Introduction

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The demand and struggle for rights has been the centerpiece of the development of modern citizenship. In his seminal essay *Citizenship and Social Class*, first published in 1950, British sociologist T. H. Marshall defined citizenship as determined by three types of rights: civil rights, political rights, and social rights. The first refers to the classical legal protections and liberties of the individual, the second to suffrage and political participation, and the third to what Marshall defined as "the right to a modicum of economic welfare and security . . . to live the life of a civilised being according to the standards prevailing in society."[1] Developing his argument along the lines of British history, Marshall assigned the achievement of civil rights to the eighteenth century, of political rights to the nineteenth century, and of social rights to the twentieth century. He readily conceded the simplifications in his chronology in order to stress his systematic point: The emergence of a comprehensive and egalitarian concept of citizenship as an institutional counterbalance to the social inequalities of market capitalism. Although this process was hardly free from conflicts and contradictions, Marshall was confident that this expansion of rights had created a fairly stable and legitimate democratic social order.

Marshall's periodization of British history was criticized because of its inherent quasi-teleological model of historical development, among other things. However, as a classificatory scheme his trio of citizenship rights has been immensely useful. His key argument that civil, political, and

1 T. H. Marshall, *Citizenship and Social Class* (Cambridge, 1950); for a German translation that includes an introduction to Marshall's works and a bibliographical afterword on the reception of *Citizenship and Social Class*, see T. H. Marshall, *Bürgerrechte und soziale Klassen: Zur Soziologie des Wohlfahrtsstaates* (Frankfurt am Main, 1992). A more detailed discussion of Marshall's concept of social rights is provided in T. H. Marshall, *The Right To Welfare and Other Essays* (London, 1981).

social rights open ways of social and political integration, that they can in fact transcend market forces, also helps us to understand why rights have held such fascination for those who do not possess them. Equality of rights not only is an indicator of full inclusion into the polity and society, it also is widely viewed as the precondition for personal and collective self-improvement.[2]

To conceptualize the evolution of society and politics in terms not only of civil but also of social and economic rights, as Marshall did, was a well-established trend after World War II. Military conflict, specifically the confrontation with totalitarian regimes that denied civil and political liberties, had heightened the world's awareness of rights. If revolution and the process of constitution making in the eighteenth and nineteenth centuries gave the discourse over civil and political rights a radically new status, the experience of fascism and the efforts to create a new world order helped to establish a new universal language of rights. The founding of the United Nations and the formulation of the Universal Declaration of Human Rights in 1948, with its somewhat uneasy mingling of civil, political, social, and economic rights,[3] certainly marked a tremendously important step in preparing the way not only for the civil rights revolution of the 1950s and 1960s in the United States but, one may argue, also for much of our modern "rights talk."[4]

From a late-twentieth-century perspective, Marshall's conceptualization of rights may appear somewhat simplistic because it assumed a more-or-less homogeneous nation-state similar to that of Great Britain at the end of World War II; thus, it focused almost exclusively on the impact of rights on the formation of social classes. Historians, sociologists, and political theorists, among others, have long since argued that the quest for rights and citizenship must be placed into a broader context that, in addition to class, must take into account a multiplicity of identities based on race, ethnicity, gender, religion, or sexual orientation, all of which have been used as rationales for the denial of rights throughout history. With societies growing ever more culturally diverse and ethnic conflict a serious threat to many countries, the question of how the liberal concept of cit-

2 See also Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, Mass., 1991).

3 A. H. Robertson, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (New York, 1982). For a good survey of civil and social rights, see D. D. Raphael, ed., *Political Theory and the Rights of Man* (Bloomington, Ind., 1967).

4 Louis Henkin, *The Age of Rights* (New York, 1990); Mary Anne Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York, 1991), 10; Dorothy B. Robbins, *Experiment in Democracy: The Experiment of U.S. Citizen Organizations in Forging the Charter of the United Nations* (New York, 1971).

izenship can be reconciled with the dynamics of multicultural societies has become a matter of intense debate.[5] No doubt, the postwar period and particularly the civil rights movement of the 1960s have resulted in a fundamental reshaping of the rights debate and of legal culture; in fact, nothing in the eighteenth or nineteenth centuries "matched this avalanche of multiplying rights claims" that has been evident ever since.[6]

In June 1997 the German Historical Institute in Washington, D.C., held a conference that focused on modern debates over rights and citizenship. This book is an outgrowth of that conference. Because the Institute is especially dedicated to promoting comparative work on Germany and the United States, it seemed obvious to concentrate on the experiences of these two countries. As cultures rooted in the Western tradition of rights, they bear enough similarities to make comparison possible but exhibit enough differences to make it fruitful. Issues concerning differences in civil rights, in modes of inclusion, as well as in the denial of rights and thus the different definitions of citizenship so important for cross-cultural comparisons[7] comprise the basic focus of this book, as do the various forms of popular legal culture, meaning – as Lawrence Friedman presented the concept – people's ideas, attitudes, and expectations about law and the legal process.[8]

The title of this book is adapted from a volume commemorating the bicentennial of the Bill of Rights to the U.S. Constitution, which defined the "culture of rights" as "a way of life informed by a set of beliefs and values in which the language of rights plays a prominent role," often complemented by "a rights-related, philosophical jurisprudence."[9] Unlike *A Culture of Rights*, which is primarily concerned with the philosophical foundations and legal interpretations of rights, the focus of this book is on the social and political history of rights, that is, on the different

5 See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford, 1995); Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford, 1995); see also William Rogers Brubaker, *Immigration and the Politics of Citizenship in Europe and North America* (Lanham, Md., 1989); William A. Barbieri, *Ethics of Citizenship: Immigration and Group Rights in Germany* (Durham, N.C., 1998).

6 Daniel T. Rogers, *Contested Truths: Keywords in American Politics Since Independence* (New York, 1987), 220; for an excellent outline of core issues, see Lawrence Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, Mass., 1990).

7 See also Heinz-Gert Haupt and Jürgen Kocka, "Historischer Vergleich: Methoden, Aufgaben, Probleme," in Heinz-Gert Haupt and Jürgen Kocka, eds., *Geschichte und Vergleich: Ansätze und Ergebnisse international vergleichender Geschichtsschreibung* (Frankfurt am Main, 1996), 9–37.

8 Friedman, *Republic of Choice*; see also the debate between Roger Cotterrell and Lawrence Friedman, in David Nelken, ed., *Comparing Legal Cultures* (Dartmouth, N.H., 1997).

9 Michael J. Lacey and Knud Haakonssen, "Introduction: History, Historicism, and the Culture of Rights," in Michael J. Lacey and Knud Haakonssen, eds., *A Culture of Rights: The Bill of Rights in Philosophy, Politics, and Law – 1791 and 1991* (Cambridge, 1991), 1–18, esp. 3.

contexts in which different groups tried to secure rights in the twentieth century. Law and litigation are obviously part of this, but they are treated primarily as a framework for social action, whereas questions related to the "correct" normative interpretation of legal propositions remain in the background.

The modern language of rights, as historian Thomas L. Haskell has pointed out, transcends the realm of personal and subjective interests and appeals to an "objective moral order" that confers legitimacy on the claims made by individuals or social groups.[10] The "objective" quality of "rights language" offers a good explanation of why rights talk has been such an attractive discursive strategy for the excluded and disadvantaged. If such an objective moral order really exists or any other acceptable epistemological justification for rights can be found, then this certainly is a worthwhile subject for intellectual historians, philosophers, and legal and political theorists alike to explore. For the purposes of this book, however, the crucial question is not whether rights must be taken seriously as a philosophical concept but whether rights were actually taken seriously by the people we study. A preponderance of historical evidence suggests that the individuals and social groups struggling for rights did indeed believe in their moral and practical relevance, just as did those who tried to bar them from enjoying those rights.

This is certainly true for American history. As Michael J. Lacey and Knud Haakonssen have aptly put it, "Nothing is more deeply rooted in the American political tradition than the vocabulary of rights."[11] From the formative experiences of the revolutionary period onward, virtually all disadvantaged groups have made their demands for equality, inclusion, and participation in the language of rights. In the course of these struggles the concept of American citizenship took shape. As the late Judith N. Shklar, among others, argued, the most important factors in this process have been slavery and race. Throughout American history slavery formed the visible antithesis to American citizenship and dominated the political thought and discourse even of those Americans who themselves were never threatened by enslavement.[12] According to Chief Justice Roger B.

10 Thomas L. Haskell, "The Curious Persistence of Rights Talk in the 'Age of Interpretation,'" *Journal of American History* 74 (1987): 984. For an introduction to the most important philosophical debates, see William A. Galston, "Practical Philosophy and the Bill of Rights: Perspectives on some Contemporary Issues," in Lacey and Haakonssen, eds., *Culture of Rights*, 215–65.

11 Lacey and Haakonssen, "Introduction," 1. For a variety of rights-related essays, see special issue of the *Journal of American History* 74 (1987); David Thelen, ed., *The Constitution and American Life*, pt. 2: *Rights Consciousness in American History* (Ithaca, N.Y., 1988), 795–1034.

12 Shklar, *American Citizenship*, esp. 14–23.

Taney's infamous dictum in *Dred Scott v. Sandford* (1857), blacks were not entitled to the rights and privileges enjoyed by American citizens under the Constitution because they were "regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect."[13] Emancipation and the granting of citizenship and suffrage to the black freedmen notwithstanding, Taney's words would burden the American culture of rights for more than a century. Not surprisingly, the issue of race figures prominently in most of the chapters in this book that focus on the American experience.

Ironically, racial discrimination and the African-American civil rights movement of the twentieth century have also played a key role in triggering what is sometimes called a rights revolution. Over the past five decades or so, the United States has experienced an expansion in the scope and content of constitutional rights that prompted historian Robert H. Wiebe to speak of a "bull market of rights."[14] Rights talk is virtually ubiquitous in American political and cultural debates. For example, the "right to life" is held against the "right to choose" in the heated controversy over abortion; assisted suicide is justified by a "right to die"; the humane society argues for "animal rights"; and some environmentalists have even claimed rights for nature itself.[15] The expansion of rights is often viewed as progress toward greater liberty and justice, whereas critics have complained that the trivialization of the very concept of rights has led to an inflation of all sorts of spurious claims. In addition, the implications of rights-centered discourse for the political process have been depicted as harmful. Because rights language has an absolute quality to it, communitarians argue, it tends to polarize political issues and to preclude considerations of the common good and the broader interests of society.[16] Wiebe has pointed to the danger that a preponderance of rights for individuals and minorities might pose for majoritarian democracy and wondered, "When does the sum of rights removed from the realm of collective decision bulk so large that it disables popular self-government?"[17]

13 Quoted in Paul Finkelman, *Dred Scott v. Sandford: A Brief History with Documents* (Boston, 1997), 61. Andrew Fede, *People Without Rights: An Interpretation of the Fundamentals of the Law of Slavery in the U.S. South* (New York, 1992), argues convincingly that despite the paternalistic rhetoric of slaveholders, slaves did not enjoy any rights as persons under southern slave laws.

14 Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago, 1995), 239. For a brief overview of the expansion of constitutional rights by the judiciary, see Henkin, *Age of Rights*, 118–24.

15 Roderick F. Nash, *The Rights of Nature: A History of Environmental Ethics* (Madison, Wis., 1989).

16 Robert Bellah et al., *The Good Society* (New York, 1991), 124–30.

17 Wiebe, *Self-Rule*, 264–5.

Because the struggle for rights in America has basically been a quest for inclusion and equality, the present concern about the alleged "Balkanization" of America by all sorts of particularist and divisive group rights is perhaps a little too alarmist. As Will Kymlicka has argued, the claims of minorities to group rights are actually demands for recognition and full membership in the larger society, demands that do not threaten the society's political stability.[18]

Arguments that the pursuit of rights and collective goals must be brought into equilibrium are fairly traditional, however, and do not question the concept of rights per se. A more fundamental criticism has been advanced by scholars on the left who have denied the legal and political usefulness of rights for the disadvantaged. Rights, the protagonists of the so-called Critical Legal Studies Movement have argued, fail to provide solutions to real cases, are aloof from the social world, and create illusions about the law as an independent power capable of protecting the weak. Rather than catalyzing political and social change, rights talk often serves the purpose of co-opting radical social movements and thus enhances the legitimacy of the legal and political systems.[19] For example, the rights consciousness that grew out of the African-American civil rights movement is said to have been "created by the powerful in search of moral exoneration" and to have produced an antidiscrimination ideology that has no bearing on the needs and interests of the victims but may actually reinforce the victimization of women and minorities.[20] There is no evidence, however, that such fundamentalist criticisms of rights have had any serious impact on the rights consciousness of the American people or the different groups trying to secure rights. The United States arguably remains the most rights-conscious culture in the world.

With respect to different cultures of rights, Germany quite noticeably lacks a body of academic and nonacademic literature dealing with the issue of rights talk.[21] No doubt, this has something to do with the way the American civil rights movement has transformed the older language of rights and liberties; but it also has something to do with the differences in academic milieus and in the ways in which law and rights are

18 Kymlicka, *Multicultural Citizenship*, 192. For an influential critique of ethnic diversity and minority rights, see Arthur M. Schlesinger Jr., *The Disuniting of America: Reflections on a Multicultural Society* (New York, 1992).

19 Compare the overview of the Critical Legal Studies Movement in William W. Fisher III, "The Development of Modern American Legal Theory and the Judicial Interpretation of the Bill of Rights," in Lacey and Haakonssen, eds., *Culture of Rights*, 288–95.

20 Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore, 1988), esp. 4–6.

21 Glendon, *Rights Talk*; in her critique Glendon repeatedly refers to Europe.

conceived altogether. Thus, one German observer of the American university scene recently expressed his bewilderment at the topics addressed by his American colleagues and with the way they write about these topics: On the one hand, the American literature lacks elements of classic "doctrinal scholarship" that play such an important role in German jurisprudence, and, on the other, exhibits a pervasiveness of critical legal studies emphasizing race and gender or neoconservative economic interpretations of law. This reflects an altogether "outlandish world." This observer speaks of a "growing disjunction" between Europe and the United States.[22] If such arguments are based on concepts of law as a "science,"[23] this reflects very well the thoroughly different role of law in these two societies. It has been argued that it is the "role law plays in the formation of American myths and ideologies that is so puzzling to foreigners."[24] Certainly there is no way of imagining the rule of law in Europe as a "civil religion," as it is often described in the United States, where the Constitution has always been able to influence American civil life to a greater degree than comparable documents or traditions have in Europe because in America traditional authoritative institutions of the state and the churches have been comparatively weak.[25]

However, Germans are no less adamant in claiming their rights both individually and collectively. The fact that Germany has a greater number of courts and judges per capita than the United States might well prove the argument that the law plays an equally strong role in structuring and regulating the everyday life of its citizens. However, the rights talk of groups and individuals tends to dwell on different issues, namely, on social rights, and places a different emphasis on the homogeneity of citizenship. Last but not least, German rights talk has struggled within formalized parliamentary political contexts much more than it has in the United States. However, as some of the essays presented here demonstrate, recent American debates on rights have had an impact in Germany.[26]

22 Reinhard Zimmermann, "Law Reviews – Ein Streifzug durch eine fremde Welt," Reinhard Zimmermann, ed., *Amerikanische Rechtskultur und europäisches Privatrecht: Impressionen aus der Neuen Welt* (Tübingen, 1995), 87–101.

23 Ibid., 113.

24 Helle Porsam, *Legally Speaking: Contemporary American Culture and the Law* (Amherst, Mass., 1999), xii.

25 Sanford Levinson, *Constitutional Faith* (Princeton, N.J., 1988); Morton J. Horowitz, *The Transformation of American Law, 1870–1960* (Cambridge, Mass., 1991), 193.

26 Many rights issues discussed in Germany can be traced back to the American debate; the legal solutions and the intensity of debate, however, are considerably different; see, e.g., Ulrich Herzog, *Sexuelle Belästigung am Arbeitsplatz im US-amerikanischen und deutschen Recht* (Heidelberg, 1997).

These differences should not lead us to forget that modern German history can be described as a struggle for rights, much in the way Marshall argued in his grand theology on the modernization of Western societies. The catalog of civil rights (*Grundrechte*, or basic rights) of the revolution of 1848 carried on the tradition of similar declarations produced in the American and French revolutions, combining it with the older natural law tradition in Germany.[27] Despite the failure of that German revolution, the notion became firmly entrenched that modern Germany was to be *Rechtsstaat*, a state ruled by law with a constitution based on the separation of powers, which thus guaranteed the civil rights of its citizens. The characteristic compounding of the words *state* and *law* (rights) in the term *Rechtsstaat* is revealing and indicative of the strong statist tradition in which the aims of the state are also always defined in terms of some form of common good. This is even more evident with regard to the term *Sozialstaat*; the "social state" proactively guarantees social rights. Although social legislation before 1914 created the foundation of this social state, it was the Weimar constitution of 1919 that specified a set of social rights for its citizens: Social rights were to complement the new political rights within the framework of the democratic republic born of the revolution.[28] The idea that the constitutional *Rechtsstaat* was to be based on the principles of the *Sozialstaat* characterizes an important aspect of the German Basic Law of 1949 and is one of the fundamental assumptions in contemporary German constitutional life and politics. After the historic catastrophe of the Nazi *Unrechtsstaat*, with its denial of political and social rights, its fervid attacks on the "principles of 1789," the destruction of Jewish and other citizens, and the bloody repression of its political opponents, the founders of the Federal Republic felt it necessary to define more clearly, and to protect, the rights of the country's citizens.[29]

Historically, parts of this statist and social law tradition have been the highly contested notions of common good and equity, which not only

27 See Gerd Kleinheyer, "Grundrechte: Menschen- und Bürgerrechte, Volksrechte," in Otto Brunner, Werner Conze, and Reinhart Koselleck, eds., *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, 9 vols. (Stuttgart, 1972–97), 2:1047–82; Günter Birtsch, *Grund- und Freiheitsrechte im Wandel von Gesellschaft und Geschichte: Beiträge zur Geschichte der Grund- und Freiheitsrechte vom Ausgang des Mittelalters bis zur Revolution von 1848* (Göttingen, 1981); Günter Birtsch, *Grund- und Freiheitsrechte von der ständischen zur spätbürgerlichen Gesellschaft* (Göttingen, 1987).

28 For a short overview, see Gerhard A. Ritter, *Der Sozialstaat: Entstehung und Entwicklung im internationalen Vergleich* (Munich, 1989), 112–29.

29 Karlheinz Niclauss, *Der Weg zum Grundgesetz: Demokratiegründung in Westdeutschland 1945–1949* (Paderborn, 1998); Erhard Denninger, *Menschenrechte und Grundgesetz* (Weinheim, 1994).

limit property rights and freedom of contract but make it necessary to ensure the balance between individual and societal interests. This debate can be traced back to the nineteenth century; yet the political and social devastation brought on by two world wars has clearly left its mark.[30] Even an issue such as abortion is handled by the constitutional court not merely within the context of the rights of mothers and those of the unborn but also within the framework of social provisions for pregnant women.[31] Although special groups have successfully invoked group rights – the best example is perhaps the special labor law established in the 1920s with its own court system – rights have been demanded throughout history not so much on the basis of differences in race, class, or gender but on the basis of an inclusionary model of citizenship. Even today, groups do not strive to be defined in terms of their status as minorities within society but on the basis of safeguarding equality and the equal rights of all citizens.

The following twelve essays by scholars from Europe and the United States cover a broad array of topics. In one way or another they all relate to Marshall's trio of civil, political, and social rights but certainly do not offer a comprehensive account of all the rights that could be listed under these headings. Such an undertaking obviously would be much too ambitious for a single collection. Rather, the goal of this book is to trace the development of several key components of modern citizenship within two different but related cultures of rights from roughly the mid-nineteenth century to the present. It is divided into three parts.

The first part deals with race, immigration, and rights. Race has arguably been the most pervasive barrier to the attainment of rights and citizenship throughout American history. African Americans and American Indians may have suffered most severely under racism, but Asian Americans, according to Roger Daniels (Chapter 1), have experienced more wide-ranging discrimination than any other group. In his survey of the rights that were denied to and attained by Asian Americans, Daniels considers nine specific fields, ranging from naturalization and immigration to the issues of racial segregation and what he calls "a right to redress for past governmental wrongs." Their dual status as immigrants and nonwhites made Asian Americans particularly vulnerable to both official and private discrimination. In California, where Asian Americans were more numerous than blacks, the segregation laws were enforced only

30 See Willibald Steinmetz, ed., *Civil Law and Social Inequality in Europe* (Oxford, 1999).
31 Glendon, *Rights Talk*, 64.

against the former group. Japanese Americans, as is well known, were incarcerated during World War II on the mere presumption of disloyalty. Still, no organized Asian-American civil rights movement was ever formed. Although Asian Americans were deemed unable to acculturate, Daniels shows that they skillfully and successfully employed the traditional legal and political strategies also used by other immigrant groups. He demonstrates how disadvantaged groups that seek legal rights and inclusion must adapt to the dominant culture of rights in order to gain acceptance.

The advocates of black voting rights, as Manfred Berg (Chapter 2) argues in his essay on the discursive strategies of the National Association for the Advancement of Colored People (NAACP), had to confront a racist political culture that denied that blacks as a group were fit for "first-class citizenship." Although it put great hopes in the ballot as a weapon for self-protection and the attainment of civil rights in general, the NAACP also tried to reassure the white majority that African Americans had no collective interests that were incompatible with or adversarial to those of white Americans. This led to far-reaching concessions with regard to the legitimacy of allegedly color-blind voting restrictions, such as literacy tests, yet it also worked toward the integration of black voters into the American political system. In stressing the American creed, the leaders and followers of the NAACP not only revealed their deep roots within the American culture of rights but also made an important contribution to transforming this culture.

For no other minority group has the American culture of rights been more benign than for Jews, as Hasia R. Diner (Chapter 3) argues in her analysis of how Jewish Americans have historically conceived of and articulated their rights. Whereas Jews in virtually all other parts of the world either were subjected to recurring persecution or experienced a protracted process of emancipation, in the United States they enjoyed, as a rule, the same rights as all other white Americans. To be sure, the hegemonic Christian Protestant culture imposed a number of restrictions on Jews, such as Sunday closing laws, but the separation of church and state restrained the authorities from interference with Jewish institutions and guaranteed an unparalleled degree of internal autonomy. Because the public sphere was committed to religious neutrality, Jews developed both a keen interest in the expansion of the state and a strong identification with the American Republic at large. Anti-Semitism, although an undeniable presence, was not nearly so politically virulent as almost everywhere in Europe. Nevertheless, even in America Jews did not feel completely secure and preferred not to articulate their rights in an aggressive manner