


5-2016

## Thinking About the Supreme Court's Successes and Failures

Erwin Chemerinsky

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vlr>

 Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

---

### Recommended Citation

Erwin Chemerinsky, Thinking About the Supreme Court's Successes and Failures, 69 *Vanderbilt Law Review* 919 (2019)  
Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol69/iss4/2>

This Article is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Thinking About the Supreme Court's Successes and Failures

*Erwin Chemerinsky\**

INTRODUCTION .....	919
I. HOW CAN WE KNOW WHETHER DECISIONS ARE GOOD OR BAD, AND RELATEDLY, IS THIS JUST ALL REALLY A LIBERAL'S CRITIQUE OF THE SUPREME COURT? .....	922
II. IS IT REALISTIC TO EXPECT THE COURT TO HAVE DONE ANY BETTER?.....	926
III. IN LIGHT OF MY CRITIQUE, WOULD THE BETTER SOLUTION BE THE ELIMINATION, OR SUBSTANTIAL RESTRICTION OF JUDICIAL REVIEW? .....	929
IV. WHAT ARE THE IMPLICATIONS OF THE COURT'S SHORTCOMINGS, ESPECIALLY WITH REGARD TO THE ISSUE OF ABORTION RIGHTS?.....	932
CONCLUSION.....	934

## INTRODUCTION

I am deeply grateful to the editors of the *Vanderbilt Law Review* for putting together this symposium on my book, *The Case Against the Supreme Court*, and to the authors who have written such terrific articles about it. It is incredibly flattering, and humbling, to have Professors Neal Devins, Brian Fitzpatrick, Barry Friedman, Corinna Lain, Gerald Rosenberg, and Ed Rubin take my book seriously and write such thoughtful papers in response. I cannot possibly thank them enough. The hope of any author is to be read and taken seriously, and hopefully to be part of a conversation on important issues. These authors have fulfilled my greatest hope in writing the book.

---

\* Dean and Distinguished Professor of Law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.

As I read their papers, I found myself nodding in agreement at their points. Not once did I feel that any of the authors made an unfair criticism. But there, of course, are areas of disagreement among us. In this short essay, I want to identify these areas of contention. For some of the points, I have thoughts to offer that continue the dialogue.

The central question of my book is how should we assess the Supreme Court's performance over the course of American history? My conclusion is that the Supreme Court often has failed at its most important tasks and at the most important times. I set out this thesis at the beginning of the book:

To be clear, I am not saying that the Supreme Court has failed at these crucial tasks every time. Making a case against the Supreme Court does not require taking such an extreme position. I also will talk about areas where the Court has succeeded in protecting minorities and in enforcing the limits of the Constitution. My claim is that the Court has often failed where and when it has been most needed. That is the case against the Supreme Court that this book presents.<sup>1</sup>

I believe that recognizing this is important in order to focus on how to improve the institution and make it much more likely to succeed in the future. In Chapter 9 of the book, I offer a number of proposals for changing the Court and how it operates.<sup>2</sup>

Most of all, I wrote the book to be part of a conversation of how our society thinks and talks about the Supreme Court. I intentionally chose to write it for a trade press—VIKING—and hopefully in a way that is accessible to a large audience. There remains a stunning formalism in how people discuss the Supreme Court. In this presidential election year, every Republican candidate has embraced originalism and a view of judicial review that seemingly allows the justices to decide constitutional cases without regard to their own values and ideology. It is reflected in John Roberts's statement to the Senate Judiciary Committee at his hearing that justices are just "umpires."<sup>3</sup>

This notion of value free judging, essentially of formalism, is understandably appealing, but impossible. Unlike umpires, Supreme Court justices make the rules. Unlike umpires, Supreme Court justices constantly must make value choices. Some of it is because the Constitution is written in broad, open-ended language. What is "cruel and unusual punishment" or what does "equal protection" require?

---

1. ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 11 (2014).

2. *Id.* at 293–330.

3. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts).

What is an “unreasonable” search or arrest within the meaning of the Fourth Amendment?

Moreover, balancing is inherently a part of constitutional law. For example, all equal protection and substantive due process claims require a balancing of the government’s interests and the right to be free from discrimination (when it is an equal protection claim) and the claimed liberty or property interest (when it is a substantive due process claim). The levels of scrutiny are simply rules for how the weights are placed on the scales for balancing. If it is strict scrutiny, then the weights are very much on the side of the challenger and against the government. If it is rational basis review, it is the reverse with the weights very much on the side of the government and against the challenger. With intermediate scrutiny, the weights on the scale are more evenly arranged, but generally more on the side of the challenger and against the government; for example, it is the government that has the burden of proof under intermediate scrutiny.<sup>4</sup>

There is no way to balance apart from the values and ideology of the justices. For instance, in the context of affirmative action, the crucial question is whether diversity in colleges and universities is a compelling government interest.<sup>5</sup> No method of interpretation—originalism or any other—can avoid the need for justices to make a value choice.

Thus, the underlying point of my book, made explicit in the concluding chapter, is that we need to hold the justices accountable for their choices, because they are exactly that: value choices about who and what to favor and disfavor. In my conclusion, I write:

Let’s admit that this emperor has no clothes. The justices made a value choice to favor the corrections officials over Francisco Castaneda just as they made a value choice to favor slave owners or the government when it interned the Japanese-Americans or businesses when it has struck down so much regulatory legislation. If we see the Court in this way, then we can begin to hold it accountable for its decisions. Then we can fully appreciate the powerful case against the Supreme Court for the choices that it has made throughout history. And then, and only then, can we think about how to reform the Court and make tragic mistakes less likely.<sup>6</sup>

None of the authors question this. Nor do the authors challenge that the Supreme Court often unquestionably has failed. Rather, as I read the articles, I see four basic questions arising: First, how can we

---

4. See, e.g., *United States v. Virginia*, 518 U.S. 515, 529 (1996).

5. See *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003) (holding that colleges and universities have a compelling interest in having a diverse student body and that they may use race as one factor among many in admissions decisions).

6. CHEMERINSKY, *supra* note 1, at 342.

know whether decisions are good or bad, and relatedly, is this just all really a liberal's critique of the Supreme Court? Second, is it realistic to expect the Court to have done any better? Third, in light of my critique, would the better solution be the elimination or substantial curtailment of judicial review? Fourth, what are the implications of my analysis, especially with regard to the issue of abortion rights?

I acknowledge that in identifying these four questions, and responding to them, I am not accounting for the nuance and much of the complexity of the arguments presented in the papers by Professors Devins, Fitzpatrick, Friedman, Lain, Rosenberg, and Rubin. But I think these are all basic and fair questions to ask about my book and I will address each in turn.

#### I. HOW CAN WE KNOW WHETHER DECISIONS ARE GOOD OR BAD, AND RELATEDLY, IS THIS JUST ALL REALLY A LIBERAL'S CRITIQUE OF THE SUPREME COURT?

At the outset of my book, I posit that the Supreme Court exists preeminently to enforce the Constitution, especially in times of crisis and particularly to benefit minorities.<sup>7</sup> None of the authors disagrees that doing so is an important role of the judiciary. But Professor Lain questions the basis for my premise and writes: "Over the past fifty years, the protection of minority rights from majoritarian overreaching has emerged as a primary—perhaps *the* primary—justification for judicial review. But where does one get this view of the Supreme Court's role? What is the basis for that claim?"<sup>8</sup> I could try and answer this question from an originalist perspective and claim that the framers were concerned with the protection of minority rights, even though their minorities were very different from the ones that I am concerned about today.<sup>9</sup> But I am not an originalist and my answer is a normative one about the desirability of enforcing the Constitution and of protecting minorities and the desirability of a largely non-majoritarian institution—the Supreme Court and the federal judiciary—doing so. I do not suggest that it is the only way to define the Supreme Court's role, but it is one that is widely shared, as Professor Lain notes.<sup>10</sup>

---

7. CHEMERINSKY, *supra* note 1, at 10.

8. Corrina Barrett Lain, *Three Supreme Court "Failures" and a Story of Supreme Court Success*, 69 VAND. L. REV. 1067 (2016).

9. Professor Lain makes this point that the Framers were concerned about minority rights, but different minorities than my focus. *Id.* at 1068.

10. *Id.*

Professor Friedman says that mine is really a critique of the Court for not being sufficiently liberal.<sup>11</sup> He essentially argues that I am pro-*Roe* and anti-*Heller*.<sup>12</sup> This possible criticism of the book troubled me from the very conception of the book. I wrote in the conclusion:

From the outset in writing this book, I have been concerned that it would be criticized as a liberal's whining that the Court's decisions have not been liberal enough. My goal was not to write, 'The Liberal Case Against the Supreme Court,' but to make a case against the Supreme Court that all across the political spectrum can accept.<sup>13</sup>

Indeed, I believe that both liberals and conservatives will agree with the first part of the book where I point to historical failures of the Court. As I wrote:

I do not expect that many today, even among staunch conservatives, would defend the Supreme Court's decisions about slavery in the 19<sup>th</sup> century, its upholding of separate but equal for 58 years, its allowing restrictions on ineffectual speech during World War I, its permitting the evacuation and internment of Japanese-Americans in World War II, or its decisions from the 1890s through 1936 striking down over 200 federal, state, and local economic regulations. These and other historical examples provide a strong case against the Supreme Court, even if conservatives may disagree with some of my more recent examples of what I regard as misguided Supreme Court decisions.<sup>14</sup>

But Professor Friedman's criticism is more subtle and more powerful. He writes that I am trying to have it both ways: I want a Constitution to constrain society, but also want to having a living and evolving Constitution. There is a tension, Professor Friedman contends, between wanting the Constitution to be sufficiently static to constrain, but also to be sufficiently flexible to evolve. He writes that I am on the one hand looking

for 'social change' and (on the other) insisting that constitutionalism is like Ulysses tying himself to the mast. He can't have it both ways, really. . . . Either you are holding fast, fulfilling one of Chemerinsky's assigned purposes for judicial review, or you are modifying the original intent to help Chemerinsky's downtrodden, fulfilling the other.<sup>15</sup>

This is a powerful point in expressing the tension of what society should expect from a Constitution. There is the desire for the constraint that comes from being governed by a document that is intentionally very difficult to change, but there also is the need for it

---

11. Barry Friedman, *Letter to Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care)*, 69 VAND. L. REV. 995, 996–98.

12. *Id.* at 4.

13. CHEMERINSKY, *supra* note 1, at 333.

14. *Id.* at 334.

15. Friedman, *supra* note 11, at 999.

to be able to deal with contemporary issues and needs. Judicial review is my answer to this tension. We expect the Court to simultaneously enforce the limits of the Constitution and to interpret them to deal with current social issues and needs. There is a need to mediate this desire for constraint and flexibility that is inherent to the Constitution. Judicial review is the mechanism for accomplishing this.

*Brown v. Board of Education*<sup>16</sup> and *Obergefell v. Hodges*<sup>17</sup> are the epitome of the Court fulfilling this function. Neither can be justified from an originalist perspective. Both are openly non-originalist. In *Brown*, the Court declared:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>18</sup>

In *Obergefell*, the Court explained:

The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.<sup>19</sup>

In cases like *Brown* and *Obergefell*, the Court is enforcing the limits of the Constitution, but also applying them to situations that could not have been anticipated when the Constitution was written in 1787 or the Fourteenth Amendment was adopted in 1868. Judicial review both enforces the limits of the Constitution and allows for the Constitution to evolve via interpretation.

My book focuses on the many instances in which the Court has failed in this regard. Professor Lain suggests that my examples, and even my criticism, show that the Court actually has succeeded. She writes: "With the Court as creator of the very expectations by which it is judged a failure, the fact of Chemerinsky's disappointment in the Supreme Court is itself a testament to the larger, and largely untold, story of Supreme Court success."<sup>20</sup> She says that it is the Court that

16. 347 U.S. 483 (1954).

17. 135 S. Ct. 2584 (2015).

18. 347 U.S. at 492–93.

19. 135 S. Ct. at 2598.

20. Lain, *supra* note 8, at 1024.

has created the expectation that it can do better in protecting minorities and enforcing the Constitution, and that shows the Court has been successful.

It is an elegant argument to say that the Court succeeds even when it fails, but I disagree with the premise of Professor Lain's claim. I believe that the expectation of the Court enforcing the Constitution and protecting those who are vulnerable comes not from the Court, but from the Constitution. It is the Thirteenth Amendment's prohibition of slavery, the Fourteenth Amendment's assurance of equal protection, and the Fifteenth Amendment's prohibition of race discrimination in voting that create the expectation that the Constitution and the Court will protect racial minorities. It is the First Amendment's protection of freedom of speech that creates the expectation that even in times of crisis there will be freedom of expression. It is the Constitution that assures people that it will be a government under law, even in times of crisis. The expectations are not, as Professor Lain asserts, a result of the Court, but from the Constitution itself.

Professor Fitzpatrick offers a different critique of my book: he says that reasoning from "bad cases" is an undesirable way of assessing the Court.<sup>21</sup> He writes:

The problem with bad-cases reasoning is that it is hopelessly circular. How can we know whether a case was rightly or wrongly decided unless we have a theory of the Constitution against which to judge the case to begin with? In other words, to say that a case was wrongly decided is to assume we already know the right way to interpret the Constitution.<sup>22</sup>

I disagree with Professor Fitzpatrick on many levels. First, I think it is possible to say that cases like *Dred Scott v. Sanford*, *Plessy v. Ferguson*, and *Korematsu v. United States* were wrong without having a theory of the "right" way to interpret the Constitution. There is a widespread consensus that these decisions were wrong in their understanding of equal protection and tragic in terms of their impact on society. I assume that Professor Fitzpatrick agrees that these were terrible decisions. He thus would agree with my central conclusion—which is not circular at all—that the Court often has made crucial errors through American history.

Second, of course, Professor Fitzpatrick is correct that there need to be criteria for evaluating decisions in order to praise or criticize the rulings. I set these out in the initial chapter of the book

---

21. Brian T. Fitzpatrick, *A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology*, 69 VAND. L. REV. 991, 992 (2016).

22. *Id.* at 991–92.



when I argue that the preeminent role of the Court should be to enforce the Constitution, especially to protect minorities and particularly in times of crisis. Ultimately, constitutional law is about value choices and appraising the Court's rulings is about considering whether they made desirable choices. There is nothing circular about that.

Third, ironically, it is Professor Fitzpatrick who is circular in his reasoning: he assumes that there is (or even can be) a meaningful theory of constitutional interpretation and then criticizes those who do not have one. But this is my strongest disagreement with Professor Fitzpatrick: I do not believe a useful theory of constitutional interpretation can exist. It is beyond the scope of this essay to explain why originalism fails as a method for interpreting the Constitution. Suffice it to say that never has the Court adopted such a limited way of interpreting the Constitution and instead always has looked to a myriad of factors: the Constitution's text and structure, Framers' intent, tradition, precedent, current social needs, and others. No theory can prescribe how these are to be considered.

More importantly, ultimately, the question in constitutional cases is whether there is a compelling, important, or a legitimate government interest. No theory has yet been advanced, by Justice Scalia, or anyone else for how to determine this. What is "compelling," "important," or "legitimate" is a value choice, and that choice must be appraised as such. It is fair to criticize my book for not adequately defending the value choices that underlie my belief that decisions are a failure, but I disagree that there is a theory that can be used to make or appraise these value choices.

## II. IS IT REALISTIC TO EXPECT THE COURT TO HAVE DONE ANY BETTER?

A consistent theme in several of the articles is that my critique of the Court is unfair because it is not realistic to expect that the justices could have done any better. They are a product of their culture and times. This, for example, is the focus of Professor Lain's paper. She argues that lamentable cases in lamentable times do not support an indictment against the Supreme Court; if these cases teach us anything, it is not that the Supreme Court has failed us; it is that the Court's capacity to protect is constrained by the cultural constraints in which it operates.<sup>23</sup> Barry Friedman, who also is a part of this symposium, has written powerfully about the influence of public

---

23. Lain, *supra* note 8, at 1023–24.

opinion on the Supreme Court's decisions.<sup>24</sup> Professor Rosenberg says that “[w]e as a society get the kind of Supreme Court we want. The problem is less with the Court and more with the political preferences of our fellow citizens. When those change so will Supreme Court decisions.”<sup>25</sup> Professor Rubin's paper is about understanding the Court's decisions in context.

Of course, it is indisputable that Supreme Court justices live in society and are affected by the events and attitudes around them. Professor Lain does a masterful job of showing that some of the worst Supreme Court decisions—*Plessy v. Ferguson*,<sup>26</sup> *Buck v. Bell*,<sup>27</sup> and *Korematsu v. United States*<sup>28</sup>—must be understood in their sociopolitical context.<sup>29</sup>

Professor Lain, of course, is correct. But I think she conflates two distinct questions: First, should we regard these decisions as undesirable rulings? And if so, second, should we have expected the Court to do better? As to the former question, there is no disagreement between Professor Lain and me, or among any of the authors, that *Plessy v. Ferguson*, *Buck v. Bell*, and *Korematsu v. United States* were tragically bad decisions. Professor Lain says: “In short, the point is not that *Plessy*, *Buck*, and *Korematsu* aren't lamentable—they are. The point is that these lamentable cases were decided in lamentable times.”<sup>30</sup> That is sufficient, to use Professor Lain's term, for an “indictment” against the Supreme Court. It failed terribly and at particularly crucial moments in American history and with great consequences: decades of segregation, 60,000 Americans involuntarily surgically sterilized, and the evacuation and internment of 110,000 Japanese-Americans.

Professor Rubin says that the “anguish and uncertainty that we presently experience when confronting such issues should caution us against quick condemnation of the *Buck v. Bell* Court on the basis of hindsight.”<sup>31</sup> But I believe that is exactly what we should do for *Buck v. Bell* and for all decisions—look back and assess whether we

24. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009).

25. Gerald Rosenberg, *The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court*, 69 VAND. L. REV. 1075, 1077.

26. 163 U.S. 537 (1896).

27. 274 U.S. 200 (1927).

28. 323 U.S. 214 (1944).

29. Lain, *supra* note 8, at 1023 (“[I]t is truly striking how strong the sociopolitical context in all three of these cases was.”).

30. *Id.*

31. Edward L. Rubin, *The Supreme Court in Context: Conceptual, Pragmatic, and Institutional*, 69 VAND. L. REV. 1115, 1126.

believe the Court did what we believe was the right result in interpreting and enforcing the Constitution. We can argue over what would have been the "right result," but I expect little disagreement over this in discussing *Buck v. Bell*.

The second question, whether the Court should have been expected to do better, is far less important to my project. My goal was to show that the Court has failed and my hope is that recognizing these as failures might be beneficial. Perhaps doing so will make such tragic errors less likely to occur in the future. But still Professor Lain's question is fair: are justices so much a product of their time that it is not realistic to expect them to do any better?

Here Professor Lain and I disagree. She says that in *Plessy*, *Buck*, and *Korematsu* the Court's decisions were part of a socio-political context and therefore it was not realistic for the Court to do better. But for me, the "therefore" does not follow. Professor Lain is correct in describing the intense social pressures of the times and in acknowledging how justices are products of their times. But that is an explanation, not an excuse. I think in each of these instances, the Court abandoned the underlying values of the Constitution. To pick an example discussed by Professor Lain, *Korematsu* was a six-to-three decision, including powerful dissents by Justices Robert Jackson and Frank Murphy. They articulated a simple, but *basic* constitutional principle: incarcerating people solely on the basis of race is inherently and inescapably a denial of equal protection. Even amidst the social and political pressures of the time, it is a principle that the majority of the justices should have followed and should have been expected to follow. As I explain in my book, "It is too easy to make excuses for the justices and say that it is unrealistic to have expected them to do better."<sup>32</sup>

Professor Rubin provides a strong basis for responding to Professor Lain, and frankly in ways that I had never considered. Professor Rubin argues that one can

contextualize these decisions in three different ways. The first, which can be described as a conceptual contextualization, is to place the decision in the mental framework that prevailed at the time the decision was made . . . The second form of contextualization is pragmatic . . . The third form of contextualization can be described as institutional.<sup>33</sup>

Professor Rubin's analysis provides a strong response to Professor Lain's explanation of *Buck v. Bell*:

---

32. CHEMERINSKY, *supra* note 1, at 89.

33. Rubin, *supra* note 29, at 1117-18.

Thus, while we cannot charge the *Buck v. Bell* Court with our present view that the sterilization was based on pseudoscience, we can charge it with a failure to be attuned to the controversies that existed at the time. The offhand dismissal of opposing views that is implicit in Justice Holmes's infamous phrase reflects a mental slovenliness that can be condemned without anachronism.<sup>34</sup>

I find Professor Rubin's analysis of how to appraise Supreme Court decisions in their context elegant and persuasive. But I wonder in reading his paper and Professor Lain's, once it is agreed that the Court was wrong, why does it matter whether it is realistic to have expected the Court to have done better? My claim is not one of moral blameworthiness, but rather that the Court failed. The hope is that if it is recognized that the Court made egregious errors and if it is understood as to why (and Professor Lain offers that explanation), it will help to decrease the likelihood of such mistakes in the future.

### III. IN LIGHT OF MY CRITIQUE, WOULD THE BETTER SOLUTION BE THE ELIMINATION, OR SUBSTANTIAL RESTRICTION OF JUDICIAL REVIEW?

Professor Rosenberg emphatically rejects the possibility that the Court can be expected to do better. He writes that "[t]he underlying problem is structural. It will only be solved if the role of the Court is reduced."<sup>35</sup> Professor Rosenberg persuasively identifies the structural constraints that inherently limit what the Court can do, including the selection process,<sup>36</sup> the limits of judicial independence,<sup>37</sup> and the political context of decisions.<sup>38</sup> Professor Rosenberg thus explains the constraints on the Court that explain the decisions I discuss. He rightly questions how much the proposals that I advance will make a difference in the Court's decision-making.<sup>39</sup>

My disagreement with Professor Rosenberg is over his conclusion about the Court and his recommendation about what to do about it. Professor Rosenberg argues that "[h]istorically, the practice of judicial review has done more harm than good to those lacking power and privilege."<sup>40</sup> He says, "what they cannot do is to protect the vulnerable when the broader society is unwilling to do so."<sup>41</sup> Professor

---

34. *Id.* at 1118 (citing *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

35. Rosenberg, *supra* note 23, at 1113.

36. *Id.* at 1083–85.

37. *Id.* at 1085–87.

38. *Id.* at 1087.

39. *Id.* at 1104–11.

40. *Id.* at 1111.

41. *Id.*

Rosenberg argues as an alternative that a solution would be “continuing with the Court’s power of judicial review while vesting appellate power over decisions invalidating state and federal laws in Congress.”<sup>42</sup>

Is Professor Rosenberg right that the Court has done “more harm than good to those lacking power and privilege?” I thought about this question a great deal in writing the book and concluded that there is simply no way to know whether on balance the Court has been beneficial or harmful for society. Assuming that my criteria for evaluating the Court are accepted, how would it be possible to add up all of the positive and all of the negative effects of the decisions that have benefited those lacking power and privilege? How could anyone begin to measure the negative effects of say *Dred Scott v. Sandford*,<sup>43</sup> or the positive ones of say *Brown v. Board of Education*,<sup>44</sup> let alone of all of the other rulings, and then weigh them in a meaningful way? For this reason, I very carefully avoided making an overall judgment about whether the Court has been overall a positive or negative force, limiting myself to the conclusion that the Court often has failed, often at the most important times and at the most important tasks.

Nor do I accept that the Court can’t “protect the vulnerable when the broader society is unwilling to do so.” There are certainly examples to the contrary, such as Supreme Court decisions in favor of criminal defendants and prisoners. To pick a recent example, in *Brown v. Plata*, the Supreme Court upheld a ruling that California had to reduce its prison population to ensure adequate protection of medical and mental health care to its inmates.<sup>45</sup> The Court did this over the vehement objections of the State of California. By any measure, prisoners are among the most vulnerable in society. When is the last time that a legislature on its own provided more rights for prisoners? The courts often have failed prisoners, but the judiciary has a far better record than the legislature when society is unwilling to do so. As I explain in the book:

Admittedly, the Rehnquist and Roberts Courts have an overall less than stellar record of protecting prisoners’ rights, but there is no doubt that judicial review has dramatically improved prison conditions for countless inmates who would be abandoned by the political process. When is the last time that a legislature adopted a law to expand the rights of prisoners or criminal defendants? In competition for scarce dollars, legislatures have every political incentive to spend as little as possible on

---

42. *Id.* at 1112.

43. 60 U.S. (19 How.) 393 (1857) (holding that slaves are property and not citizens and invalidating the Missouri Compromise).

44. 347 U.S. 483 (1954).

45. 131 S. Ct. 1910 (2011).

prisoners. Moreover, how much worse might it be if politicians and prison officials knew that the constitutionality of their actions could not be reviewed by the courts?<sup>46</sup>

More generally, I believe that *Marbury v. Madison* got it right: the Constitution exists to limit the government and those limits are meaningless if not enforced. Professor Rosenberg responds to this by saying that I am “mistaken . . . in apparently believing that vindication can only come from courts. The most important institution for the creation and protection of rights in the United States by far is the Congress.”<sup>47</sup> He then presents examples of positive federal legislation.

We, of course, do not disagree about the desirability of this legislation or about Congress’s role in protecting rights. But we disagree over my view that it is essential that the courts be available to enforce the limits of the Constitution. For those whose rights have been violated, vindication is from the courts or nowhere. Throughout the book, I give examples of many individuals whose rights were violated, but who were turned away by the courts.<sup>48</sup> Court remedies, including damages and injunctions, are necessary to deter and halt constitutional violations, as well as to compensate injured individuals. In fact, legislation to protect individuals from violation of their rights depends on judicial action for enforcement.

Would it be desirable, as Professor Rosenberg argues, to vest “appellate power over decisions invalidating state and federal laws in Congress.”<sup>49</sup> In fairness to Professor Rosenberg, he only briefly makes this suggestion and does not defend it. I am very skeptical. Why does Professor Rosenberg believe that Congress will do a better job than the Court, especially when it comes to protecting the vulnerable? As explained above, Professor Rosenberg says that the Court has failed in large part because of the political context of its decisions. But Congress operates in that same political context and is even more likely to be responsive to it because its members have to seek reelection. Moreover, the judiciary must hear everyone’s complaint; Congress rarely responds to those without the means of influence. The judiciary sees its role as interpreting and enforcing the Constitution; Congress does not.

---

46. CHEMERINSKY, *supra* note 1, at 276–77.

47. Rosenberg, *supra* note 23, at 1102.

48. I develop this further in my forthcoming book, ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW THE SUPREME COURT MADE YOUR RIGHTS UNENFORCEABLE (forthcoming 2016).

49. Rosenberg, *supra* note 23, at 1112.

My book criticizes the Court's performance through American history, but I don't see any reason for believing that Congress would be better at enforcing the Constitution or protecting minorities. It is for this reason that I oppose elimination of judicial review or its substantial curtailment as Professor Rosenberg advocates. Allowing Congress to overturn Supreme Court decisions seems worse in terms of protecting the vulnerable. Over the course of my career, I have represented a homeless man in the Supreme Court,<sup>50</sup> Guantanamo detainees,<sup>51</sup> death penalty defendants,<sup>52</sup> challengers to an Arizona law eliminating Mexican-American studies,<sup>53</sup> victims of police abuse,<sup>54</sup> and many other politically unpopular individuals. I often have lost. But I know for my clients it is the courts or nothing. Ultimately, that is why I prefer to look for ways to improve the Court and make it more likely to succeed, rather than to eliminate or substantially curtail judicial review.

#### IV. WHAT ARE THE IMPLICATIONS OF THE COURT'S SHORTCOMINGS, ESPECIALLY WITH REGARD TO THE ISSUE OF ABORTION RIGHTS?

Professor Devins approaches my book in a very different way. He notes that my book is largely silent on abortion.<sup>55</sup> He is correct and other reviewers criticized the book for this.<sup>56</sup> This was a deliberate choice. In my prior book, *The Conservative Assault on the Constitution*, I explicitly defended the Court's decision in *Roe v. Wade*.<sup>57</sup> I did not think I had anything new to say. Also, believing that *Roe* was rightly decided, it was not a logical focus for a book that was primarily about instances where I think that the Court got it wrong.

The thesis of Professor Devins's article is that "now is the time for the Court to decisively intervene in the abortion controversy by issuing a maximalist *Roe*-like decision; today's politics do not support

---

50. *Van Orden v. Perry*, 545 U.S. 647 (2005) (denying a challenge to a Ten Commandments monument at the Texas state capitol).

51. *Coalition of Clergy v. Bush*, 310 F.3d 1153 (2002) (dismissing suit on behalf of Guantanamo detainees for lack of standing).

52. *Wilkinson v. Polk*, 227 F. App'x. 210 (4th Cir. 2007).

53. *Arce v. Douglas*, 793 F.3d 968 (9th Cir. 2015).

54. *See, e.g., Berry v. Gates*, 956 U.S. 274 (9th Cir. 1992).

55. Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 940–41.

56. *See* Terry Eastland, *Book Review: The Case Against the Supreme Court by Erwin Chemerinsky*, WALL ST. J. (Sept. 24, 2014), <http://www.wsj.com/articles/book-review-the-case-against-the-supreme-court-by-erwin-chemerinsky-1411598692> [<https://perma.cc/57ME-4N5Q>].

57. ERWIN CHERMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 173–74 (2010).

an intermediate standard like *Casey's* undue burden test.”<sup>58</sup> Professor Devins argues that the rise of the Tea Party and party polarization call into question the benefits of an intermediate standard.<sup>59</sup>

I agree with Professor Devins's conclusion, but not his premise. The Court should aggressively protect abortion rights from erosion or elimination via the political process. But unlike Professor Devins, I do not base this conclusion on the current political times. For me, the right to abortion is a fundamental aspect of reproductive autonomy properly found to be protected as an aspect of liberty under the due process clause. From this perspective, *Roe v. Wade* got it exactly right in finding a right to abortion for all women in the country.

The Court in *Roe* faced three questions. First, is there a right to privacy protected by the Constitution even though it is not mentioned in the document's text? Second, if so, is the right infringed by a prohibition of abortion? Third, if so, does the state have a sufficient justification for upholding laws prohibiting abortion?

As for the first question, the Court long had protected unenumerated rights under the Constitution, including reproductive autonomy. In *Eisenstadt v. Baird*, the Court stated: “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>60</sup>

As for the second question, obviously, forbidding abortions interferes with a woman's ability to control her reproductive autonomy and to decide for herself, in the words of *Eisenstadt v. Baird*, whether to “bear or beget a child.” Also, no one can deny that forcing a woman to continue a pregnancy against her will is an enormous intrusion on her control over her body. Justice Blackmun expressed this forcefully in his majority opinion in *Roe*:

The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>61</sup>

---

58. Devins, *supra* note 55, at 936.

59. *Id.* at 937–38.

60. 405 U.S. 438, 453 (1972).

61. 410 U.S. at 153–54.



The third question is whether the state has a compelling interest in protecting fetal life. Here, too, I believe that *Roe v. Wade* got it right. There is no way to resolve the question of whether the fetus is a human person. This is a question that is best left to each woman to decide for herself. Some will believe that human personhood begins at conception and never would have an abortion; millions of other women do not see it that way. In light of the autonomy interest involved, it is a choice for the woman to make and not the legislature.

This brief defense of *Roe* just sketches out my argument. My point is that I believe that *Roe* was correct when decided and is correct today. Fundamental rights should not be left to the political process, whatever its nature. So I agree with Professor Devins's conclusion of the need for "maximalist" protection of abortion rights, but because of the nature of the right and not based on the political process at this point in time.

#### CONCLUSION

No words can express my joy in reading such thoughtful articles about my book. The authors have caused me to think carefully about my arguments and to wish in many instances that I had explained things differently or had taken into account the points they have made.

Several of the authors describe my "heroic" vision of the Supreme Court. Professor Friedman writes that I am an "Acolyte" of the Court. I will agree to these characterizations. I have devoted my professional career to teaching, writing, and litigating constitutional law. It is based on a faith in the Constitution and the institutions that it creates, including the Supreme Court. I believe that the Court can and should be expected to play a heroic role in society in enforcing the Constitution, especially in times of crisis and particularly for minorities.

I continue to have that faith. I wrote *The Case Against the Supreme Court* because the Court has too often failed. My response is not to give up my faith in the Constitution and the Court, but instead to look to make the Court better. The first step in that regard is to recognize where it went wrong and to begin thinking about how to change it. That was my purpose in writing the book.