

## Review Symposium: Retrospective on the Work of Hendrik Hartog

### Rights-consciousness as an Object of Historical Inquiry: Revisiting the Constitution of Aspiration

Ely Aaronson and Arianne Renan Barzilay

HARTOG, HENDRICK. “The Constitution of Aspiration and ‘The Rights That Belong to Us All.’” *The Journal of American History* 74, no. 3 (1987): 1013–34.

Hendrik Hartog’s article “The Constitution of Aspiration” paved new ways of thinking about the historical formation and political significance of rights-consciousness. This Essay considers the contribution of social histories of rights-consciousness to our understanding of the underpinnings and consequences of constitutional change. In particular, we consider the impact of this literature on debates regarding questions of periodization in American constitutional history and on debates concerning the relationship between egalitarian and counter-egalitarian strands of rights-consciousness. We critically evaluate the importance and limits of these contributions by focusing on methodological and interpretive questions that emerge from recent literature on struggles for racial and gender equality.

## INTRODUCTION

In a series of statements conveying his skepticism regarding the survival chances of the newly drafted U.S. Constitution, Thomas Jefferson identified the challenge of sustaining the Constitution’s legitimacy within an ever-changing social environment as the major source of instability built into the nation’s political order. Arguing against those who “look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched” (Jefferson 2011b, 1816, 14), he famously observed that “no society can make a perpetual constitution” (Jefferson 2011a, 1789, 106). Failure to heed to the moral intuition that “the dead should not govern the living,” he warned, is prone to stimulate a legitimization crisis that would render the enforcement of the constitution into “an act of force and not of right” (*ibid.*). In retrospect, the concerns expressed by Jefferson seem exaggerated. The

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Ely Aaronson is Associate Professor at University of Haifa Faculty of Law and can be contacted at [aharonso@research.haifa.ac.il](mailto:aharonso@research.haifa.ac.il).

Arianne Renan Barzilay is Associate Professor at University of Haifa Faculty of Law and can be contacted at [arianne@law.haifa.ac.il](mailto:arianne@law.haifa.ac.il).

Authors contributed equally to this Essay. We thank Deborah Dinner and Yair Sagy for helpful comments.

U.S. Constitution continues to enjoy widespread reverence long after the demise of any other national constitution that emerged during the long nineteenth century.

In “The Constitution of Aspiration” (Hartog 1987), Hendrik Hartog developed a novel approach to explain how the Constitution has retained its pivotal place in American political culture. This approach challenged the conventional understanding of the Constitution as a system of rules and institutional arrangements aiming to govern the activities of public institutions. Instead, it highlighted its operation as a system of cultural meanings shaping aspirations, perceptions, identities, and solidarities at both the individual and collective levels. Hartog’s intervention took part in a broader paradigm shift that led constitutional historians to pay closer attention to the social formation and political impact of rights-consciousness. This Essay considers the contribution of this shift to our understanding of the social underpinnings and consequences of constitutional change. In particular, we identify three important contributions of this approach: first, its contribution to contesting conventional periodizations of constitutional change; second, its innovative conceptualization of the actors and practices that participate in the construction of constitutional norms; and third, its inclusiveness of a broad range of political ideas, including counter-egalitarian strands of rights-consciousness. We critically evaluate the importance and limits of these contributions, as seen through the lenses of two bodies of historical scholarship: studies of African Americans’ engagement in constitutional politics, and studies of women’s legal mobilization and the debates over the Equal Rights Amendment (ERA).

## HISTORIES OF AFRICAN AMERICANS’ RIGHTS-CONSCIOUSNESS

The approach developed in “The Constitution of Aspiration” decenters top-down processes of developing constitutional norms, such as judicial rulings and formal amendments. It highlights, instead, the functions that bottom-up processes of legal mobilization perform in shaping both judicial and popular understandings of the constitutional text. This approach proved highly fertile for rethinking the role that African Americans have played as agents of constitutional change throughout U.S. history. Three contributions of this literature have been particularly fruitful. First, by revisiting forms of civil rights protest mobilized by African American activists and lawyers during the nineteenth and early twentieth century, historians identified various antecedents, precursors, paths not taken, and lost promises, and used them to revise previous understandings of the roots, development, and outcomes of the landmark constitutional struggles of the 1950s and 60s (Goluboff 2007). This literature developed a more nuanced understanding of the gradual formation of the “long civil rights movement” (Dowd Hall 2005). It also challenged conventional modes of periodization premised on schematic constructions of putatively discrete “constitutional moments.”

Second, historians have broadened the conceptualization of the array of practices through which African Americans have mobilized constitutional change. Earlier scholarship has tended to portray a clear divide between the legal and the grassroots arms of the civil rights movement. Recent histories have shown, however, that grassroots organizations were themselves heavily inspired by constitutional ideals, and in turn served as

powerful vehicles of changes in key doctrinal dimensions of American constitutional law (Brown-Nagin 2011; Schmidt 2018).

Third, recent histories of the civil rights movement have increasingly called attention to its influence on the discourses and strategies of its opponents. This literature demonstrates that the movement had powerfully transformed the rights-consciousness not only of African Americans and white liberals, but also of pro-segregationist constituencies. The Southern opposition to the Supreme Court's decision in *Brown v. Board of Education* was particularly influential in shaping new constitutional discourses that legitimized resistance to equalitarian governmental interventions (Walker 2009; Schmidt 2016).

However, the success of this literature in expanding the boundaries of the discipline of constitutional history is not without its challenges. Questions concerning our ability to delineate the meaning of the concept of rights-consciousness in a way that avoids its conflation with other frames of political and moral imagination arise in various interpretive contexts. The following discussion examines several of them.

The task of identifying the origination point of the development of blacks' rights-consciousness is highly complex. Historians have often treated the Reconstruction period as the dawn of African Americans' active engagement in constitutional politics. This aspect of the conventional periodization is premised on the view that the underlying conditions for the inclusion of African Americans as agents of constitutional change materialized only in that period, in which the equalitarian language originally formulated by Northern racial reformers inspired efforts to introduce formal constitutional amendments (Foner 1994). Some historians traced the precursors of this development even further back, focusing on the protest activities taken by Northern black leaders in the 1830s and 40s to challenge discriminatory laws and procedural arrangements (Finkelman 1986).

Arguably, recent trends in the historiography of slavery urge us to include Southern slaves within this genealogy, and recognize the extent to which slaves understood their political and social conditions in normative terms inspired by the Constitution. Obviously, slaves lacked access to the organizational vehicles that were required to mobilize collective rights claims. Nevertheless, fugitive slave narratives and other sources reveal that slaves were keenly aware of the ideological tensions between the normative views underpinning slave laws and the humanitarian creeds enshrined in the Constitution and the Declaration of Independence (Suggs 2004). Recent work exploring the political implications of personal and collective forms of slave resistance also demonstrates the strong inspirational influence of constitutional values on how slaves and ex-slaves perceived their entitlement to pursue their freedom (Hahn 2005). The question of whether such attitudes and practices should be interpreted as manifestations of rights-consciousness raises both methodological and political complexities. Methodologically, there is an obvious risk of anachronism in projecting notions of rights-consciousness on the existing evidence regarding the normative understandings that prevailed among Southern slaves. Politically, it is important to recall that the literature that seeks to highlight aspects of agency as part of slaves' experienced reality has revolted against a long tradition that portrayed slaves as passive objects of white oppression (or as beneficiaries of white elites' paternalistic sentiments). This literature accurately noted that these historiographical representations evoked long-standing

stereotypes of African Americans as lacking the full capacity to serve as the authors of their own lives. However, as Walter Johnson noted, what often seems as a retroactive “discovery” of elements of agency in early African American history threatens to underplay the brutality that inscribed the lives of the enslaved (Johnson 2003). This debate should inform our reflection on whether deploying the concept of rights-consciousness to describe the black experience under slavery redeems previously denied aspects of the slaves’ human dignity, or, instead, obscures the extreme harshness of their experiences.

The expanded conception of the actors and practices taking part in constitutional politics also generates intricate interpretive dilemmas. Once the distinction between the legal and the grassroots components of civil rights struggles collapses, interpretive decisions as to which movements, activities, and events should be classified as manifestations of rights-consciousness are likely to give greater prominence to the distinction between violent and nonviolent forms of political action. This distinction is implicit in the common tendency to mark the late 1960s as the end-point of the civil rights movement, and to treat the racial riots that thrived in urban black ghettos during that period as catalyzing the “post”-civil rights era in African American history. It also underpins the relative neglect of questions concerning the complex interrelationship between pro-segregationist racial violence and regional understandings of constitutional norms in recent studies of Southern strategies of “preservation through transformation” (Walker 2009). However, the tendency to treat these forms of collective violence as exogenous to the processes that reshaped conceptions of rights in the post-*Brown* epoch reinforces an incomplete narrative of American racial history (Aaronson 2014).

## HISTORIES OF WOMEN’S RIGHTS-CONSCIOUSNESS

Following the conceptual and methodological innovation of “The Constitution of Aspiration,” legal historians concerned with gender equality and women’s rights are also increasingly looking beyond Court-centered decisions to understand rights-consciousness as a system of cultural meanings that shapes aspirations. This expands the lens with which to look at the history of women’s constitutional activism toward investigating rights claims made in social movements that target legislatures, executive and administrative bodies, and leads to a more inclusive conceptualization of women’s rights movements’ goals, actors, and subject matters, while consequently challenging conventional periodization.

Until recently, the “waves” metaphor provided the framing for the development of the women’s right movements in U.S. history. Under this periodization, the first wave, launched in Seneca Falls, was resolved with women gaining political rights in the Nineteenth Amendment; the second wave, erupted in the 1960s, centered on the formation of the National Organization for Women (NOW) in 1966, and ERA struggles in the 1970s and 1980s. Yet this “wave conceptualization” occludes the range of actors, grievances, and sites of social mobilization that occurred before, after and in the interim, and the extensive roots of women’s activism. Indeed, over the past thirty years, scholarship has expanded our notions of women’s activism (Cott 1987). Recently, histories of feminisms have challenged the wave metaphor, arguing that women’s activism

neither subsided between waves nor consisted of one agenda, and did not encompass solely white, middle-class activists. New accounts have stretched, and altogether revisited, established periodization, suggesting we should consider “the long women’s movement” as reflective of a more diverse movement and a more accurate historical depiction of women’s activism. (Laughlin et al. 2010). Hartog’s approach further problematizes the conventional framework in the context of rights-consciousness, teaching us that rather than focusing on peak “moments” of constitutional change, scholars need to consider complex narratives of the goals, voices, origins, and continuous remaking of the Constitution. Scholarship now increasingly looks at myriad arenas and sources, such as organizational newsletters, lobbyists’ memos, administrative reports, and congressional hearings, as indicative of social mobilization’s constitutional purposes and goals. On-the-ground practices such as marches, protests, strikes, and “wet-ins” serve to inform the meanings of the rights for which social movements fought (Siegel 2001; Dinner 2010). Such praxes provide “complex positive accounts of the practices through which nonjuridical actors participate in the production of constitutional meaning” (Siegel 2001, 303).

Here we wish to exemplify how one can read recent scholarship as interpreting contestations, aspirations, and claims made by myriad actors as shaping constitutional meaning. This example serves to show the broad range of subject matters now included in the long movement’s rights-consciousness historiography. Between the first and second waves, constitutional aspirations were debated in legislative proposals, administrative reports, and activists’ correspondence. An alliance of social feminists—from the Women’s Trade Union League, labor activists, the National Council of Negro Women, the American Civil Liberties Union (ACLU), and the League of Women Voters—objected to the National Women’s Party’s repeated proposals for a constitutional amendment (the ERA). Instead of what social feminists perceived as an “empty” amendment, they proposed labor legislation to provide economic justice to women. While at times, social feminists articulated claims in terms of needs, rather than rights, so great was the influence of the constitution as aspiration, that even these feminists who objected to the strategy of pursuing an ERA, were, nonetheless, shaping their own aspirations, and policy proposals in relation to the constitutionally inspired equal rights discourse, and debating the method, more than the goal, of achieving equal rights (Renan Barzilay 2016). A growing literature demonstrates how they fought for paid maternity leave and an end to sex-based wage discrimination, and how their proposals provided an agenda and promise to labor feminists in the civil rights era (Cobble 2004). By the late 1960s, rights-consciousness served as a discursive vehicle for universal child-care mobilization (Dinner 2010).

But it is precisely this richness of Hartog’s inclusive approach that also presents a challenge of boundaries. If women’s rights-consciousness movement is defined in such broad terms, are there any women’s movements that are outside of it? Consider the conservative counter-movement, STOP-ERA. By the 1970s, most feminists believed a constitutional change could be pursued simultaneously through constitutional amendment and through judicial interpretation of the Equal Protection Clause of the Fourteenth Amendment (Mayeri 2004). As ERA ratification began, however, contestation split along different lines than earlier decades. In the wake of *Roe v. Wade*, opposition increasingly comprised of religious groups, business, and conservative

women. Opposition stimulated backlash by focusing on the ERA's possible effects on contentious subjects such as abortion, homosexuality, the military draft, and traditional family values. Together with the Supreme Court's establishment in *Reed v. Reed* of heightened scrutiny under the Equal Protection Clause, which produced claims that the ERA was superfluous, and along with counter-mobilization tactics opponents utilized, such as lobbying, protesting, public speaking, rights discourse, and political organizing, the ERA never fully came to fruition. (Mansbridge 1986; Siegel 2006; Mayeri 2009; Boisseau and Thomas forthcoming).

Despite the backlash against the ERA, the process Hartog identifies—continuous making and remaking of the Constitution—endured. The struggle over the ERA influenced the rise of the Supreme Court's sex discrimination jurisprudence under the Fourteenth Amendment in the 1970s. Accordingly, judges interpreted the Constitution while listening to social actors debate conflicting meanings of the Constitution outside of court (Siegel 2001, 2006). Moreover, when ERA-proponents later attempted to introduce a renewed ERA, these decisions, in turn, provided the landscape for constitutional amendment advocacy (Mayeri 2009).

Hartog envisions that constitutional rights-consciousness can transform received meanings of constitutional text when challenged by the legitimate aspirations of the public. Despite social movements' disciplining of their messages in light of counter-movements (Siegel 2006), what can jurists make of the complex, sometimes contradictory voices and meanings of constitutional aspirations? If rights-consciousness is to guide judicial interpretation, which movements' rights-consciousness should be salient? Inherent in the decision whether to include all groups' aspirations or favor some, ultimately lies a normative judgment.

## CONCLUSION

"The Constitution of Aspiration" has stimulated new ways of thinking about the driving forces, character, and consequences of constitutional change. Current changes in American political culture transform not only contemporary modes of rights-consciousness, but also the historiographic frames through which we analyze the meaning that was latent in past events. Our understanding of the complexities inherent to different trajectories of civil rights thinking in American history is likely to develop further alongside these broader transformations of the lenses through which we look at the past.

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