

# RIGHTS WITHOUT REASON

Posts in this series.

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## Introduction

Social media is full of right-wingers bleating about the infringement of their rights. Sometimes it's gun nuts blathering about their rights to own every gun. Sometimes it's some dude whining about being slammed for exercising his free speech right to spew his racist opinions. These blowhards say that no limitation on their rights is permitted, whether it's criminal penalties, civil damages, or public insults.

Perhaps these oppressed people get their idea about rights from the Declaration of Independence,

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness...

But, of course, the Declaration doesn't confer any rights. Maybe they think the right to mouth off and the right to strut around with guns are God-given. That would explain why they are offended when they encounter consequences for their behavior.

Perhaps they believe these rights spring from the first two Constitutional amendments. But SCOTUS says otherwise in *US v. Cruikshank* (1875).

The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It 'derives its source,' to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, 'from those laws whose authority is acknowledged by civilized man throughout the world.' It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution.

...

The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.

....

The second and tenth counts are equally defective. The right there specified is that of 'bearing arms for a lawful purpose.' This is not a right granted by the Constitution.

The Supreme Court says that neither the right of free association nor the right to keep and bear arms are granted by the Constitution. By that logic, neither is the right of free speech. The cases applying these amendments to the states under the 14th Amendment do not reject this reasoning.

It seems that our rights depend on the interpretation by five members of SCOTUS of a word like "republican", or of whatever they think they know about our tangled history. If so, there is no way to explain anything about our rights. That's especially true of this version of SCOTUS, which doesn't even pretend to

care about precedent, and invents rules to suit its preferred policy outcomes.

### **Preliminary Ideas**

I'm going to read and write more about our rights. For starters, here are some thoughts. It will be interesting to see how these thoughts hold up against other people's ideas.

1. Every idea people have about everything was invented by a human being. This is a point made by the early Pragmatist William James; see the last part of this post. This is the second in a three part series on Pragmatism, the other two are here and here. They lay out the basic ideas that help me to understand our world. For those interested in how this philosophy works in our time, take a look at *Philosophy And Social Hope* by Richard Rorty, a collection of essays by the late Pragmatist.

2. One problem with our Bill of Rights is that the language is unhelpful. Many of them are couched in the negative, leaving open the nature of the positive right. Others use imprecise language, such as "cruel and unusual". From the beginning these amendments were seen as limits on the national government. When the Supreme Court began to implement the Reconstruction Amendments, it imposed the language in the Bill of Rights limiting the national government on the states. The result was the eradication of the power of the states to participate in the regulation of these rights. This was a major change in our federalism. And we were left with the vague language, now subject only to the interpretation of SCOTUS. Constitutionalizing these ill-defined rights leads to inflexibility in thinking about their content.

3. What exactly do we mean by "rights"? As a starting place, and in keeping with what I take to be the position of First Amendment absolutists and the gun nuts, we mean that no one is allowed to interfere with some action taken by another. For example, the right to own a gun means no one can interfere with anyone

else's right to buy and own a gun, including violent criminals and domestic abusers. The right to free speech means no one can interfere with the right of anti-abortion fanatics to scream outside my neighborhood abortion clinic.

4. Rights are inherently social, not individual. Every right requires a concomitant imposition on everyone else. The existence of rights limits the way our society can regulate itself. For example, anti-vaxxers may make religious liberty claims, while others point out that refusal to get vaccines threatens their children. If the anti-vaxxers prevail, we are all exposed to greater risk of illness and death.

This implies that rights should have a political aspect. Our current system is heavily biased towards a legalistic approach, empowering courts, especially SCOTUS, with undue power. It also focuses on the claims of individuals and ignores the impact on society and the claims of people not in the litigation. Dobbs is a good example: the plaintiff was the state government, and the defendant was an abortion clinic. What about pregnant women? What about their families? What about the impact on society? Alito and four other self-righteous rulers don't care.

### **New Series**

My next book will be *The Evolution Of Agency* by Michael Tomasello. I think it indirectly supplies a more useful approach to thinking about social relations, and thus rights. It's short, and easy reading (mostly).

In this post I discuss the Epistemic Regime as described by Jonathan Rauch, in his book *The Constitution Of Knowledge*. The Epistemic Regime is the way we arrive at truth in the Pragmatic sense. I think it's good background for some of Tomasello's ideas about our species.

I'd like to follow that with books or papers about the theory of rights in the US. I don't know what that will be yet, and if anyone has a suggestion, please put it in comments; also I'm still on Xitter @MasaccioEW, and slowly moving

to BlueSky. @EdWalker@bsky.social.