Essays

Early Modern Rights Talk

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Modern historians of political thought, legal historians, critical legal theorists, and others regularly look to the seventeenth century as the “classic” period of rights talk, the period which shaped the development of all subsequent liberal political theory. Thus, scholars as diverse as Carole Pateman, Ian Shapiro, John Rawls, and Mary Ann Glendon have taken the seventeenth century as their point of departure in evaluating the role of rights in modern liberal theory. The same is true of older scholars, such as Leo Strauss and C. B. Macpherson, not to mention the numerous historians of political thought for whom Hobbes and Locke mark the beginning of the liberal tradition.1 Although this list of strange bedfellows would seem to suggest a considerable divergence of opinion about what transpired in the seventeenth century, there is in fact surprising agreement

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about the emergence of a proto-liberal conception of the rights-bearing individual and of individual consent to political contract as the basis of political legitimacy. Ernst Bloch articulated the scholarly consensus in *Natural Law and Human Dignity* when he described the most important feature of the new language of rights as "the belief that individuals constitute and preserve social life." These individuals are the possessors of "private rights," which

cannot be violated except under the one condition that the individual consents to let this happen out of what he considers his own best interest. It was a juridical rather than a historical concept that led to the view that a just state could not be thought of except as the product of the will of its members.²

All of the above named scholars have argued that our ways of thinking and talking about rights are still shaped in part by the "classic" early modern discussions of the rights-bearing individual. Perhaps more surprising, all are agreed that this formative influence has been harmful—although for different reasons. Some, like Leo Strauss (who can stand here for a long line of politically conservative critics), have argued that the seventeenth-century discourse of individual rights ushered in the historicism and relativism of the modern age.³ Others, like C. B. Macpherson (who can stand for a long line of Marxist-inspired critics), have argued that the rights-bearing individual of the seventeenth-century, the individual who in Locke's words has "property in his person," was modeled on the protocapitalist economy of the seventeenth century, and that this conception of rights has had a deleterious influence on subsequent liberal attempts to think about justice, especially just distribution.⁴ The feminist political theorist Carole Pateman extended Macpherson's argument to gender, claiming that the liberal language of rights and social contract is essentially the same as patriarchal models of political obligation: the language of rights simply obscures—and thus helps to preserve—inequitable relations of power.⁵ More recently, and from a much more socially conservative communitarian perspective, Mary Ann Glendon has attacked the "possessive individualism" of the early modern period, arguing that rights talk, then and now, imagines the individual as prior to the community and fosters a conflict regarding rights to scarce resources rather than encouraging us to think of our responsibilities to our fellow citizens.⁶ Finally, and taking a somewhat different tack, Ian Shapiro

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³ see generally LEON H. STRAUSS, supra note 1.
⁴ see generally MACPHERSON, supra note 1; BLOCH, supra note 2; SHAPIRO, supra note 1.
⁵ see generally PATEMAN, supra note 1.
⁶ see generally GLENDON, supra note 1.
has argued that the early modern language of rights was far more coherent than modern liberal rights talk, because it was informed by certain epistemological and religious convictions that most of us no longer share. In Hobbes, Locke, and many of their contemporaries, rights talk was underpinned by a theory of objective interests and (in the case of Locke and others) divine will, that constrained the rampant pursuit of self-interest and made seventeenth-century rights talk immune to the objections of relativism—to which modern liberalism is vulnerable. In contrast, according to Shapiro, the individualism, even monadism, of Rawls and Nozick is indefensible: an anachronistic throw-back to early modern thought without early modern presuppositions, and thus an inadequate way of talking about rights in an age of globalism. Thus all of the critics I have mentioned suggest that we need to know more about the underlying assumptions of early modern views so we can see how their current influence is unwarranted—so we can see how inappropriate they are to our own very different time and society.

I would like to concede both the influence of this version of early modern rights talk and its problematic relevance to modern debates, and still argue that there is something of positive value in the seventeenth-century language of rights that bears on contemporary discussion. And that is the insight, for all the debate about “natural rights” in this period, that rights are discursive—derived by rational deliberation and discussion—even, we might say, linguistically constituted. Despite their interest in the early modern period, none of the contemporary critics I have mentioned has anything to say about the “talk” part of seventeenth-century “rights talk.” And yet it is arguably this discursive focus—the awareness on the part of some seventeenth-century writers that language as a set of conventions could serve as a model for rights—that is of greatest relevance to modern discussions of rights. An account of early modern “rights talk” as opposed to “rights theory” would then focus not simply on discussions of rights in this period, but rather on discussions of rights as a matter of talk. In order to appreciate this point, we need to backtrack a few steps and say something about the historical context of the language of rights in the early modern period.

Rights talk emerged in the seventeenth century in response to what we might call a crisis of legitimation, an overlapping set of political crises involving religious and civil wars and international conflict. This crisis

7. See generally SHAPIRO, supra note 1.
9. The secondary literature on the evolution of the concept of rights is enormous. For accounts that stress the originality of seventeenth-century theories of natural rights, see KNUD HAAKONSSEN, NATURAL LAW AND MORAL PHILOSOPHY (1996); J. B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998); SHAPIRO, supra note 1; RICHARD TUCK, PHILOSOPHY AND GOVERNMENT, 1572-1651 (1993). For dissenting views, see BRIAN
was moral and epistemological as well. In contrast to those late scholastics who explained the binding force of agreements in terms of the Aristotelian virtues of promise-keeping, liberality, and commutative justice, seventeenth-century English and continental Protestant writers were operating in a world in which such Aristotelian assumptions were no longer taken for granted. The task of political thinkers and jurists was to find a new way of talking about obligation and binding agreements in the absence of religious and political consensus. In one common account of the discursive shift in this period, the language of law replaced that of virtue. But this formulation does not do justice to the sophisticated early modern reflection on the linguistic dimension of rights, reflection that was itself generated by the search for a common language of obligation. Along with rights, I argue, language took center stage. In particular, language as a conventional system of signs was seen to be the precondition and model for the articulation of early modern rights.

In the following account of rights talk I focus on Hugo Grotius’s *De jure belli ac pacis* (1625) and Samuel Pufendorf’s *De jure naturae et gentium* (1672). Now read as a classic of international law, Grotius’s work is by most accounts the first important example of the new rights talk; Pufendorf was an admirer of both Grotius and Hobbes and, in the late seventeenth and eighteenth centuries, an extremely influential theorist of natural rights. Both authors offer an account of political association predicated on the individual transfer of natural rights to a sovereign, and both must accordingly explain why individuals should and do keep their promises of obedience, their political contracts.

As in all early modern theories of political contract, Grotius and Pufendorf waver between voluntarism and rationalism, between emphasizing the role of the individual’s will and consent in legitimating political rule and the role of reason in conforming to already existing

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**Tierney, The Idea of Natural Rights: Studies in Natural Rights, Natural Law and Church Law**, 1150-1625 (1997); Johann Sommerville, *From Suarez to Filmer: A Reappraisal*, 25 *Hist. J.* 525 (1982). Tierney locates the decisive shift towards a subjective notion of rights in the twelfth century rather than the seventeenth, although he also stresses that medieval rights theory did not focus on the individual in the same way early modern rights theory does. I am most persuaded by the accounts of Haakonssen, Schneewind, Shapiro, and Tuck.

10. See *James Gordley, The Philosophical Origins of Modern Contract Doctrine* (1991). For some scholars of this period, including Gordley, the absence of Aristotelian or Thomist metaphysics means that contract theory (then and now) is doomed to incoherence. I want to suggest, in contrast, that both then and now incoherence is not the only alternative to Aristotle. Late sixteenth- and seventeenth-century men and women were grappling in their own way with a crisis of foundationalism and many were attempting self-consciously to forge a new basis of social and political obligation, in which language had an important normative role to play.

11. See, e.g., *Schneewind, supra* note 9, at 76.

standards of justice. In the first case, they focus on subjective natural rights, in the second on objective natural law. In the first case, the argument for keeping one’s promises tends to be prudential and pragmatic, in the second, moral or theological. But there is a midpoint between these extremes, and that is the argument that language itself provides a basis for rights talk that is neither theologially determined nor merely prudential and self-interested. In both Grotius and Pufendorf, this kind of rights talk takes three forms: the quotation of previous discourses about rights; the argument that the political contract is analogous to, and founded on, a prior linguistic contract; and the suggestion that the constructive power of language is itself constitutive of rights. No one of these arguments logically dictates the others, nor are they in all respects consistent with each other or with the presupposition of an objective natural law. But together they show the effort on the part of at least two important early modern theorists to take language into account in the formation and articulation of rights.

We can begin to get a sense of the discursive occasion and motive for early modern rights talk by turning to the Prolegomena of Grotius’s De jure belli ac pacis. Here Grotius explains his reasons for writing:

Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human.14

As though to emphasize the occasion of conflict, Grotius makes controversiae (controversies) the first word of chapter one. To the early modern reader, the word “controversiae” would have conjured up not only contemporary religious and political controversies but also rhetorical exercises training students to argue on both sides of a question (as in the elder Seneca’s Controversiae), thereby emphasizing the inextricability of discursive and political conflict. Grotius then goes on to argue, from common linguistic usage, that “war” has come to mean “not a contest but a condition,”15 just as Hobbes would argue in Leviathan.16 It was in

13. See Patrick Riley, WILL AND POLITICAL LEGITIMACY (1982); Shapiro, supra note 1, especially part II; James Tully, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS (1993), especially ch. 9.
16. “For WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known.” Thomas Hobbes, Leviathan 88 (Richard Tuck ed., Cambridge Univ. Press 1994) (1651). Schneewind, supra note 9, at 72, also notes
response to this condition that Grotius, like Hobbes and Pufendorf, turned to natural law. Natural law seemed to offer a point of convergence or agreement for the otherwise competing interests of individuals or nations, a lowest common denominator. An important part of this new minimalism was the focus on subjective rights. In Grotius and others, natural rights were a subset of natural law.\(^7\) Whereas natural law referred to an objective order, natural right referred to subjective faculties and powers—such as the freedom to defend oneself and one’s property. Along with our natural sociability, the natural right of self-preservation seemed to provide a particularly compelling motive for political obligation.

What was the rhetorical force of the language of rights and what sorts of argument did this language itself promote? In some cases, the power of the new language of rights lay in the fact that it was ahistorical—and thus a way of wrenching consensus from historically embedded conflicts and traditional but contested legitimations of authority. This was the rhetorical function of the state of nature and of the description of rights as “natural.” Natural rights were opposed to divine right, feudal rights and obligations, traditional notions of hierarchy and authority, historical custom and consensus.\(^8\) Thus Grotius goes out of his way to distinguish natural law and natural right from historically variable positive law, whether in an individual country or in the law of nations. The discussion of natural law can only be made systematic, he tells us, if it is divorced from positive law:

> For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment.\(^9\)

But in other cases (or, in the case of Grotius, in other places), natural rights alone or both natural law and natural rights were linked to history. At times Grotius argues that whereas natural law is absolute, natural rights are relative and historical: they come into being in—and help to negotiate—the postlapsarian, historical existence of individuals and nations. At other times, while insisting that the law of nature is always and everywhere the same, Grotius allows that it encompasses things that are created by human volition. As an example, he cites the notion of ownership. Once ownership has been historically introduced by human agreement, it is wrong according to natural law to take someone’s

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that controversiae is the first word of chapter one in De jure belli.


18. The issue of custom is complicated since, for example, in England the customary language of the ancient constitution was linked to that of natural rights.

19. GROTIUS, supra note 14, at para. 30. See also id. at paras. 39-41; Grotius, supra note 12, at bk. 1, ch. 1, § 10 (discussing how the law of nature is different from the law of nations).
This entwining of natural law and history was enshrined in Grotius’s response to the question of how to prove the existence of the law of nature. This may be done either \textit{a priori} by matching human behavior to natural law or—the easier way—\textit{a posteriori}, by considering what natural law has been thought to be “among all nations, or among all those that are most advanced in civilization.”\textsuperscript{21} The linking of natural law and natural rights to history then mandates a particular kind of rights talk. As anybody knows who has dipped into them, Grotius’s \textit{De jure belli ac pacis} and Pufendorf’s \textit{De jure naturae et gentium} offer encyclopaedic, proto-anthropological investigations of rights talk from antiquity to the seventeenth century. Drawing on “the testimony of philosophers, historians, poets, [and] orators,”\textsuperscript{22} they introduce the reader to the customs of ancient Roman worship, penal law, polygamy, and slave contracts. But along with such historical examples, the reader of Grotius and Pufendorf would take away a methodological lesson as well. In these texts, any claim regarding the universality of rights is supported not simply by reference to a divinely authored natural law, but also by a wide array of historically and culturally disparate examples from classical and contemporary texts, suggesting that we can only know which rights are “natural” by knowing what people have historically \textit{made} or \textit{said} of them. Customs—and customary ways of speaking—are thus not simply opposed to natural laws, but evidence of their historical instantiation. This, then, is the first way in which we should construe early modern “rights talk.”\textsuperscript{23}

The second way we should understand “rights talk” has to do with the analogy between the political contract and what I have called the linguistic contract. For many early modern authors, natural rights were the basis of the political contract.\textsuperscript{24} According to this argument, individuals have natural rights of self-preservation and dominion which they consent to transfer to the sovereign in exchange for protection, security, and what Hobbes called “commodious living.” This exchange of protection for

\addcontentsline{toc}{section}{Notes}
\begin{itemize}
\item \textsuperscript{20} GROTIUS, supra note 12, at bk. 1, ch. 1, § 10.4.
\item \textsuperscript{21} \textit{Id.} at bk. 1, ch. 1, §12.1
\item \textsuperscript{22} GROTIUS, supra note 14, at para. 40.
\item \textsuperscript{23} See GROTIUS, supra note 12, at bk. 1, ch. 1, § 12 (use of quotations as proof); see also GROTIUS, supra note 14, at paras. 40, 46. For a good discussion of the tension in \textit{DE JURE BELLI} between arguments from natural law and arguments from positive law and local custom, see Jane O. Newman, “Race,” Religion, and the Law: Rhetorics of Sameness and Difference in the Work of Hugo Grotius, in \textit{RHETORIC AND LAW IN EARLY MODERN EUROPE} 285 (Victoria Kahn & Lorna Hutson eds., 2001).
\item \textsuperscript{24} In the following pages, the term “social contract” refers to the contract individuals enter into with each other to form society; the “political contract” is the contract between those members of society and the sovereign. The two are usually analytically distinct in seventeenth-century discussions of political obligation, with the language of contract being used most often to refer to the political contract. Hobbes is the exception to the distinction between society and the political contract: With the demise of the Hobbesian political contract individuals re-enter not society but a bellicose state of nature.
\end{itemize}
obedience was the essence of the political contract. Such a contract prompted the obvious question: Why do individuals remain bound by it when the sovereign appears to act contrary to their interests? Why should and do they keep their promises? From antiquity onwards, one answer to this question was that we are morally obliged to do so by the divine and natural law that “promises must be kept” (pacta servanda sunt), as well as by the implicit sanction of divine punishment. But in the seventeenth century, this answer was very often supplemented by another, which involved an analysis of the mechanism of promising and of the social conventions—the social contract—of language. Beginning with the assumption that language is a distinctively human capacity which is essential for the founding of society, rights theorists such as Grotius gradually articulated the insight that language itself entails certain obligations. On the basis of this normative view of language, they then argued that a linguistic contract—a contract about the meaning and right use of language—is the precondition of all other contracts.

Drawing on a range of classical, patristic, and humanist texts, Grotius represents language as the sign of our rational and sociable nature. Like Cicero, Grotius sometimes confidently asserts that man has “an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech (sermonem).” He spells out the implications of this view in his discussion of good faith in Book 3. Here Grotius goes so far as to criticize Cicero’s opinion that promises could be broken in exceptional cases. Although lying might be permitted in wartime, promises have a special status as a sign of our rationality: “From the association of reason and speech arises that binding force of a promise with which we are dealing.”

At other times, Grotius gives greater emphasis to the indispensable role language played in eliciting our capacity for reason and sociability. Here

25. In his account of the relationship between language, society, and political association, Grotius was influenced by Cicero, who offered two accounts of social and political association to his early modern readers. In the rhetorical treatises, Cicero painted a picture of men wandering in a state of nature until they were brought together by the powerful eloquence of a single individual. See CICERO, DE INVENTIONE, at bk. 1, §§ 1.2–2.3 (H.M. Hubbell trans., Harvard Univ. Press 1976) (n.d.); CICERO, DE ORATORE, at bk. 1, §§ 8.33–34 (E.W. Sutton & H. Rackhaus trans., Harvard Univ. Press 1967) (n.d.). In these and other works, he also put forward an Aristotelian view of man’s natural sociability, and natural disposition to form political associations. See, e.g., CICERO, DE OFFICIIS, at bk. 1, §§ 4.12, bk. 1, §§ 17.53–18.54 (Walter Miller trans., Harvard Univ. Press 1968) (n.d.) [hereinafter CICERO, DE OFFICIIS]. Thus, Cicero vacillated between descriptions of man’s natural sociability and of a state of nature in which men were associational, irrational, and bellicose. He alternately described the gift of speech as reflecting our reason or bringing it into being. The first account was predicated on natural law as the source of right reason, while the second implied the arbitrary imposition of political order.

26. GROTIUS, supra note 14, at para. 7.


28. GROTIUS, supra note 12, at bk. 3, ch. 19, § 1.3 (“Nam verum eloquendi obligatio est ex causa”).
Grotius draws on, among others, Cicero’s account of the linguistic origin and preservation of society in *De inventione*. According to this account, the eloquence of one man was necessary both to transform irrational “wild savages into a kind and gentle folk,” and—once society had been established—to induce “those who had great physical strength to submit to justice without violence.” Moreover, Cicero goes on to argue, eloquence also has a role to play in regulating violence itself. In a passage that could describe Grotius’s own ambitions, Cicero tells us that, after “eloquence came into being and advanced to greater development... in the greatest undertakings of peace and war (in rebus pacis et belli) it served the highest interests of mankind.”

Grotius proposes a similar role for eloquence with regard to his savage and irrational contemporaries. As we have seen, in the *Prolegomena* to *De jure belli* Grotius makes it clear that the goal of his ambitious treatise is to subdue irrational force—to subdue war itself—to the constraints of rational discourse.

In *De jure naturae et gentium* Pufendorf follows Grotius’s emphasis on and interpretation of our capacity for speech:

This one fact alone might be sufficient proof that man was intended by nature for a social life, namely, that he of all creatures has been given the ability to express his thoughts to others by means of articulate sound, which faculty can be of no logical use to men, unless they lead a social life.

Language, in other words, enables those verbal agreements which facilitate the peaceful social relations dictated by natural law: “[T]he law of nature commands, in a general way and indefinitely, that men enter into agreements of some kind or other, since without them social relations and peace between men could not be preserved.” Accordingly, like Grotius, Pufendorf argues that promises and agreements must be kept—*pacta...*
servanda sunt—by referring not only to natural law but also to language as proof of our social and moral obligations. Language provides both evidence of, and a vehicle for, our natural disposition to peaceful and faithful social relations.

Pufendorf makes an even stronger claim for the power of language to bring reason and sociability into being when, like Grotius, he locates speech at the dividing line between violence and law. Thus in his discussion of “the natural state of man,” Pufendorf quotes with approval Horace’s description in Book One of his Satires:

“When living beings first crawled on earth’s surface, dumb brute beasts, they fought for their acorns and their lair with nails and fists, then with clubs, and so from stage to stage with the weapons which need thereafter fashioned for them, until they discovered verbs and nouns by which to make sounds express feelings. From that moment they began to give up war, to build cities, and to frame laws . . . .”

In this genealogy of society, nouns and verbs replace clubs; the ability to frame laws in language replaces the natural state of war. Language, in short, brings into being an entirely new set of social and political relations to which human nature was not originally inclined.

Accordingly, Pufendorf distinguishes between the minimal obligations incumbent upon us by the “mere law of humanity,” and those rights and obligations created by “agreement or covenants”:

“If mutual offices, the real fruit of humanity, are to be practised more frequently between men, and by a kind of set rule, it was necessary for men themselves to agree among themselves on the mutual rendering of such services as a man could not also be certain of for himself on the mere law of humanity.”

Social relations are a linguistic artifact—specifically, an artifact of the verbal contracts we enter into. In the examples that follow we see that actual contracts exemplify the social, world-making capacities of language; they supplement the natural duties of charity by creating new rights and obligations created by “agreement or covenants”:

“By means of these we form contracts [commercia agitamus] with one another, and
lay aside private enmities as well as general wars."

In addition he quotes Aristotle's *Rhetoric*: "'If contracts are invalidated, the intercourse of men is abolished.'" For these pragmatic reasons, as well as because of the *a priori* moral law, Pufendorf subscribes to Cicero's argument in *De officiis* that even villains need to keep faith with each other.

Although Grotius and Pufendorf both point to speech as evidence of our natural reason and sociability—and thus of our natural obligation to keep our promises—they also argue that a political contract is necessary because our natural disposition was not enough to ensure peaceful and faithful interaction. In these works, reflection on political obligation is always shadowed by skepticism, by the conviction of sin, or by its secular equivalent: the recognition that we are naturally prone to breach of promise. Thus it was a short step from Grotius's and Pufendorf's observations on the distinctively linguistic nature of human society to the insight that a linguistic contract logically preceded the social or political contract. Because political and other contracts are forged in language, part of what is involved in making a contract is making language itself dependable or calculable. A contract in language is inevitably also a contract about the use of language—one that proscribes deceit, equivocation and, in most cases, coercion. The possibility of binding signification then becomes the precondition of binding oneself politically, the precondition of the irrevocable transfer of rights.

Grotius makes the connection between right linguistic usage and right government at various points in *De jure belli*. The centerpiece of his argument appears in Book 2, Chapter 16, *On Interpretation*. This chapter is obviously indebted to earlier humanist legal scholars who, in their effort to codify the norms of interpretation, gave increased attention to the rules for the interpretation of Roman law found in Digest 50.16, *de verborum significatione*. Like his humanist predecessors, Grotius was anxious to

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36. *Id.* (quoting ISOCRATES, AGAINST CALLIMACHUS).
37. *Id.* (quoting ARISTOTELE, RHETORIC, at bk. 1, ch. xv [1376b10]).
38. See CICERO, DE OFFICIS, *supra* note 25, at bk. 2, § 11.40 (The importance of justice is "so great, that not even those who live by wickedness and crime can get on without some small element of justice."). Pufendorf is drawing here on GROTIUS, *supra* note 12, at bk. 2, ch. 16, § 1, which includes the example from Isocrates. Pufendorf comments approvingly, "if it were not necessary to keep promises, it would be in no way possible with any confidence to base one's calculations on the assistance of other men." PUFENDORF, *supra* note 12, at bk. 3, ch. 4, § 2. In this way Pufendorf finally arrives at the dictum that it is "a most sacred precept of natural law... that every man keep his given word, that is, carry out his promises and agreements," *id.*; but it is notable that, like Grotius, he does so by a series of pragmatic, even utilitarian arguments, drawn as much from Aristotle's and Cicero's rhetorical works as from invocations of the moral law.
39. Hence the large place given by both Grotius and Pufendorf to the rules for the interpretation of contracts—a feature usually not seen in late scholastic treatises and probably traceable to humanist commentaries on Roman law, with their heightened attention to questions of language and interpretation. On early modern legal interpretation, see note 41, infra.
40. See IAN MACLEAN, *INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF...
discover ways of constraining subjective intention, including criteria regarding the "objective" or socially determined meaning of words. Even more than his predecessors, Grotius was acutely aware of the political implications of his attention to the norms of interpretation. In particular, he tried to articulate a middle ground between tyranny and anarchy by arguing that the meaning of an individual's consent to a contract, including a political contract, is constrained by the social contract of language.

Thus, to the fundamental question regarding political obligation—Must we mean what we say?—Grotius answers a resounding yes:

If we consider only the one who has promised, he is under obligation to perform, of his own free will, that to which he wished to bind himself. "In good faith what you meant, not what you said, is to be considered," says Cicero. But because internal acts are not of themselves perceivable, and some degree of certainty must be established, lest there should fail to be any binding obligation, in case every one could free himself by inventing whatever meaning he


41. On humanist jurisprudence, see KATHY EDEN, HERMENEUTICS AND THE RHETORICAL TRADITION (1997); DONALD R. KELLEY, HISTORY, LAW, AND THE HUMAN SCIENCES (1984); DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION (1990); IAN MACLEAN, supra note 40. Maclean demonstrates a pervasive concern in Renaissance legal texts with objective and subjective criteria of interpretation, the first focussing on the meaning of the words and the second on the intention of the speaker. He also shows that this distinction is untenable: although most Renaissance authors assume "the priority of thought over language," they also assert "the impossibility of thought without language." Id. at 146. Intention, that is, is only accessible through language, through the interpretation of words that takes the form of other words. While focussing on civil law, Maclean also demonstrates the existence of the same concerns in Suárez's theological treatise on law and in English legal thought, and comments:

This is on the one hand not surprising, as Roman law provides a precedent for legal thinking for canonists and common lawyers alike and supplies many maxims useful to both; on the other hand, it leaves the modern historian with the question whether the similarities of approach arise out of a common legal outlook, or a common crisis about language which affected Renaissance thinkers at more or less the same time.

Id. at 202. Maclean asserts that both explanations are likely.

Maclean also demonstrates the greater concern in Renaissance texts than in their medieval predecessors with the determination of subjective intention:

Verba, according to Aristotle and Cicero, are mental symbols or tokens (notae animi) representing concepts which are common to all men.... By the late Renaissance, on the authority of the Corpus [Juris Civilis] and of writers on forensic rhetoric, the definition of verba has been extended to read "notae rerum declarantes animi voluntatisque passiones et motus" (symbols of things which express the passions and movements of the mind and will). The introduction of subjective meaning is significant.... Its apparent exclusion in the medieval period permitted the elaboration of a logic which treated only intellectus or thoughts and ignored the word as an expression of feelings (motus animi) or perception (sensus, species).

Id. at 160-61. My reading of Grotius bears out Maclean's observations. Grotius and many of his contemporaries argued both that the subject's intention was crucial to the binding force of political and legal contracts, and that intention was constrained or dictated by the form of the contract itself. By this, they seemed to mean something different from the scholastic view that the emphasis on intention is compatible with objective obligations attendant upon the essence of a particular contract. Rather, for early modern contract theorists, the form of the contract is viewed as a constraint on wayward intention and equivocation.
might wish, natural reason itself demands that the one to whom the promise has been made should have the right to compel the promisor to do what the correct interpretation suggests. For otherwise the matter would have no outcome, a condition in which morals is held to be impossible.\footnote{Grotius, supra note 12, at ch. 2, bk. 16, § 1.1(emphasis added); accord id. at bk. 2, ch. 13, § 1.1-5.}

In this passage Grotius both acknowledges and appears to depart from the widespread medieval view that internal acts are perceivable by God and morally binding for that reason.\footnote{See Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 247 (1983).} Instead, he imagines a world in which morals are secured in the realm of interpersonal communication. Confronting the ever-present possibility of deception and equivocation, he asserts a public standard of meaning and accountability: Words should be understood “according to current usage.”\footnote{“Populari ex usu.” Grotius, supra note 12, at bk. 2, ch. 16, § 2.}

That is, while appealing to the independent authority of natural reason, Grotius also locates that authority in common linguistic practice—in the hope that language itself might provide the ethical and interpretive guidelines which are “not of themselves perceivable,” and for which there is no more obvious foundation.\footnote{With his greater skepticism about the force of common usage, Hobbes provides an instructive point of contrast. In De Cive and Leviathan Hobbes puts forward the radical claim that not just understanding but also “truth... depends on men’s consent and agreements” concerning the common use of words. Agreements can take place once we agree about the meaning of “promise” and “agreement.” Yet he also cautions the reader not to rely on language alone: “[I]t is universally true of language that although it rightly takes first place among the signs by which we disclose our ideas to others, it cannot do the job on its own; it needs the help of a context [multarum circumstantiarum].” Hobbes, On the Citizen [De Cive] 219, 232 (Richard Tuck ed., Michael Silverthorne trans., Cambridge Univ. Press 1998) (1642); accord Hobbes, supra note 16. Context determines meaning, however, only if the sovereign determines the context; otherwise there will be endless disputes concerning proper meaning and proper ownership, and these disputes are tantamount to the state of war.}

This characteristically early modern tension between subjective intention and objective meaning—the objective constraints of language—is also apparent in Grotius’s discussion of promises in Book 2, Chapter 11 of De jure belli. In this chapter, Grotius argues against the French jurist Connanùs’s view that some material proof or consideration is necessary for an agreement to be binding. But even here, where Grotius is defending the canon law principle that we are bound by our bare promises (promises without consideration), he focusses not simply on the necessary representation of the promise in language but also on the way language constrains our meaning in ways we may not intend.\footnote{See Berman, supra note 43, at 245-50 (discussing bare promises or nuda pacta).} According to Grotius, to be able to promise is to be able to alienate one’s actions or
freedom, just as we alienate or transfer our right to property. In Grotius’s account, the mechanism of such alienation—the way we secure our promises—is language: We represent our intention by means of “external signs.” This analogy between the alienation of one’s intention in language and the alienation of property then informs Grotius’s argument that one can consent to permanent alienation of one’s rights by means of an irrevocable political contract. But this representation of our intention in language may involve a different kind of alienation as well, as we see when Grotius quotes Proverbs: “Thou art snared by the words of thy mouth,” and Ovid’s *Metamorphoses* (Book 2, line 51), where Apollo regrets his promise to Phaeton: “My word has become yours.” In these two examples, the emphasis is not so much on the way verbal promises effectuate the will of the speaker as on the way language may bind the speaker to express but nevertheless unintended terms.

As the preceding has already suggested, to focus on the obligations that language creates was not only to consider the relation of intention to the social contract of meaning. It was also, necessarily, to take up the question of performance. In his *Introduction to the Jurisprudence of Holland*, Grotius argues,

The duty of keeping faith arises from speech or anything that resembles speech. Speech is given to man alone amongst animals for the better furtherance of their common interest in order to make known what is hidden in the mind; the fitness whereof consists in the correspondence of the sign with the thing signified, which is called “truth.” But since truth considered in itself implies nothing further than the correspondence of the language with the mind at the actual moment when the language is used, and since man’s will is from its nature changeable, means had to be found to fix that will for time to come, and such means are called ‘promise.’

Because our will is changeable, Grotius argues, we need to invent ways to bind ourselves, to bind our intention to perform, and this self-binding

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47. “The third way [of making a promise] is, where such a determination is confirmed by evident signs of an intention to convey a peculiar right to another, which constitutes the perfect obligation of a promise, and is attended with consequences similar to an alienation of property.” GROTIUS, *supra* note 12, at bk. 2, ch. 11, § 4.1. This translation draws on the more fluent translation, GROTIUS, *THE RIGHTS OF WAR AND PEACE* 134 (A.C. Campbell trans., M.W. Dunne 1901), as well as on Scott’s edition.


49. For the view that neoscholastic/natural law notions of contract saw no contrast between the will and the terms of its expression in a contract, see GORDLEY, *supra* note 10, at 109:

Modern theories tend to set in opposition, on the one hand, the will of the parties, and on the other any attempt by a court or legislature to judge the fairness of a contract. For the late scholastics and the natural lawyers, there was no such radical opposition. To hold the parties to the terms natural to the type of contract they entered into was to effectuate their will.

takes the form of a promise or contract. Here language appears as a condition of mortgaging the will. Language is what allows us to sustain the fiction of an identical will—and of conscience—through time. As he often does, Grotius is not so much working forward from the natural moral law as working backward from language. For language to make sense, promises have to be possible. It may not be too much to say that the power of the will to bind itself is a consequence of language—of language conceived of as the rational bond of society and as the tropological power to transfer one’s rights. In the Prolegomena to De jure belli Grotius famously claims that even if we were to imagine (etiamsi daremus) that God did not exist, we would still be bound by the dictates of natural law.\(^{51}\)

In light of the arguments we have surveyed, we can now recast Grotius’s formulation: “etiamsi daremus,” even if we were to imagine that God did not exist, language would still permit the transfer of rights and would still dictate certain rational obligations. As Grotius says in the passage from The Jurisprudence of Holland, our intentions are themselves bound by language, not the other way around.\(^{52}\)

But Grotius was not naive about the force of the linguistic contract. In On Interpretation and elsewhere in De jure belli it is clear that this force is normative rather than actual: conventions of meaning cannot preclude deception; instead, they provide the norm for the enforcement of promises. At the same time, because norms are not the same as constraints, Grotius also acknowledges the necessity of some kind of extra-linguistic compulsion to enforce the common understanding: “the one to whom the promise has been made should have the right to compel the promisor to do what the correct interpretation suggests.”\(^{53}\) The relevance to international affairs is clear. According to De jure belli, a just war is one that has been precipitated by an international breach of promise or some other violation, and that grants the injured party the “right to compel,” the right to exercise force against another nation.

In On the Duty of Man and Citizen Pufendorf is even more explicit about the linguistic contract that precedes the political contract.\(^{54}\)

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51. GROTIUS, supra note 14, at para. 11.
52. Hobbes also attributes a kind of binding force to language. Discussing the second law of nature, “Stand by your agreements, or keep faith,” Hobbes remarks commonsensically that “agreements would be pointless if we did not stand by them.” For in making an agreement, one denies by the very act of agreeing that the act is meaningless. . . . Anyone therefore who makes agreement with someone, but does not believe he is obliged to keep faith with him, believes that making agreements is meaningless and at the same time meaningful, and that is absurd. Therefore either one should keep faith with every one or one should not make agreements.

HOBBS, supra note 45, at 44 (ch. 3). Yet, for Hobbes, the injunction in the last sentence betrays the fact that the binding power of language is hypothetical, or rather contingent upon the power of the sovereign to enforce our agreements.

53. GROTIUS, supra note 12, at bk. 2, ch. 16, § 1.1 (emphasis added).
54. PUFENDORF, supra note 31.
According to Pufendorf, we incur "a double obligation by using [language] whether in speech or in writing":

The first is that users of a given language . . . must employ the same words for the same objects following the usage of that language. For since neither sounds nor particular letter-shapes naturally signify anything (for if they did, all languages or forms of writing would necessarily converge), the use of language would become meaningless if everyone could give an object any name he wanted. To prevent this, it is necessary for a tacit agreement [tacitam conventionem] to be made among users of the same language to denote each thing with one particular word and not another. . . . The second obligation involved in the use of language is that in speaking to someone one should disclose the sense of one's mind to him in such a way that he may clearly know it.55

Like Grotius, Pufendorf argues in De jure naturae et gentium that there is an implicit social contract regarding both the meaning and the well-intentioned use of signs. The imposition of meaning is established by consent, agreement, and pact. Linguistic connotation is also a function of social interaction, for words gain accessory meanings as "an expression of our judgment or passion and esteem."56 He asserts that the social agreement regarding the right usage of words is dictated by the law of nature, which forbids deceit by the use of signs.57 But he also casts this argument in terms of the "right" (jus) not to be deceived, attendant upon the conventions of language.58 In On the Duty of Man and Citizen Pufendorf goes further, arguing that such linguistic rights are themselves socially constituted, thus changeable: here he justifies various forms of equivocation or lying in terms of their conformity to social concerns or what he calls "moral truth."59 Like Grotius, then, Pufendorf vacillates between arguing that the moral obligation to keep our promises is dictated by substantive natural law and that it is created by linguistic convention itself.60 It is the latter argument that is of particular interest to our post-foundationalist world.

In addition to proto-anthropological rights talk and the linguistic contract, there is a third and final way in which early modern reflection on the political contract anticipates modern rights talk. As I mentioned before, the early modern emphasis on the linguistic constitution of rights can be interpreted as a response to skepticism about the legibility of

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55. Id., at bk. 1, ch. 10, § 2-3.
56. PUFENDORF, supra note 12, at bk. 4, ch. 1, § 5-6.
57. See id. at bk. 3, ch. 4, § 2; bk. 4, ch. 1, § 1.
58. See id. at bk. 4, ch. 1, § 10.
59. PUFENDORF, supra note 31, at bk. 1, ch. 10, § 7.
60. See GROTIUS, supra note 12, at bk. 2, ch. 13, §§ 1-5, bk. 2, ch. 16, § 1.1-2.
natural law or as an attempt to stress the historically contingent activities of persuasion and negotiation in response to the lethal conflicts generated by the wars of religion. In either case, early modern rights talk is characterized, in Bloch’s words, by “the belief in the power of a logical construction,” the belief that we can only know what we have made or constructed ourselves.\(^6\) Hobbes, Pufendorf, and Locke, all in their different ways, articulated versions of this belief. In *De Homine*, Hobbes asserts that “politics and ethics . . . can be demonstrated *a priori*; because we ourselves make the principles.”\(^6\) Pufendorf puts forward a view of moral (as opposed to natural) entities as specifically human inventions or constructions; and Locke asserts in a similar vein that, like God, man has a maker’s knowledge and natural right in “the work of his hands” and other intentional actions.\(^6\)

This emphasis on construction has usually been interpreted in terms of mathematical models of cognition. Bloch’s comment on the belief in logical construction is typical: “This is an essential trait of modern bourgeois thought since its inception: It knows only that which has been rationally produced, and it must be able to be reconstructed logically from its elements and foundations. . . . Here mathematics provided the model.”\(^6\) There is certainly plenty of evidence that Hobbes thought of his political theory in this way, and Grotius, too, claimed scientific precision for his analysis of natural rights.\(^6\) But the preceding analysis suggests an alternative interpretation of the power of construction, one that focusses on the constitutive power of language. Following in the footsteps of their humanist predecessors, Grotius, Hobbes, Pufendorf, and Locke all developed to different degrees the analogy between God the creator and man the maker, not least of all in terms of the linguistic power of creation first instanced in the divine *fiat*: let us make man in our image and likeness.\(^6\) In their historical account of rights talk, Grotius and Pufendorf

\(^6\) BLOCH, *supra* note 2, at 55.


\(^6\) JOHN LOCKE, TWO TREATISES OF GOVERNMENT, at bk. 2, ch. 5, § 27 (Peter Laslett ed., 1988). On the role of the workmanship metaphor in Locke, see SHAPIRO, *supra* note 1, at 103-10, drawing in part on JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES (1980). On the role of construction in Pufendorf, see J. B. Schneewind, Pufendorf’s Place in the History of Ethics, 72 SYNTHÈSE (1987); Alfred Dufour, Pufendorf, in THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT 1450-1700, at 566 (J. H. Burns & Mark Goldie eds., 1991). For Pufendorf “moral entities are inventions, some of them divine, most of them human. But Pufendorf does not think that their status as constructions gives us any reason to doubt their force and efficacy.” Alfred Dufour characterizes Pufendorf’s “new theory of power in which all kinds of authority were grounded in agreement or free consent,” as “conventionalism.” Dufour, *supra* at 130. Ultimately, however, in Pufendorf’s account the validity of these conventions depends on the will of God.

\(^6\) BLOCH, *supra* note 2, at 55.

\(^6\) GROTIUS, *supra* note 14, at para. 58.

\(^6\) Hobbes deliberately invokes the biblical *fiat* in the *Introduction* to LEVIATHAN. HOBSES, *supra* note 16.
in particular suggest that a similar fiat is at work in the declaration of rights. The innovation of at least some early modern theories of political contract, as P. S. Atiyah has correctly observed, is not “the idea of a relationship involving mutual rights and duties,” but rather the idea that contract creates and sustains this relationship by means of the free choice of individuals.67 The same could be said of the relationship between the linguistic contract and mutual rights: What distinguishes the early modern from the medieval period is not so much the idea of natural rights, which had a prior life in medieval philosophy, but the idea that such rights might be created and sustained by our linguistic agreement, without any other foundation.68

I am not suggesting that early modern contractarians are theorists of modern human rights. Among the many theoretical and practical reasons this could not be the case (some of which I have explored above) is the simple fact that early modern rights talk was perfectly compatible, in the minds of many of its proponents, with political absolutism. I am also not suggesting that simply failing to understand the history of rights talk must result in unsuccessful modern discussions of rights. But, in attempting to deal with the seventeenth-century equivalent of a crisis of foundationalism, Grotius and Pufendorf do have something to contribute to our modern debates. Specifically, they provide both a historical corrective and a methodological alternative to modern accounts of rights. Although a full treatment of the implications of early modern rights talk for modern debates cannot be undertaken here, it is clear that Grotius and Pufendorf challenge the consensus discussed at the beginning of this essay, a consensus that defines liberalism (both then and now) in terms of a pre-social essentialist version of the self; ahistorical individual rights; and ahistorical, universally valid natural laws. In the alternative genealogy I am suggesting, at least some early modern rights talk looks forward to modern attempts to define the liberal self as already embedded in culture and language, as constituted through an ongoing series of interpersonal relations.69 It also looks forward to efforts to locate rights somewhere

68. As I have indicated, this constructivist or, at its extreme, anti-foundationalist view of rights is in tension, in early modern texts, with the belief in objective natural law. Yet, it was also possible to hold that rights were created by rational agreement but only received their obligatory force from the existence of a divine creator. On this distinction in Locke, see Tully, supra note 13, at ch. 9.
between positivism and the metaphysics of natural law, in the in-between space of conversation.  

The contemporary relevance of the early modern focus on the discursive dimension of rights is suggested by Thomas Haskell’s article The Curious Persistence of Rights Talk in the “Age of Interpretation.” Haskell argues (against Leo Strauss on the one hand, and Nietzsche on the other) that it is still possible to talk about rights, even once one has accepted the historicist critique of positivism. Whereas Strauss and Nietzsche agreed that rights needed a metaphysical foundation in natural law (which for Strauss was at least desirable and for Nietzsche impossible), Haskell suggests that we think about rights as conventions:

Rights need not be either eternal or universal, but if they are to do us any good, they must be rooted deeply enough in the human condition to win the loyalty of more than a few generations (and ideally, more than a few cultures). Conventions possess the requisite durability.  

Haskell concedes that

[R]ights as rational conventions will lack some of the qualities that have traditionally been claimed for rights.... Far from being fixed once and for all in a constitution or a bill of rights, the definition of rights will be a perpetual object of contention between rival groups with strong vested interests, both ideal and material, in one interpretation or another.  

Although Haskell makes a compelling case for the continued significance of rights talk in the absence of metaphysical foundations, he devotes little attention to language. Here, it is useful to turn to the work of Claude Lefort and Jürgen Habermas. For Lefort, the very idea of human rights implies the disentangling of the notion of right from that of power, and this in turn means that “the source of right” is “the human utterance of right”:

Modern democracy invites us to replace the notion of a regime

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70. See Owen M. Fiss, Human Rights as Social Ideals, in HUMAN RIGHTS IN POLITICAL TRANSITIONS: GETTYSBURG TO BOSNIA 263, 273, 275 (Carla Hesse & Robert Post eds., 1999). See also THOMAS, supra note 69, at 45 (“Works of realism . . . challenge the formalism of contract law by presenting promising as an interpersonal act that is grounded neither in a scientific appeal to the laws of nature nor a moral appeal to God’s witness.”). Thomas’s analysis of the novel’s anti-foundationalist account of contracting has antecedents in early modern attempts to formulate an account of obligation in the absence of any legible, substantive natural law.

71. Haskell, supra note 8, at 1104-05.

72. Id. at 1005. Interestingly, although Haskell stresses interpretation and gestures ironically towards “literocentrism,” he does not accord much weight to language itself. Yet in a final, appreciative analysis of Thomas Kuhn's work on the interpretive conventions of scientific communities, he quotes Kuhn on language itself as the basis of any objectivity we have. See id. at 1010-11.

governed by laws, of a legitimate power, by the notion of a regime founded upon \textit{the legitimacy of a debate as to what is legitimate and what is illegitimate}—a debate which is necessarily without any guarantor and without any end. The inspiration behind both the rights of man and the spread of rights in our day bears witness to that debate.\textsuperscript{74}

To rephrase Lefort in Grotius’s terms, rhetorical \textit{controversiae} may profitably substitute for physical conflict; in fact, it is only when speech replaces violence that rights can appear. A similar argument is put forward by Jürgen Habermas in his article \textit{Multiculturalism and the Liberal State}. Habermas criticizes what he calls “the liberal assumption that human rights are prior to popular sovereignty. . . . The addressees of law,” he argues, “must be in a position to see themselves at the same time as authors of those laws to which they are subject.”\textsuperscript{75} And this means that “[i]t must be up to the citizens themselves to debate and deliberate in public, and to have parliaments democratically decide, on the kinds of rights they regard as necessary for the protection of both private liberties and public participation.”\textsuperscript{76} If this notion of democratic deliberation is a far cry from the early modern rights talk of Grotius, Hobbes, and Pufendorf, the insight that rights are created in and by language is not.

As I have argued, Grotius’s attempt to think of language as both the result of a contract and as the enabling condition of any individual contract is one part of this alternative genealogy. In placing the linguistic contract at the center of his account of political obligation, Grotius stresses the mutual dependence of the “sovereign subject” who freely enters into a contract and the social and linguistic conventions that enable the subject to communicate, that is, to make sense. This analysis of the way in which language both enables and constrains the individual speaking subject might ultimately lead one to reject the metaphor of the contract, with its attendant voluntarism and its talk of individual rights, as inappropriate. In the terms of one modern critic, we could then say that Grotius ultimately helps us see that “the contract of language is not one that is freely entered into by autonomous and sovereign speakers”; “no speaker has the right to

\textsuperscript{74} Id. at 39.
\textsuperscript{75} Jürgen Habermas, \textit{Multiculturalism and the Liberal State}, \textsc{Stan. L. Rev.} 849, 852 (1995).
\textsuperscript{76} Id. at 851. This elevation of speech is not the same thing as the elevation of opinion or contingent interests. \textit{See Lefort, supra} note 73, at 38, 41 (“right cannot be immanent within the social order without the very idea of right being debased”). On the establishment of right through the discourse of rights, see also Norberto Bobbio, \textit{The Age of Rights} (1996), who also stresses the necessary protection of rights by the coercive power of the state; and Richard Flathman, \textit{The Practice of Rights} 6-7, 185 (1976). The notion that the declaration of rights is performative—that it actually helps constitute the rights to which it refers—is widespread in contemporary discussions of international human rights. \textit{See, e.g., Fiss, supra} note 70; Michael Ignatieff, \textit{Human Rights, in Human Rights in Political Transitions, supra} note 70; Ruti Teitel, \textit{Millenial Visions: Human Rights at Century’s End, in Human Rights in Political Transitions, supra} note 70.
recede from the contract . . . except at the price of ceasing to be a speaker at all." 77 But rather than equate this irrevocable linguistic contract with political repression and social control, we might instead want to hold onto the Grotian model of the linguistic contract as an emblem of "the negotiated character of social knowledge," and thus the ever-present possibility of renegotiating social and political relations through rights talk. 78 For this reason, as I have argued, modern critics and defenders of liberalism would do well to look again at the early modern period, which offers us a richer and more contested legacy of rights talk than the usual histories of liberalism would suggest.

78. Id. at 41. Prendergast does not discuss rights talk, though he does elaborate the parallel between the social contract and the contract of mimesis. In the early modern period, Grotius provided ammunition both to those who supported absolute monarchy and those who, like Locke, argued that the contract with the sovereign was by definition revocable. See TUCK, supra note 50, at ch. 7.