

HOW COURTS CAME TO CONTROL OUR RIGHTS

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In Chapter 1 of *How Rights Went Wrong*, Jamal Greene goes through the actual history of the origin of the Bill of Rights. I think most of us were taught that the Bill of Rights is a list of rights that go with being US citizens. Courts are the arbiters of the meaning of the Constitution, so they protect the minority from overreaching by the majority. That's not what Greene sees.

The Constitution doesn't give individuals very many rights. It bars *ex post facto* laws, and bills of attainder, gives people a right to trial by jury, and a few other rights, not much compared to the rights people thought they have.

The Anti-Federalists objected to the Constitution in large part because of the absence of a bill of rights. They claimed to fear that the central government would infringe on the power of the states just like the British kings had done. The people living at that time were very interested in their individual rights, but according to Greene:

... within Founding-era political thought, the institutions best suited to reconcile the competing demands of rights bearers were not courts but rather state and local political bodies: juries, churches, families, and legislatures. Democracy was not a tool of majoritarian oppression but rather was the means through which a community prevented oppression from the outside.
P. 7.

The key phrase here is "reconcile the competing demands of rights bearers." Greene thinks the goal of the Bill of Rights was to center the balancing of rights claims at the local and

state levels, and to keep it out of the hands of the federal government.

This theory was consistent with the political power structures of that era, with local and state governments having the dominant role. Many of the states were run by the rich: slavers, merchants and bankers in varying proportions in each of the states. None of these people were willing to cede much power to the federal government not least because it might interfere with their own power and their own profits. The Federalists held plenty of power in their own states, and had no reason not to agree.

Side note: I may be reading some of this into Greene's words. He doesn't discuss power and wealth, but I think this is a fair reading of his words:

The backers of the Bill of Rights were not interested in protecting minorities from majority tyranny. They were interested in protecting their own governing majorities from others who might have different interests or agendas. P. 13

The purpose of the Bill of Rights was not to protect individuals from the tyranny of the majority. It was to protect state and local governments from interference and control by the federal government. Most of the provisions of the Bill of Rights in their own words apply to the powers of Congress: "Congress shall make no law". Only a few of them seem to give rights to individuals, or protect individuals from the power of the States to regulate as they see fit. In fact, as we will see, most states and the federal government enacted laws that seem to violate the express provisions of the Bill of Rights.

Greene says the theory that state and local governments, juries, and private institutions like churches and schools were best positioned to deal with rights claims was destroyed in the

Civil War.

Greene goes through each of the first 10 Amendments in the second half of Chapter 1. I'll look at some of those in the next post.

Discussion

1. So how did the Supreme Court gain control over our rights? SCOTUS claimed the ultimate power to interpret the Constitution. In *Dred Scott*, it aggressively asserted that it was in charge of the slavery question, no matter what Congress and the people wanted. After the Civil War, instead of refashioning the Supreme Court and insisting on their proper role in control of our rights, Congress and the Executive gave the judiciary a large role in the enforcement of the laws and our rights, including in several Civil Rights laws.

From the beginning, SCOTUS resisted the force of the Reconstruction Amendments. In *The Slaughterhouse Cases*, there is a nice statement of the goal of the 13th, 14th, and 15th Amendments. Then the Court says it can't possibly really mean much by that, so those old racists went on to say that the rights of Black people, women and Native Americans were still controlled by the states. In a series of cases SCOTUS restricted the power of Congress to carry out the intent of those amendments, and repurposed them to protect corporations.

After a few decades SCOTUS decided that the Due Process Clause of the 14th Amendment applied against the states, effectively creating a whole set of national rights for individuals which it claimed to find in the Bill of Rights. It claims that the rights it finds there are absolute, and cannot be touched by our government. Congress and the Presidents acquiesced. That's how we find ourselves under the thumb of a rogue SCOTUS.

2. The current conservative majority agrees with those old courts. They restrict congressional and executive powers. They put crucial matters like women's health and welfare in the hands of

states. They approves of state actions to gerrymander and suppress voters to make sure minorities in those states can dominate the majority. Every disgusting decision the six right-wingers hand down would fit fine with their Reconstruction-era predecessors. Every policy choice they make would satisfy the demands of the Gilded Age Plutocrats.

The founders were rich white men infused with the biases of their day. There were slavers and people willing to compromise with slavers for their own reasons. They agreed that the lives of enslaved people and Native Americans didn't matter, and that women weren't really people. Those views informed their drafting of our Constitution and Bill of Rights. Why should they control ours? But Roberts and his majority are trapping us in the amber of those ignorant prejudices.