STRICT SCRUTINY AND RATIONAL BASIS SCRUTINY

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In Chapter 2 of *How Rights Went Wrong,* Jamal Greene introduces us to a rule of Constitutional interpretation suggested by Oliver Wendell Holmes in his dissent in *Lochner v. New York* (1905). The idea is that the Constitution protects few rights, but those it protects, it protects strongly. This cashes out as the requirement that the government must show very strong grounds if it infringes a protected right, the strict scrutiny test. However, the government need only show that it has a rational basis for other legislation, the rational basis test.

Chapter 3 explains how that rule came into effect, worked for a while, and then proved inadequate. The principle driver of change was Felix Frankfurter, showing once again the importance of people and relationships in the evolution of our legal system. Frankfurter was the son of Austrian immigrants. He came to New York City in 1894 at the age of 11. He was a star student, went to Harvard Law, and began to rise in government service. Greene describes him as "An inveterate sycophant and social climber" (p, 60). One of his targets was Holmes, and over the years, Frankfurter slobbered over him.

In 1914 Frankfurter joined the law faculty at Harvard and began to advocate for the Holmes dissent in *Lochner*. He was in and out of government service, and became a sort of Leonard Leo figure, placing his best students in clerkships and government positions.

He forged a relationship with Franklin Delano Roosevelt during WWI when both served on a government board. The relationship grew when FDR became governor of New York.

The effort to actualize Holmes' *Lochner* dissent wasn't going well through the 1920s, as the Supreme Court repeatedly applied the rule of the *Lochner* majority. When FDR was elected president, Frankfurter became one of his most trusted advisers. In the early years of the New Deal, SCOTUS struck down most of the laws enacted to deal with the Depression. That led to FDR's threats to pack the Court, and to the sudden change in the outcomes of these cases.

US v. Carolene Products Co. was an early example. In that case, the majority based its decision on Frankfurter's view of Holmes' *Lochner* dissent. Further, it expanded that rule with Footnote 4, which Greene summarizes as holding that strict scrutiny would apply in three different cases:

> (1) when the law interferes with a right the Constitution specifically protects, (2) when the law restricts the political process itself, or (3) when the law discriminates against particular religious or racial minorities. P. 66.

I read Greene as suggesting that one of the factors in Frankfurter's advocacy was his progressive view of the need for government regulation of corporations. Footnote 4 connects that view with strong protection for minority groups.

Greene shows how this rule made its way into the leading treatises and legal textbooks, largely through the influence of people trained and steeped in Frankfurter's views.

With minor adjustments, that remained the rule through the 50s and early 60s. That was a period of vast social change, and social unrest, as Black people, women, LGBTQ people, Native Americans, and poor people from all groups began to make demands on the legal system that went beyond the bare scope of Footnote 4.

One example of this push is *Griswold v. Connecticut*, which Greene discusses in detail.

One of Frankfurter's last SCOTUS decisions was *Poe v. Ullman*; *Poe* was a facial challenge to Connecticut's ban on birth control. Frankfurter punted, saying that the statute was never enforced. Side note: the legal term is desuetude. It ought to apply, for example, to the Comstock Act which isn't ever enforced, but with the current majority on SCOTUS, who knows.

Estelle Griswold, the executive director of Planned Parenthood League of Connecticut, got herself and a doctor arrested and convicted for dispensing birth control material and information. Frankfurter had retired due to a stroke. William O. Douglass, who had dissented in *Poe*, wrote the majority opinion in which he laid out the right to privacy.

In the remainder of the Chapter, Greene looks at the different ways courts, especially SCOTUS, have tried to deal with the demands of groups whose rights were limited by all branches of state and federal governments.

Discussion

1. Reading between the lines, it seems to me that Greene thinks that the values, biases, and opinions of judges play a crucial role in decisions. This is one of several versions of legal realism.

> For the purposes of this Article, I define "legal realism" as the perspective that Supreme Court decisions resolving important constitutional law questions are based primarily on the Justices' values, politics, and experiences, not on text, history, or precedent. In other words, personal preferences, rather than the prior law dictate most Supreme Court constitutional law decisions.

2. Here's an example. Richard Posner is an intellectual. He served on the 7th Cir. From 1981 to 2017. He taught at the University of Chicago Law School for decades. He seems to have

been influenced by the strict neoliberalism taught at the Chicago Business School. That connection perhaps led him to his theory of law and economics, which I would describe as the idea that in deciding cases Posner would assume that the law favors the economically efficient outcome.

In a 1985 article, *An Economic Theory of the Criminal Law*, he analyzes crimes like rape in terms of markets and market efficiency, apparently indifferent to the inherent silliness of the effort.

> Put differently, the prohibition against rape is to the marriage and sex "market" as the prohibition against theft is to explicit markets in goods and services. [footnote omitted]

After the Great Crash of 2008, he formally renounced the entire project of the Chicago School of economics, including his own law and economics branch. Here's a discussion. That, of course, is the mark of an intellectual: he rejected a theory he had relied on for decades when he saw it didn't work.

2. Greene mentions the deeply felt trope that we have a government of laws, not men, citing John Adams. P. 58. How does it square with the theory that the prejudices and deeply held world views of judges are a critical factor in their decisions?

In routine cases it's not a problem. But it's a huge problem for major constitutional law issues decided by SCOTUS. Neil Gorsuch pompously demonstrated this when he said at oral argument in *Trump v. United States,* "…we're writing a rule for the ages" about presidential immunity from criminal accountability. P. 140. That is not the job of a judge. Writing rules for the ages is the responsibility of legislatures. But the current majority doesn't think like that. As they showed in *Dobbs* and the gun cases, they don't even believe there are rules for the ages.

There are only rules laid down by five unelected unaccountable lawyers, good only until changed by five other unelected unaccountable lawyers.

3. I think that when institutions are controlled by people willing to subvert the norms of their jobs to achieve ideological or political goals, the institutions will fail. There are no rules sufficient to restrain them. The only solution is to remove them and replace them with people who comply with the norms.

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Graphic: Gilbert Stuart’s portrait of John Adams.