is the foundation for any rights). In applying universal human rights provisions to certain areas of the military, for example, Biggar thinks judges

have paralyzed military officials who are trained to act quickly based on good moral intuitions.

This kind of objection to applying rights doctrine, however, appears incoherent. Biggar seems to be saying that judges and others who favor the application of human rights provisions to military practices are to blame for some military failures, because effective warfare sometimes requires suspending some human rights claims. It is certainly true that holding military officials accountable to the moral absolutes that ground human rights doctrines (such as a prohibition against torture, or against the intentional killing of innocent life) could lead to disadvantages in war. But it would be wrong to suggest, as Biggar might be doing, that we are morally culpable for the evils that might result from adhering to absolute moral norms in warfare, unless we do something immoral.

A more plausible lesson to draw from Biggar's discussion of judges—and one that Glendon would likely agree with—is that there are costs when judges try to translate the demands of morality into determinate legal rules or policies, because they often lack the institutional competence, knowledge, or experience of other legal actors (like the executive or legislative branches or the military).

So we have in Biggar a sharp departure from Glendon on the plausibility of natural rights, and in Greene a disagreement about the role of judges in resolving rights conflicts (and a deeper difference on the proliferation of rights in liberal societies). But neither of these newer critiques proposes a solution that is ultimately convincing. Glendon's original analysis of rights stands as a better middle ground: We should seek renewal of our natural rights tradition so as to better inform our legal rights. And we should do this not by giving courts more of a say over the meaning and scope of rights, but by encouraging the seeds of renewal in institutions that rebuild from the ground up: our local governments, our schools, our churches, and our homes. The Supreme Court's decision to overturn *Roe* in *Dobbs*, it's worth pointing out, will likely do exactly that: it will encourage state governments and community actors to take more responsibility for women in crisis pregnancies and the vulnerable lives they are carrying.

Greene's and Biggar's critiques mirror a strange parallel that paradoxically shapes the polarization of left and right. Contingents on both sides of the political spectrum have become more aggressive about rejecting a "neutral" public square in the last ten years. Some progressives are doing all they can to cancel those who dissent from progressivism's tenets, and some conservatives

are calling much more overtly for the promotion of Catholic or Christian morality through politics, even at the cost of hard-won liberal freedoms like religious liberty. Echoes of this sharp divide can be heard in Greene, who stubbornly refuses to question whether some progressive rights claims are legitimate in the first place, and in Biggar, who voices deep pessimism about the future of one of liberalism's core principles. At a time when these views sound like fairly sane voices in a sea of political chaos, Glendon's middle way steers above as the most enduring and the most reasonable.

Other Views:

- Anthony Sanders, *Which Rights Are We Mediating?*, 22 FEDERALIST SOC'Y REV. 108 (2021), available at <https://fedsoc.org/commentary/publications/which-rights-are-we-mediating>.
- Kenneth Roth, *Pompeo's Commission on Unalienable Rights Will Endanger Everyone's Human Rights*, Human Rights Watch (Aug. 27, 2021), <https://www.hrw.org/news/2020/08/27/pompeos-commission-unalienable-rights-will-endanger-everyones-human-rights>.
- JAMAL GREENE, HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART (2021), available at <https://scholarship.law.columbia.edu/books/302/>.
- NIGEL BIGGAR, WHAT'S WRONG WITH RIGHTS? (2021), available at <https://global.oup.com/academic/product/whats-wrong-with-rights-9780198861973?cc=us&clang=en&>.