THE BATTLE OVER RIGHTS IS THE PROBLEM BUT JUDGES ARE NOT THE SOLUTION

HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART. By Jamal Greene.* Boston: Houghton Mifflin Harcourt. 2021. Pp. xxxvi + 300. $23.00 (hardcover).

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"Constitutional law can help-but only when it stops being about judges peering at law books and dictionaries and starts being about the rest of us." (p. 251)

Constitutional law is in disarray. Courts are tearing away at the fabric of abortion doctrine, affirmative action precedents have driven the use of race in university admissions underground, and the conflicts between people of faith and the rights of LGBTQ folks are colliding nationwide, among many other examples. Court reform to address these problems is in the air, if not on the ground.

In his new book, *How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart*, Professor Jamal Greene documents these battles with precision, and demonstrates that our legal system's failure to generate compromise and find common ground between people who hold conflicting rights is, indeed, tearing us apart. Most of this beautifully written book accurately captures how our Supreme Court's largely all-or-nothing approach to rights is making America a less hospitable and more polarized country. Greene's descriptive accounts are poignant.

The problem with the book is Greene's proposed solution.

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He prefers the European style of judicial review that goes by the label "proportionality" (pp. xxii–xxiii). He wants judges to play closer attention to the facts of each case, emphasize the unique aspects of specific controversies, and spend more time trying to find workable solutions that may leave both sides a little satisfied and a little angry, rather than the winner-take-all version our Supreme Court often prefers. The problem is that this suggestion provides unelected, life-tenured judges too much power and discretion to make public policy, not too little. Neither the liberals nor conservatives on the Court, nor our lower court judges, should be trusted to make this shift the way Greene advocates. The better way forward, if one agrees with Greene's depressing account, which I do, is to return most constitutional law issues to the political process directly and unapologetically.[2]

Part I outlines Greene's summary of the contentious rights disputes plaguing our country. Greene is at his best when lamenting the status quo. This section also discusses his proposals, both generally and as to specific debates, and shows they are neither workable nor desirable. Part II suggests a different way forward.

I. ALL OR NOTHING RIGHTS BATTLES

Greene sets out his thesis clearly and cogently: "The problem of the twenty-first century, in short, is the problem of the rights line" (p. xvii). In modern vernacular, "rights have gone viral . . . . Rights are everywhere, but we disagree, intensely, and in good faith, about what rights protect" (pp. xiv–xv). When we view rights as absolute, or even almost absolute, the result is a winner-take-all battle. As Greene observes, "[i]f only one side can win, it might as well be mine" (p. xvii).

In response to these battles, Greene suggests there are three options: minimization, discrimination, and mediation. He dismisses the first two options as either not protective enough of important values we hold dear or too dismissive of the competing interests involved. The third choice, mediation, is the one Greene advocates. Our judges, he asserts, recognize relatively few rights compared to other free societies, but those rights that judges do

2. *See* Eric Segall, *Supreme Overreaching: The Justices Should Return Gun Control, Affirmative Action, and Abortion to the States*, DORF ON LAW (Jan. 13, 2020), http://www.dorfonlaw.org/2020/01/supreme-overreaching-justices-should.html.

identify they protect too strongly. Instead, Greene suggests that we should recognize the validity of more rights, but less aggressively (p. xx).

Rather than requiring judges to define rights by arguing about the express or implied meaning of the Constitution, or even worse, historical debates, Greene suggests a much more pragmatic, consequentialist approach. Courts should devote much less time to "probes of original intentions, pedantic textual analysis, and mechanical application of precedent . . . and spend more time examining the facts of the case before them" (p. xx). He suggests judges focus on the following factors to help mediate between conflicting claims of rights and adopt proportional judicial review:

> What kind of government institution is acting? Is there good cause, grounded in its history, procedures, or professional competence, to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual freedom or equality? Knowing that courts will ask these kinds of questions makes other government actors ask them, too, as they craft their own policies and structure their own behavior (p. xx).

Much of the rest of the book is devoted to detailed discussions of rights conflicts, how our courts have gotten many of them wrong, how other countries, especially Germany and Britain, have fared better, and specific suggestions, based on the criteria above, for some of our most intense battles over rights. Among the many disputes Greene discusses are affirmative action, abortion, gun control, disability rights, and the conflict between religious liberty and rights of non-discrimination.

Greene's discussion of the current doctrinal chaos surrounding affirmative action is compelling. He begins by observing that until "America gets rights right, it won't get race right either" (p. 195). He argues that battles over racial preferences in higher education in the courts have reduced the debates to us against them. The most salient defect of the Court's precedents is that its formal distaste for race-conscious measures to overcome past discrimination has led colleges and universities to hide the ball when it comes to how they use race, and forces them to "pursue racial justice in the shadows" (p. 201).

Greene's persuasive critique is that the Court's rejection of

explicit race-based measures to address structural racial disadvantage and requiring educational institutions to rely exclusively on diversity as the basis for affirmative action programs leads to invisible race-based bumps that lack transparency and make it much harder for people to trust what universities say about their admissions decisions (p. 200). This diversity rationale, according to Greene, "isn't quite hogwash but it's close. . . . [T]hat student body diversity drives their race conscious admissions is less an educational imperative than a litigation strategy" (pp. 201–202).

Greene spends pages documenting the pernicious results of an exclusively diversity-based justification for racial preferences. He astutely points out that not all diversity needs are the same in all places and that the myth of merit-based admissions for non-students of color is just that—a myth. Children of alumni, athletes, and big donors are admitted to our elite universities in large numbers even where their grades and test scores do not meet university medians. Moreover, the tests used by these schools are racially and culturally biased in the first place, which should justify non-diversity-based justifications for racial preferences. Greene observes that the "complexity of it all has been too much for the Supreme Court to bear" (p. 214). In a powerful paragraph ending his descriptive account, Greene says the following:

> The Court permits the use of race, but only in the furtherance of diversity goals that fail to make sense of why race is prioritized over other measures of diversity. It requires schools that use race to do so in ways that are maximally discretionary, subjective, and hidden from scrutiny by both applicants and members of the public. And it openly encourages schools to adopt measures . . . that hide the role race plays in their decisions. The Supreme Court isn't (yet) completely unreceptive to the use of race, but it has been implacably hostile to schools being honest about it (p. 215).

Greene's solution is for the Court to take a more fact-based approach to affirmative action by being more attentive to conditions on the ground, the specific problems universities are trying to address, and allowing educational institutions to be more honest about how and why they need to use racial criteria not just for diversity purposes but also to take into account institutional racism and its historical causes. He concedes that courts should be uncomfortable or skeptical with government decisions based on race, but that a more contextual, rather than

rule-based jurisprudence, would be far superior to the current regime.

There is much to admire in all this but, as will be discussed in the next section, there are also serious problems with allowing judges to mediate among conflicting claims in this difficult area of the law on what would amount, in large part, to a case-by-case approach. There are substantial downsides to a legal regime where the permissibility of the use of race in admissions at thousands of colleges and universities could depend on how *judges* view the issue locally. Also, inevitably, there will be judges who are more sympathetic or more hostile to racial preferences than other judges, and Greene's approach could accentuate those differences and make them much more important. But before we discuss that critique in more detail, we turn to abortion.

Greene is likely right when he says that there "is no issue over which Americans are divided more . . . than abortion" (p. 114). He points out that the preamble to a new Alabama law restricting abortion compares it to the Holocaust, Stalin's gulags, and, among other things, the Rwandan genocide (p. 114). On the other side, although this comparison is not totally fair, he notes that there was a major social media campaign in 2015 encouraging women to "'shout' their abortions" (p. 115). Abortion "presents a conflict of rights in is purest form," because it is hard to find "common ground between a woman who shouts her abortion and a protester who believes that the woman has murdered her child" (p. 115).

Greene begins this Chapter by reminding us that *Roe v. Wade*[3] was a 7–2 decision, that the majority included five Republicans, and that at the first Supreme Court confirmation hearing after *Roe* (John Paul Stevens) no Senator asked a question about abortion (pp. 115–16). But that relative peace in the abortion wars, of course, did not last. According to Greene, *Roe* eventually "tore the anti-abortion movement apart," because of its insistence that the fetus "was not a constitutional person" (p. 120). The Justices' removal of the fetus from all constitutional protections was the equivalent of a declaration of war. That war was fought most successfully in terms of partisan politics, if not abortion, by the 1980 Presidential campaign run by Ronald Reagan. Greene describes the role abortion played in that election this way:

3. 410 U.S. 113 (1973).

> The overt political strategy to help Republicans regain power heading into the 1980s was to use abortion and the human life amendment to create a permanent home in the Republican Party for Catholics and evangelical Protestants, aligning them with white southerners who associated Black civil rights with moral degradation (p. 122).

By 1981, when Justice O'Connor was nominated to the Court, abortion became the central issue during her confirmation, and 1980's American politics was dominated by abortion conflict. When the Court returned to the issue in *Planned Parenthood v. Casey* in 1992,[4] the Court did a slightly better job of taking conflicting rights into account. The Justices' "undue burden" test allowed for more regulation of abortion and was less extreme than *Roe*, but the three Justice plurality made up of Kennedy, Souter, and O'Connor (all Republicans) thought it was their job to try and depoliticize abortion (they failed of course) when, according to *Greene*, they should have done "just the opposite" (p. 136). Rather than lecture the American people about how the government should treat abortion, the Court should have facilitated conversation about the issue. The result is that abortion politics is still an all-out war between competing sides over fifty years after *Roe* was decided.

Greene compares this nightmare to the German experience, and finds America wanting. This Review cannot do complete justice to that narrative, but here are the highlights. Greene's main point is that the German Constitutional Court, when facing the issue in 1975, "did not simply choose between rights but instead forced the state to take both the rights of the fetus and the rights of women seriously" (p. 124). Starting from the premise that the fetus has important rights, but also taking into account that forcing a woman to carry a fetus to term against her will has serious consequences, the German Constitutional laid down a set of rules that Greene admits were not perfect, but which gave enough to both sides to make the issue less contentious there than in the United States.

The German Court ruled that women could not get abortions in the first trimester unless two doctors certified that the termination of the fetus was necessary to avoid severe emotional or financial distress for the woman and she went through

4. 505 U.S. 833 (1992).

counseling, or there were threats to the woman's physical health or life. The distress exceptions (called "socially indicated") were not too difficult to obtain, and by 1990 eighty-five percent of legal abortions were "socially indicated" (p. 125). Moreover, to the extent that women were forced to or encouraged to carry fetuses to term, Germany made sure, and this is crucial, that the law provided job and financial security for women who have children, such as a guaranteed job after caring for a new born for three years, and extensive tax credits for extended child care, among many other benefits (p. 130).

When the abortion issue returned to the German Constitutional Court after reunification in the early 1990s, it issued a complicated decision and to some extent threw the issue back to the legislature. What eventually emerged Greene describes as follows:

> The Bundestag responded with a revision in 1994 that defined abortion as a crime but permitted a woman to choose an abortion in the first trimester without fear of prosecution, even if she did not let her counselor in on her reasons. The law followed the court decision in permitting public funding of abortions for women receiving welfare and allowing funding for other women only if their abortions were the result of health issues, genetic issues, or rape or incest. The law also strengthened childcare support and job security guarantees for parents who took time off to care for their children (p. 130).

The lesson Greene draws from the German experience is not that it has a "perfect regime of abortion regulation," but that this complicated and divisive issue has become mostly an issue of politics that all sides feel they have some control over (p. 131). He contrasts this to the American experience where red states are doing anything they can to make abortions harder, especially for poor women, with the goal of prompting test cases where the Court will return the issue to the states. At the federal level, in addition to bans on public funding of abortions, again hurting poor women the most, the politics of abortion is essentially the politics of judicial appointments. According to Greene, "when the Court makes political compromise impossible, the losing side sees changing the Court as the only option" (p. 132). Much of this story, Greene suggests, can be attributed to "*Roe*'s absolute rhetoric around privacy rights and medical autonomy" (p. 132).

There is a lot to admire in this account, but there is also a lot to criticize. On one level, Greene too quickly glosses over major

non-abortion differences and social contexts between Germany and America, such as the acceptance of much more developed welfare services across the board in Germany, which reduced to some degree the harm women suffer when forced to carry fetuses to term against their will. Moreover, *Casey* did return the issue to the political process to a great degree with its amorphous undue burden test, which does allow far more compromise on the abortion issue than *Roe* did, but which, if anything, as Greene admits, turned up the temperature of the American public even more on the issue. Greene's narrative also glosses too quickly over the GOP's reach out in 1980 to groups who had not held strong feelings about the abortion issue, such as Evangelicals, until it became in their political interest to do so. Abortion politics in America is much more about politics than abortion.

Moreover, Greene's use of the German experience to suggest that the Court in *Roe* and *Casey* should have taken the fetuses' rights into account instead of relying on the state's interest in potential life (until viability), and that if only the Court had done so, abortion politics in America might be different, is not persuasive. A better critique is that the Court just went too fast by deciding the issue in "one fell swoop" as Justice Ruth Bader Ginsburg famously observed.[5] In one case, the Court went from no protection for a woman's right to choose to the invalidation of the laws of almost every state. Had the Court moved slower while still focusing on the state's interest in fetal life, as well as the medical health of the mother, it is possible our abortion politics today would not be so overwhelmingly strident. In any event, *Casey* is very much the kind of decision that *Greene* advocates but it changed little or nothing in how abortion has come to dominate our local and national politics and judicial confirmations. There is a lot wrong with *Casey,* but it is emphatically not an all-or-nothing decision.

Greene's discussions of other hot button issues such as gun control, disability rights and campus free speech problems follow similar paths. There is much to learn from these chapters and Greene remains consistent about how he thinks the Supreme Court should approach these questions. In his words:

5. Alisha Haridasani Gupta, *Why Ruth Bader Ginsburg Wasn't All That Fond of* Roe v. Wade, N.Y. TIMES (Sept. 21, 2020) https://www.nytimes.com/2020/09/21/us/ruth-bader-ginsburg-roe-v-wade.html.

> In cases ranging from affirmative action to campaign finance to gun regulation, the justices almost never acknowledge the presence of constitutional rights on both sides of the cases they hear. As with abortion, doing so leaves the law erratic and disrupts the possibility of political compromise. Worse, it makes us hate each other a little bit more, to tragic effect (p. 139).

I agree with Greene that many of the Supreme Court's major constitutional law decisions have been tragedies that caused much pain and anguish to the American people. But, as the next section explains, we disagree about what to do about that problem.

II. DEFERENCE NOT PROPORTIONALITY IS THE BETTER WAY FORWARD

Greene does not suggest that a more proportional method of dealing with rights by the Supreme Court would be a total panacea for our constitutional woes, but he strongly favors a case-by-case, detail-oriented jurisprudence. But do the American people actually care about the method with which the Court decides cases or do they just feel deeply about the bottom-line holdings? There does not appear to be much data on that question, but it is highly unlikely that rhetorical driven softening of rights disputes would ease our divisions. Could the Court truly lower our collective temperatures through narrowly crafted opinions that take both sides more seriously? Maybe, but it depends much more on the sound bite reporting of the result than the quite unlikely to happen careful parsing by the public of judicial opinions.

Under Greene's approach, our most divisive constitutional questions would have to be more locally focused. A school that uses racial preferences in the Deep South might be treated differently than a school in New York City, or gun control legislation in Wyoming might meet a different fate than the exact same law in Detroit. What kinds of social welfare umbrellas states provide women who are unsure whether to carry a fetus to term might make all the difference in abortion cases.

I am in favor of returning most of these issues to the states and having them decided locally, but emphatically not through a rigorous, fact-based case deciding method by the unelected, life-tenured federal courts. There is no evidence that either our overly politicized confirmation process or the resulting celebrity status

of our Justices would produce jurists who are good at, or want to be so locally focused and sensitive to, competing claims of rights. Justices O'Connor and Stevens often wrote opinions that way but that usually led to more hand wringing (O'Connor's endorsement test for establishment clause cases for example did little to ease divisions).

Greene thinks the problem is that judges do not take enough rights seriously and those they do recognize they should protect less in the face of competing rights. But, as I have tried to explain throughout my career, the real problem is that federal courts just make too many important decisions.[6] Adding more factors, flexible balancing tests, and warm rhetoric about competing rights by the Justices would likely just push these issues to the lower courts and not to local and national politics, where they truly belong.

If Greene is right about the failings of our overly polarized and contentious inability to deal with rights successfully, and I believe he is, his remedy might provide some rhetorical comfort to a small number of American, but it would also require judges to write longer opinions, take more imprecise factors into account, and ultimately not reduce their power at all. This problem can be seen through the lens of our gun rights battles, though Greene does not spend too much time on the issue.

He describes the text and history of the Second Amendment well, and suggests that both gun rights and the need to regulate guns are important (pp. 17–18). The reality of twentieth-century America, however, is that we are as or likely more polarized over guns now than when *District of Columbia v. Heller*[7] was decided in 2008, in exactly the manner Greene suggests should help us navigate rights better. The Court only decided the narrow issue of whether a city could ban all handguns, suggested that traditional restrictions on guns, like keeping them out of the hands of felons, were still permissible, and did not articulate any overreaching doctrinal rules or even standards of review. The result is anarchy, high tempers, and conflicting decisions in the lower courts over both the legality of and desirability of gun reform and expensive litigation throughout the nation.

6. *See* ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES (2012); ERIC J. SEGALL, ORIGINALISM AS FAITH (2018); Segall, *supra* note 2.

7. 554 U.S. 570 (2008).

A better way is to recognize, as Greene does in his descriptive account, that lawyers who are trained in reading texts and believing that value judgements should be separated from judicial analysis, are not the right government officials to try and solve contentious claims of conflicting rights. Where the constitutional text is unclear, and the history contested, judges should stay out of major political controversies, not inject more subjective judicial factors into them. The way to facilitate more healthy discussion among both our citizens and elected officials is for the Justices to decide much less, not for them to impose frameworks that will, in all likelihood, be just as divisive as firm rules. The major problem with rights in America is that judges often just make them up out of whole cloth, and then enforce them too rigorously. Adding more rights for the Justices to overemphasize is not the answer.

CONCLUSION

The first step in solving any serious problem is to describe it carefully. That cliché is true for doctors, academics, and athletes, as well as lawyers, judges, and law professors. Professor Jamal Greene's book goes a long way in explaining how the Supreme Court has made us more polarized, more divided, and less willing to compromise with the people who disagree with us. But his remedy misses the mark. Other than issues involving juries, evidence, and sentencing,[8] judges are notoriously bad at making public policy, or even setting the terms for debates about public policy. The last thing we should want is to give them more discretion and power than they currently wield. The better way, whether through structural reform of how the Court is constituted or threatening the Justices with political tools to weaken the institution, is to encourage or coerce the Court to do much less: to get out of politics where, absent clear text or uncontested history, it simply does not belong.

8. No part of this argument for deference here is meant to apply to the rights of criminal defendants under the Fifth through Eighth Amendments as we expect judges to have expertise over such questions and judges should be allowed to run their own courtrooms.