



The Myth of Rights

What do people talk about when they talk about their constitutional rights? In most cases they're talking about individual entitlements, such as the right to speak one's mind or worship as one pleases. However, in *The Myth of Rights: The Purposes and Limits of Constitutional Rights* (Oxford University Press), UC Hastings law professor Ashutosh Bhagwat argues that rather than intending to protect individual liberties, the founding fathers meant only to limit the powers of government. Recently, Bhagwat spoke to *California Lawyer* Editor Martin Lasden about the implications of his perspective.



Ashutosh Bhagwat

➔ To listen to the entire interview, go to uchastings.edu/legally-speaking.

Q. Why is the distinction that you're making between protecting the freedom of individuals and limiting government so important?

People try to write self-centeredness into the Constitution, and I think that's inherently destructive. More practically, it's important because reframing the debate often lets one understand why the Constitution does certain things. Take flag burning. Why is that an important right to have? That's a hard question to answer. But if you ask the question the way I would ask it, which is: "Do we trust the government to decide how people may and may not protest against the government?" that's a very different question. And there I think the answer is no.

Well, the irony, of course, was that once the Supreme Court said it was OK to burn flags, people stopped burning them. That's true.

Which maybe was the goal all along—if these guys are as smart as they say they are.

That may be a little too Machiavellian.

Does your analysis shed any light at all on why, relative to other countries, it took so long for us to recognize the civil

rights of blacks or to give women the vote, or why we're now taking so long to recognize same-sex marriage?

That's an interesting question. I mean I don't want to claim too much. I think a lot of those differences reflect very different factors, and a lot of it reflects the fact that this is a much, much more religious country than any European country.

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And that religiosity explains how backward we were on civil rights?

On some issues. Civil rights, no.

Didn't religious people make the argument that God meant for blacks to be slaves?

Sure, but it's important to remember that on the abolitionist side, religious leaders also played an incredibly important role.

OK, but did the influence of the slave states infect how we came to view rights in general? Did we come out of the starting gate with something that perhaps protects rights less robustly than the constitutions of other countries?

In 1789, other countries didn't have constitutions. Ours is still the oldest

written constitution. So nobody was protecting rights at that point.

Yet Great Britain was able to get rid of slavery in 1833 without a fight.

Sure, but at least part of that was economic. In Britain itself, slavery was not an important part of the economic infrastructure.

DeTocqueville made the point that one of the advantages that this country had

at the start was that we didn't have the baggage that the Europeans had.

Now it seems to me we don't have that advantage anymore; we have an antique constitution. Is that a disadvantage?

Some provisions in it are indefensible, but not the things most people think about. The structure of the Senate is indefensible. The idea that Wyoming and California both have two senators is absurd, anti-democratic, and makes no sense in the modern era. But by and large the Constitution does not try to make moral judgments. Rather, it tries to set up structures under which popular sovereignty remains in place and remains the fundamental basis of our government.

Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics that is co-produced by California Lawyer and UC Hastings College of the Law.

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You write in your book that the Constitution does nothing to alleviate the effects of poverty since it provides no right to public support or services. But as you know, a series of Supreme Court decisions in the seventies flirted with the idea that the poor have a constitutional right to some very basic benefits. Is it your view that those decisions were completely wrong?

It's not just my view, it's the Court's view. And while they may have flirted, they never consummated. The Court dropped a few hints but then backed off pretty clearly on the idea that there are any basic rights to welfare or education. And the reason is simply that that's not what judges are good at.

I think the reason they backed off was because in 1968 Richard Nixon beat Hubert Humphrey in a close election. If Humphrey had gotten the chance to appoint judges, wouldn't the legal landscape look a lot different than it does now?

It would have looked different. But less than you think. The constitutional argument for welfare rights and education rights is extraordinarily weak. There's no historical grounds for it, there's no textual grounds for it; it's based on pure moral reasoning, in my view.

In his book *The Second Bill of Rights*, Cass Sunstein defends those Supreme Court decisions by arguing that the Bill of Rights is not merely about limiting government; it's also about protecting citizenship, and in his mind that opens up an avenue of attack for those who are trying to protect the poor. In other words, if I'm starving or if I'm illiterate or if I'm homeless, those are meaningful barriers to my participating in the democratic process—as meaningful, say, as a poll tax. Is that an implausible argument?

It's not implausible, but it's how you perceive the Constitution. Cass Sunstein has a lot more faith in government than I do. He sees the Constitution as empowering and even obligating the government to act. My view is that they may be good policies—indeed, I think they *are* good policies—but I don't think the Constitution speaks to them. 🗣️