


5-2016

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### Recommended Citation

Suzanna Sherry, Introduction: Is the Supreme Court Failing at Its Job, or Are We Failing at Ours?, 69 *Vanderbilt Law Review* 909 (2019)

Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol69/iss4/1>

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# VANDERBILT LAW REVIEW

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VOLUME 69

MAY 2016

NUMBER 4

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## Introduction: Is the Supreme Court Failing at Its Job, or Are We Failing at Ours?

*Suzanna Sherry\**

It is a pleasure and a privilege to write an introduction to this Symposium celebrating Dean Erwin Chemerinsky's important new book, *The Case Against the Supreme Court*.<sup>1</sup> Chemerinsky is one of the leading constitutional scholars of our time and a frequent advocate before the U.S. Supreme Court. If *he* thinks there is a case to be made against the Court, we should all take it very seriously indeed.

Chemerinsky's thesis may be stated in a few sentences. The primary role of the Supreme Court, in his view, is to "protect the rights of minorities who cannot rely on the political process and to uphold the Constitution in the face of any repressive desires of political majorities."<sup>2</sup> Canvassing the Court's performance over two centuries, he concludes, first, that it has failed dismally at those tasks. Nevertheless, he reaches two additional conclusions: he believes that we can and should expect the Court to do better, and he outlines reforms that might help it do so.

Chemerinsky makes a strong case that the Court has historically failed to live up to its role. His primary historical examples—from *Dred Scott v. Sanford* and *Plessy v. Ferguson* to *Buck v. Bell* and *Korematsu v. U.S.*—are widely thought of as reprehensible.

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1. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

2. *Id.* at 10.

(His contemporary examples are more controversial, as Professor Brian Fitzpatrick's contribution to the Symposium illustrates,<sup>3</sup> but Chemerinsky really doesn't need those examples to support his conclusions.) Where there is room for argument is on his second and third conclusions: Is it reasonable to expect the Court to live up to Chemerinsky's expectations, and how can we help ensure that it does so?

In the pages that follow, constitutional scholars address these questions. Professors Gerald Rosenberg and Corinna Lain argue that it is unrealistic to expect the Court to escape political, cultural, and structural constraints to rein in repressive popular majorities. "[T]he Supreme Court is structurally and inherently conservative,"<sup>4</sup> writes Rosenberg, and "the practice of judicial review has done more harm than good to those lacking power and privilege."<sup>5</sup> Lain argues, similarly, that the Court is ill-equipped to play the "heroic, countermajoritarian role" that Chemerinsky expects of it.<sup>6</sup> This is especially true in the cases that make up Chemerinsky's evidence of failure. As Lain puts it, "history shows that when minorities are most vulnerable—when society is itself repressive—the Justices are least likely to see the need to protect."<sup>7</sup> Or as Rosenberg says, "what [the Court] cannot do is to protect the vulnerable when the broader society is unwilling to do so."<sup>8</sup>

Professors Ed Rubin and Barry Friedman take the opposite position. Agreeing with Chemerinsky, they believe that the Court can and should fulfill its rights-protecting role even in repressive times. Rubin contends that even in 1927, when *Buck v. Bell* was decided, the Justices should have been aware that sterilization was morally reprehensible, politically controversial, and scientifically questionable.<sup>9</sup> The same Court that was vigorously protecting property rights in cases like *Lochner v. New York*, he argues, should have been more sensitive to rights of bodily integrity. Friedman has less to say about the historical examples, but agrees with Chemerinsky's condemnation of the Court for modern immunity doctrines that allow government

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3. Brian Fitzpatrick, *A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology*, 69 VAND. L. REV. 991 (2016).

4. Gerald N. Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075, 1078 (2016).

5. *Id.* at 1111.

6. Corinna Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1022–23 (2016).

7. *Id.*

8. Rosenberg, *supra* note 4, at 1111.

9. Edward L. Rubin, *The Supreme Court in Context: Conceptual, Pragmatic, and Institutional*, 69 VAND. L. REV. 1115 (2016).

officials to violate constitutional rights with impunity.<sup>10</sup> As Friedman tells the Court: “You had one job.”<sup>11</sup> Remedying violations of rights was that one job, but immunity doctrines mean that instead of actually deciding whether rights were violated—instead of “actually call[ing] . . . balls and strikes”—the Court “defer[s] to the players themselves every time something really troubling crosses [its] plate.”<sup>12</sup>

Chemerinsky responds to Lain and Rosenberg with two points. The first is to suggest that the question of whether the Court should have been expected to do better is “far less important to [his] project”<sup>13</sup> than is persuading his readers that the Court has failed, because he is not interested in “moral blameworthiness.”<sup>14</sup> The second—somewhat in tension with the first—is to label the socio-political context of lamentable decisions “an explanation, not an excuse” and to conclude that in these decisions “the Court abandoned the underlying values of the Constitution.”<sup>15</sup>

But persuading his readers that the Court *has* failed—that it *has* abandoned constitutional values—is the easy part. The hard part is whether (and how) we can fix the problem. And here the battle lines are drawn differently: It is Rosenberg against all the others. Even Lain, who finds the historical mistakes all but inevitable given their context, sees a silver lining.

Rosenberg, true nonbeliever that he is, holds out no hope for the Court. The subtitle of his essay says it all: Chemerinsky’s suggestions for reform are nothing but “romantic longings for a mythical Court.” The core of the problem, according to Rosenberg, is judicial review itself, which will always have the effect of “protect[ing] property and privilege against attempts to regulate them.”<sup>16</sup> And the solution is to reduce the role of the Court: Keep judicial review but “vest[ ] appellate power over decisions invalidating state and federal laws in Congress.”<sup>17</sup> Readers will draw their own conclusions, but for me, Rosenberg’s proposal is terrifying. What on earth does he think the current Republican-

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10. CHEMERINSKY, *supra* note 1, at 197–225.

11. Barry Friedman, *Letter to Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care.)*, 69 VAND. L. REV. 995, 1015 (2016).

12. *Id.* at 1017. As Chemerinsky points out in his response, Friedman has previously taken a somewhat different view, suggesting that public opinion exerts a powerful influence on the Court. Erwin Chemerinsky, *Thinking About the Supreme Court’s Successes and Failures*, 69 VAND. L. REV. 919, 927 (2016).

13. Chemerinsky, *supra* note 12, at 928.

14. *Id.* at 929.

15. *Id.* at 928. The tension lies in the fact that it is hard to characterize the abandonment of constitutional values as not morally blameworthy.

16. Rosenberg, *supra* note 4, at 1079.

17. *Id.* at 1112.

controlled, Tea-Party-dominated Congress would do with—or to—*Roe v. Wade*, *Obergefell v. Hodges*, *Boumediene v. Bush*, and dozens of other cases protecting individual rights from repressive majorities? As Chemerinsky puts it, “Congress operates in [the] same political context [as the Court] and is even more likely to be responsive to it because its members have to seek reelection.”<sup>18</sup>

So we come to the most difficult and important question: How can we reduce the probability of the Court creating today’s versions of *Korematsu* and its ilk? *The Case Against the Supreme Court* offers numerous suggestions, the most prominent of which is to limit Supreme Court Justices to non-renewable 18-year terms.<sup>19</sup> Chemerinsky is not the only proponent of term limits. Rosenberg says imposing term limits is “supported by data, experience, and the findings of the branch relations literature” and “makes sense.”<sup>20</sup> Similar proposals have been endorsed by others on both the left and the right.<sup>21</sup>

Whether or not term limits are a good idea in the abstract, however, they are unlikely to solve the particular problem that troubles Chemerinsky: judicial abdication of the Court’s role in protecting individual rights. To the extent that the Court’s failure lies in its refusal to correct majority tyranny, term-limited Justices are *less* likely to override majority preferences. First, a Court made up of Justices all chosen within the past eighteen years (and half chosen within the decade) is more rather than less likely to agree with contemporary popular sentiments. Repressive times will breed repressive Justices, without the potential tempering effect of colleagues from an earlier generation. Second, a term-limited Justice will have to do *something* after her term expires, and affiliating herself with unpopular views by protecting individual rights will limit her options.

Chemerinsky’s obvious response is that part of the problem is the Justices’ enforcement of property rights and states’ rights—in other words, that the Court not only refuses to invalidate trespasses on individual rights, it also harms the politically vulnerable by striking legislation meant to help them.<sup>22</sup> On this account, the longevity of the Justices can produce what Rosenberg calls “judicial obstinance in the

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18. Chemerinsky, *supra* note 12, at 931.

19. As Rosenberg points out, none of Chemerinsky’s other proposals are likely to do much good. Rosenberg, *supra* note 4, at 1104–12.

20. *Id.* at 1109.

21. See, e.g., SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 123–39 (2006); REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2005).

22. CHEMERINSKY, *supra* note 1, at 90–110.

face of political change.”<sup>23</sup> That’s a fine argument for liberals, but not as persuasive to those who believe that property rights or states’ rights are important constitutional values. As Chemerinsky himself says, there was always a danger that *The Case Against the Supreme Court* might be perceived as liberal whining, and he therefore set out “to make a case against the Supreme Court that those all across the political spectrum can accept.”<sup>24</sup> To do so, however, he has to abandon his claim that cases like *Lochner* or *Hammer v. Dagenhart*—to say nothing of *Citizens United* or *Shelby County*—are evidence of the Court’s failure. He has to rest, in other words, on universally condemned cases like *Plessy*, *Buck*, and *Korematsu*.<sup>25</sup> And those cases all involved judicial failures to act,<sup>26</sup> more likely to be exacerbated than alleviated by term limits.

The other participants in the Symposium offer some intriguing approaches to the problem of the Court’s failures. Lain turns failure into success by suggesting that although we cannot expect the Court to be heroic, it can—and does—still do a lot of good. First, as she argues elsewhere, to the extent that *legislative* outcomes are not necessarily reflective of *majoritarian* views, the same impediments that prevent the Court from fulfilling its role as countermajoritarian savior may render it a more promising channel of progressive majoritarian change.<sup>27</sup> Second, she argues that the Court created its own image as guarantor of individual rights and protector of vulnerable minorities—and that expectation can in turn create “a cadre of believers” who will keep pushing boundaries until the cultural constraints ease and the expectation becomes a reality.<sup>28</sup>

A more indirect suggestion comes from Professor Neal Devins. He analyzes the abortion cases to illustrate the effect of political context on the success of minimalist (non-heroic) or maximalist (heroic)

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23. Rosenberg, *supra* note 4, at 1110.

24. CHEMERINSKY, *supra* note 1, at 333–34.

25. Or even on modern cases like *Hui v. Castaneda*, 559 U.S. 799 (2010), and *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), for which Friedman takes the Court to task by suggesting that everyone can agree that they are wrong. Friedman, *supra* note 11, at 1015–17.

26. *Dred Scott* is the lone exception. See generally, Suzanna Sherry, *Why We Need More Judicial Activism*, in CONSTITUTIONALISM, EXECUTIVE POWER, AND THE SPIRIT OF MODERATION (Giorgi Areshidze, Paul Carrese, & Suzanna Sherry eds., forthcoming 2016), <http://ssrn.com/abstract=2213372> [<https://perma.cc/3DJF-NEDS>] (listing universally condemned decisions and suggesting that the vast majority involve judicial failures to act).

27. Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113 (2012).

28. Lain, *supra* note 6, at 1072-73.

Supreme Court decisions.<sup>29</sup> His analysis is independently interesting and also shows us how the Court can take political context into account in a positive and productive way. Minimalist decisions work best, he argues, when there is a possibility of political dialogue and compromise. When dialogue and compromise are impossible because of political conditions, however, the Court should issue maximalist decisions that settle the issue. Thus, Devins suggests, *Roe v. Wade* was wrong for its time: There was no hard-and-fast partisan divide on abortion, and compromise was possible—and indeed occurred despite *Roe*—and so the Court should have issued a minimalist decision incorporating an indeterminate standard. *Casey*, on the other hand, was right for its time: Compromise and political discourse were still alive and well in 1992, and *Casey*'s minimalism allowed both to flourish. Devins shows that beginning in 2010, however, political polarization has made both dialogue and compromise impossible, and thus he urges the Court to issue another maximalist decision, in other words, to “assume the heroic role” that Chemerinsky embraces.<sup>30</sup>

Devins's suggestion won't always solve the problem: A Court so enmeshed in contemporary mores that it cannot see its way out of them, as *Lain* and *Rosenberg* suggest happened in cases like *Buck* and *Korematsu*, will not issue maximalist rights-protective decisions. Nevertheless, it is a thoughtful approach to the problem that Chemerinsky identifies.

Friedman offers a different sort of solution to what he calls the “loss of faith” on both the right and the left.<sup>31</sup> He urges the Court to be more institutionally transparent: cameras in the courtroom, more information available online, shorter and clearer opinions, no more issuing all the controversial opinions at the very end of the Term. Unfortunately, none of these things are likely to satisfy critics—like Chemerinsky—who think that the true problem is that the Court is failing at its job of protecting rights.

Indeed, Friedman's suggestions are actually addressed to a different problem, which he identifies: The public has lost faith that the Court is “up to anything other than simple . . . politics.”<sup>32</sup> Chemerinsky's book is merely Exhibit 1 in establishing the case against the Supreme Court. According to Friedman (and I agree), Chemerinsky is just one of

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29. Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935 (2016).

30. *Id.* at 936.

31. Friedman, *supra* note 11, at 1005.

32. *Id.*

many, on the left and the right, who are frustrated because they see the Justices as “ideological and result-oriented rather than reasoned lawgivers.”<sup>33</sup> Pundits, politicians, and scholars have now become convinced that any decision with which they disagree must be based on ideology. As Friedman puts it, “all of a sudden everyone seemed to think the umpire was playing for some team—even if they could not say exactly which one.”<sup>34</sup>

While Chemerinsky faults the Court for not protecting individual rights, then, Friedman cuts through that lament to what he sees as the underlying issue. Chemerinsky (and others on the left) believe that the Justices wrongly turn their conservative political preferences into constitutional law. As Friedman notes, of course, there are many on the right who think the current Court is doing just the opposite, constitutionalizing liberal political views. Hence the “loss of faith” on both sides of the aisle.

And therein lies the *real* failure, and it is not primarily the Court’s. It is ours. Academics, especially legal academics, are in the best position to educate the public—both directly and, through the media, indirectly—about the Court and its role. If we describe the Court as politically motivated, that view is bound to seep into public consciousness sooner or later. Unfortunately, that is exactly how two quite different groups of influential legal academics have characterized the Court (and judicial decision-making generally) for the last several decades.

As early as the 1960s, prominent attitudinalist political scientists argued that judicial decisions are determined primarily by the judge’s politics, and very little by legal principles.<sup>35</sup> Legal academics used to take issue with that claim, but lately many have been implicitly or explicitly accepting it. From popular constitutionalism<sup>36</sup> to Friedman’s magnum opus on how the Court follows public opinion<sup>37</sup> and Rosenberg’s insistence that expecting it to do otherwise is a hollow

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33. *Id.* at 997.

34. *Id.* at 1006.

35. *See, e.g.*, DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* (1976); GLENDON SCHUBERT, *THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963* (1965); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002).

36. *See, e.g.*, LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994); JAMIN B. RASKIN, *OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE* (2003); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

37. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND THE MEANING OF THE CONSTITUTION* (2009).



hope,<sup>38</sup> too many legal academics have bought the attitudinalist party line. It doesn't help that many liberal friends of the Warren Court—like Chemerinsky himself—have lately turned against the Court, and some conservative critics of the Warren Court have developed a previously undiscovered fondness for judicial activism. Such blatantly political reversals lend support to the conclusion that the Court itself must be political.

Beginning in the 1980s, another group of legal academics adopted a post-modern approach, arguing that knowledge and reality are social constructs made by those in power.<sup>39</sup> Judicial decision-making, on this theory, is simply an exercise of political power. Although the strongest form of social constructionism has largely faded from legal scholarship, the mistrust of those in positions of power—including the Supreme Court—took its toll.

Now these dangerous misconceptions about what it is that judges do in constitutional cases have reached the general public. No wonder there is a crisis of faith. Attitudinalism and post-modernism, watered down into a democracy-based critique of judicial decision-making as ideologically motivated, must take much of the blame. (To be fair, one can also blame the late Justice Scalia, whose intemperate attacks on his colleagues, such as the characterization of a recent decision as “a naked judicial claim to legislative—indeed, *super-legislative*—power”<sup>40</sup> and a “judicial Putsch,”<sup>41</sup> reinforced the notion that the Court is a purely political body.)

Make no mistake, however, these *are* misconceptions. The Court was never an umpire, calling balls and strikes, but neither are the Justices members of political “teams” or legislators in robes who do their best to enshrine their policy preferences into law. Judging necessarily involves discretion but it is neither unconstrained nor primarily political. A diverse array of internal and external safeguards—from professional norms to the demands of collaboration and opinion-writing—serves to cabin judicial discretion and channel personal preferences into principled decision-making.<sup>42</sup>

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38. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

39. For a description and critique of this approach, see DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

40. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

41. *Id.*

42. For elaborations of this argument, see DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* (2009); Suzanna Sherry, *Politics and Judgment*, 70 *MO. L. REV.* 973 (2005).

What Justices do in constitutional cases, in other words, is not far removed from what they do in non-constitutional cases: they look to text (if there is one), precedent, history, institutional considerations, consequences, policy concerns, and common sense to reach the best answer they can. Sometimes they get it wrong. When they do, the job of academics is to explain why the Court's answer is wrong and encourage it to do better. Instead, we have been attributing the Court's mistakes to ideological differences. We should stop.

Chemerinsky has it half right, then. The Supreme Court can do better, and we should urge it to do so. But the institutional changes he suggests are unlikely to succeed. Moreover, his use of controversial conservative decisions as contemporary examples of the Court's broader failures exacerbates the problem by politicizing judicial decision-making.

In short, if we want the Court to live up to its role as a protector of rights, we have to revive an older view of judging as reasoned decision-making based on legal principles rather than as mere political fiat.

That revival may, in the end, be impossible. As I write this, Republican senators are adamantly refusing to vote on (or, in some cases, even to meet with) President Obama's nominee for the Supreme Court—a political moderate whom some of them have previously urged as a potential nominee. A public official was willing to go to jail rather than obey a Supreme Court decision. Political polarization among both politicians and the general public is at an all-time high, and one scholar has suggested that continued polarization is inevitable in a mature democracy.<sup>43</sup>

In such an atmosphere, it is probably foolish to expect anyone to believe that Supreme Court Justices are capable of putting their politics aside. Certainly none of the participants in this Symposium are naive enough to believe it. So although it is indeed a pleasure and a privilege to write this introduction, one part of me mourns Chemerinsky's book and the responses to it as further evidence that we have irretrievably lost our innocence.

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43. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

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