



ERWIN CHEMERINSKY MAKES HIS CASE AGAINST THE SUPREME COURT

Thane Rehn

Erwin Chemerinsky is one of the country's foremost academic commentators on the Supreme Court. He has authored one of the leading casebooks on constitutional law, as well as a leading textbook on federal courts and federal jurisdiction. This means that a substantial percentage, perhaps even a majority, of American law students over the last decade, have been introduced to the Supreme Court's decisions and legal doctrines in large part through Chemerinsky's work. There are few lawyers or academics who can claim to have an equivalent depth of knowledge about the Court.

In his latest book, *The Case against the Supreme Court*, Chemerinsky takes that knowledge and uses it as the basis for a full-scale assault on the legitimacy and legacy of the Court. The thesis of his book is that "the Court has frequently failed, throughout American history, at its most important tasks, at its most important moments." Later in the book, Chemerinsky really takes off the gloves: "Let's admit that this emperor has no clothes. . . . It is time to get past the façade of the marble columns and the mystique of the justices who appear in robes from beyond the heavy curtains."

Others have made similar attacks on the Court, of course, but hearing them from someone with Chemerinsky's background is disorienting. It's as if Paul Krugman were to write a book that announced his realization that dollar bills are just worthless pieces of paper, or perhaps as if Vince McMahon were to hold a press conference in which he angrily declared that he had discovered that professional wrestling is phony. One wonders what led Chemerinsky to decide that the men and women behind the curtains at the Court are driven primarily by ideology rather than the law (and whether he'll rewrite his *Constitutional Law* casebook to reflect that viewpoint!).

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Whatever the cause of his loss of faith in the Court, Chemerinsky shows the zeal of a new convert. Through a detailed case-by-case discussion of the many decisions that Chemerinsky believes the Supreme Court has bungled, he carefully builds the case that it has failed the American people more often than not. This book offers a comprehensive review of the Court's uneven record. The depth and breadth of Chemerinsky's knowledge is truly impressive. For many readers, especially those who follow the Court only casually, Chemerinsky's book will offer an eye-opening exposé of the ways in which the Court has too often failed to live up to the ideals of the Constitution.

Disappointingly, however, Chemerinsky does not provide much in the way of an overall theory. He faults the Court for overturning some laws and for failing to overturn others, for being overly aggressive in challenging government power at some times and overly timid at others. Although he disavows that his account is based on personal

ideology, it often seems as if the one unifying thread that runs through his critique of the Court is that it has often failed to reach results that align with Chemerinsky's personal views. This keeps the book from grappling with the important structural question of whether there are inherent problems in having a body like the Supreme Court, made up of nine unelected individuals who have the last word on questions of constitutional law.

The Difference between Failing to Make Things Better and Actively Making Them Worse

Chemerinsky opens his book with a discussion of *Buck v. Bell*, the infamous 1927 case in which the Supreme Court upheld a state statute providing for forced sterilization of persons deemed "unfit" to have children. And there is little doubt that this case, and the statute it considered, is a black mark in American history. But in discussing this case, Chemerinsky fails to appreciate fully that the Court was not alone in its blindness to justice in this instance.

In the first part of the twentieth century, the concept of eugenics enjoyed broad support in both popular and elite opinion. Ultimately, thirty states passed forced-sterilization laws, evidence of the widespread support for these laws at the time. Thus, while the Court's opinion was woefully misguided (to put it lightly), one cannot lay all of the blame for these laws at the Court's feet. The justices who decided *Buck v. Bell* were part of the culture of their time, and it is unfortunate but perhaps not surprising that they failed to correct one of the failings of their society.

In this way, there is a significant difference between *Buck v. Bell* and a contemporaneous decision like *Hammer v. Dagenhart*, the 1918 case in which the Supreme Court struck down a federal statute banning child labor. In *Hammer*, the Court did not merely fail to correct an injustice, but stood as an active obstacle to the government's attempts to address the scourge of child labor.

Chemerinsky criticizes *Hammer*, as well as other cases from the same era in which the Supreme Court obstructed

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federal efforts to confront the social problems of the day. And he acknowledges in passing that the Court's decisions striking down laws are more important than the decisions in which the Court merely upholds laws, because the Court makes the greatest difference when it invalidates a law. But he misses the opportunity to explore that distinction further and to consider the ways in which the Supreme Court as an institution can pose unique threats to individual rights by standing in the way of urgent political reforms.

Although Chemerinsky does not make this point, one theme that does emerge from his critical review of the Court's history is that many of its worst decisions have come when it declared federal statutes to be unconstitutional. The first and foremost example is the *Dred Scott* decision, which struck down federal laws aimed at preventing the spread of slavery. As well, there were the many early-twentieth-century cases that invalidated federal laws aimed at regulating the economy, and the Court's hampering of federal efforts to address the country's economic collapse in the early years of the Great Depression.

Chemerinsky also criticizes more recent examples, such as the 2000 case of *United States v. Morrison*, which held that Congress lacked the power to give rape victims the right to sue their attackers in federal court. That's a decision that looks worse with each passing year. And Chemerinsky does not mention them, but the *Civil Rights Cases* of 1883 is another oft-cited nominee for the ignominious "honor" of being the Court's worst decision. The *Civil Rights Cases* struck down the Civil Rights Act of 1875, a federal law prohibiting racial discrimination in public accommodations, and so helped to pave the way for the rise of Jim Crow-era apartheid throughout the American South. (Not only has the Court never overruled the *Civil Rights Cases*, but it actually relied on the *Civil Rights Cases* decision in *Morrison*.) Chemerinsky does discuss and criticize two other recent decisions that invalidate federal laws, *Citizens United v. Federal Election Commission* (striking down limitations on political spending by corporations) and *Shelby County v. Holder* (striking down a central enforcement provision of the Voting Rights Act). Although history has not yet rendered its ultimate judg-

ment on these decisions, there is a good chance that in time they will be viewed as significant missteps, on par with some of the worst decisions in the Court's history.

This string of failings—each a case in which the political system was addressing a real problem and the Court stood in the way—raises serious questions about the value of the Court's judicial review of federal statutes. Chemerinsky devotes a chapter to considering whether the Court should have the power of judicial review and concludes that it should. But the only examples he provides in that chapter are cases in which the Court struck down state and local laws, and he draws no distinction between that power and the ability to overrule federal laws. His failure to do so is unfortunate, as the Court's judicial review of state statutes is arguably necessary to the preservation of the union under a common set of laws, and is thus quite different than judicial review of federal statutes. As Justice Oliver Wendell Holmes, Jr., observed, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States." Chemerinsky misses the chance to wrestle with the fundamental question whether the benefits of the Court's judicial review of federal statutes have outweighed the harms.

The Court in Political Context

Chemerinsky's book also devotes insufficient attention to the broader political context within which the Court operates. While we are trained to think of the Supreme Court as an independent actor, separate from the so-called political branches, the reality is that the political branches ultimately determine the Court's makeup. That means that it is hard for the Court to stay too far out of step with popular opinion for too long.

For example, Chemerinsky bemoans the Supreme Court's retrenchment in the 1970s, when it declined to extend the landmark decisions of the Warren Court in the areas of school desegregation and criminal procedure. Although the Court did not expressly overrule many Warren Court decisions, it carved back sharply on the

scope of those rulings and has generally interpreted them narrowly ever since.

Chemerinsky sees this retrenchment as a failure of the Court, but he largely elides the fact that the change in the Court reflected a rightward shift in the country's politics. Nor does he address an argument that other historians have made—that in some ways, it was the Warren-era Court itself that arguably contributed to the change in American politics by sparking a popular backlash against its more aggressive decisions. The most important difference between the Court in the 1960s and the Court in the 1970s was the presence of four justices appointed by President Richard Nixon. And Nixon became president in

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part by making the Supreme Court a major political issue, spending significant time on the campaign trail blaming the Court for a breakdown of "law and order," and promising to appoint "strict constructionists" to the Court.

If that narrative is historically accurate, then the underlying dynamic it represents is fascinating. The Court's decisions generate political opposition, which creates an opportunity for a presidential candidate to run against the Supreme Court, and then to change the Court's trajectory upon being elected president. Some would argue that this pattern has repeated several times in American history, but Chemerinsky does not discuss the political context in which the Court operates in any detail. Nor does he consider whether that political context provides certain limits on the degree to which the Court can be expected to move the law in any particular direction for a sustained period of time.

Can the Court Be Changed?

At the end of his book, Chemerinsky offers a few ideas for reforming the Court, but they are mostly small bore. He argues, for instance, that the Court should allow television cameras to cover oral argument, announce in advance which decisions will be released on which days, and provide clearer summaries of its rulings to avoid confusion. These are sensible proposals to increase the public's ability to understand the Court, but it's hard to see how they would have done anything to correct the Court's significant historical failures.

Chemerinsky also endorses a proposal to give the justices eighteen-year term limits, with a new justice appointed every two years. There is something to that idea, which would probably require a constitutional amendment. It would likely make the Court more responsive to changes in American politics and society, and less likely to be so far out of step with the political branches as to spark a crisis, as happened in the 1920s and 1930s, arguably the Court's nadir.

Ultimately, however, none of the reforms that Chemerinsky proposes would change the fact that the Court is composed of nine people who have the final say about the meaning of federal law, including the Constitution. Notwithstanding his book's title, Chemerinsky is not advocating a fundamental change to the role the Court plays in the American political system. He favors limited reform, not a revolution. The Court may have failed at times, but barring a full-scale change to the American political system, it will continue to play a central role in the interpretation of the Constitution for generations to come. Chemerinsky's book provides a welcome opportunity to meditate on the Court's flawed historical legacy and to learn from it as we continue to strive for a more perfect union.

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