

5-2016

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The Broken-Hearted Lover: Erwin Chemerinsky's Romantic Longings for a Mythical Court

Gerald N. Rosenberg*

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INTRODUCTION

Erwin Chemerinsky is broken hearted.¹ “Almost forty years ago,” he writes, “I decided to go to law school because I believed that law was the most powerful tool for social change and that the Supreme Court was the primary institution in society that existed to stop discrimination and to protect people’s rights.”² Smitten by the Court, Chemerinsky was blind to its historical role as a protector of privilege, and its structural limitations as an agent of progressive social change. Placing the Court on a pedestal, he abstracted it from the culture and the society in which it operates. For decades political scientists, historians, and other scholars have repeatedly shown that the Court is structurally conservative, institutionally constrained from furthering the causes that Chemerinsky cherishes, but Chemerinsky was too enamored to see. But now, thanks to repeated decisions by the Burger, Rehnquist, and Roberts Courts (prominently including, I suspect, *Bush v. Gore*³), the romance has been shattered, and Chemerinsky can see somewhat more clearly. Now he understands what many have known for at least half a century, if not more: the Court “has rarely lived up to these lofty expectations and far more often has upheld discrimination and even egregious violations of basic liberties.”⁴ And yet he still longs for his love. “No institution in society,” he writes in the last paragraph in his book, “is more important than the Supreme Court in ensuring liberty and justice for all.”⁵ Chemerinsky is wrong. His romantic, ahistorical, and unsupported belief in the triumph of rights over politics leads his focus away from other institutions of government and broader society where progressive change largely occurs. The Supreme Court can only act on the margins. Yet the broken-hearted lover still longs for his love.

Chemerinsky’s method is to examine Supreme Court decisions that “both liberals and conservatives today would consider grave mistakes.”⁶ His basic argument is several-fold. First, he repeatedly states that the purpose of the Supreme Court is “to enforce the Constitution against the will of the majority.”⁷ More specifically, he

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1. See generally ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2015).
 2. *Id.* at 5.
 3. 531 U.S. 98 (2000).
 4. CHEMERINSKY, *supra* note 1, at 6.
 5. *Id.* at 342.
 6. *Id.* at 12. In his view, and mine too, they are legion!
 7. *Id.* at 9.

writes that the “two preeminent purposes of the Court are to protect the rights of minorities who cannot rely on the political process and to uphold the Constitution in the face of repressive desires of political majorities.”⁸ Chemerinsky’s second argument, his “thesis . . . is that the Court has largely failed at both of these tasks”:

Throughout American history, the Court usually has been on the side of the powerful—government and business—at the expense of individuals whom the Constitution is designed to protect. In times of crisis, when the passions of the moment have led to laws that compromise basic rights, the Court has failed to enforce the Constitution.⁹

Chemerinsky’s third argument is that all is not lost. The Supreme Court, he believes, can do better. This includes the Warren Court, which “could have and should have done so much more.”¹⁰ The judiciary, Chemerinsky writes, “can be a moral leader and protect our core values from hostile public pressure”¹¹ In the end, Chemerinsky “seek[s] to challenge all of us to think more critically about the Court and to confront the reality that, by any measure, it has too often failed at its most important responsibilities under the Constitution.”¹²

I agree with Chemerinsky’s substantive critiques of the many Supreme Court decisions he discusses and his general understanding of the conservative role the Supreme Court has played historically and continues to play. I, too, yearn for a society that does a much better job protecting individual liberty, the rights of the poor, the relatively disadvantaged, and political dissidents. I, too, want to live in a more equal society without discrimination. But unlike Chemerinsky, I do not look to the Court to produce these results. While Chemerinsky believes the Supreme Court “could and should have done so much better,”¹³ both history and scholarship teach us that the problem is much deeper. We 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. The “*Case Against the Supreme Court*” would be more accurately titled, “*The Case Against American Society*.” Chemerinsky’s book is more the story of the intellectual odyssey of a dedicated liberal than it is a careful, historically-informed analysis of the role of the Court.

8. *Id.* at 298.

9. *Id.* at 10.

10. *Id.* at 156.

11. *Id.* at 284.

12. *Id.* at 15.

13. *Id.* at 334.

In the following pages I will lay out the case that the Supreme Court is structurally and inherently conservative. Building on decades of political science and historical research, I will argue that as a general rule the Court is constitutionally structured so that it cannot and will not go further in protecting rights and “ensuring liberty and justice for all” than the public and political elites are willing to accept. Because the American public holds generally conservative views on the issues Chemerinsky cares deeply about, so will the Court. On those rare instances when its decisions do go further, they are unlikely to be well implemented. The Court is not the mythical institution that Chemerinsky pines for that can rise above the political, social, cultural, and economic understandings of the society in which it is embedded. To treat it as such is the stuff of romance, myth, and legend. I will conclude by suggesting that the United States would be better served by a much reduced role for the Supreme Court.

I. THE ROLE OF THE SUPREME COURT

Chemerinsky’s understanding of the role of the Supreme Court, 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,”¹⁴ is a relatively modern view. It traces its roots not to the founding, nor to the adoption of the Fourteenth Amendment, but rather to the “most famous footnote”¹⁵ in Supreme Court history: footnote four in the 1938 case of *Carolene Products*.¹⁶ In that lengthy footnote, in a case about the power of the federal government to regulate the interstate shipment of filled-milk products, Justice Stone suggested that in the future the Court might apply “more exacting judicial scrutiny” under the Fourteenth Amendment to “legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”¹⁷ In paragraph three of the footnote he went further, raising the possibility of a “more searching judicial inquiry” in the future for “prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes

14. *Id.* at 10.

15. Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 277 (1995).

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

17. *Id.*

ordinarily to be relied upon to protect minorities.”¹⁸ Whatever role the framers intended the Court to play, this was not their clear and well-settled understanding. Even the Court’s powers were undetermined at the founding. As Chemerinsky well knows, it was not clear at the founding that the Supreme Court had the power of judicial review. The power of judicial review is not explicitly granted in the Constitution. Rather, it has been implied. For the first half century of its existence the Court rarely invalidated an Act of Congress on the grounds of unconstitutionality, arguably doing so only twice as of 1857, nearly seventy years after the ratification of the Constitution.¹⁹ It was not until the later part of the nineteenth century that the Court began to regularly invalidate congressional acts on grounds of unconstitutionality, to protect property and privilege against attempts to regulate them.²⁰ Even so, over the entire history of the United States through May 2014, the Court has only invalidated 177 acts of Congress, fewer than one per year.²¹ The historical record is quite clear: the Court has not been an active enforcer of minority rights.²²

Progressive political activists, as well as defenders of the wealthy and privileged, have long understood that the Court’s role is not to help “minorities who cannot rely on the political process” but rather to protect property and privilege against attempts to regulate them. Arguing for that role in 1886, Professor Christopher G. Tiedeman warned against progressive movements that demand that government act to “protect the weak against the shrewdness of the stronger, to determine what wages a workman shall receive for his labor, and how many hours daily he shall labor”²³ Faced with these “extraordinary demands,” Tiedeman wrote, “the conservative classes stand in constant fear of the advent of an absolutism more tyrannical and more unreasoning than any before experienced by

18. *Id.* For a classic study of the theory of Footnote 4, see generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

19. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–79 (1803); see also *Scott v. Sandford*, 60 U.S. (19 How.) 393, 528–29 (1856).

20. See generally ARNOLD M. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960).

21. CONG. RESEARCH SERV., *ANALYSIS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES TO MAY 23, 2014*, S. Doc. No. 112-9, at 2283–2330 (2014), <https://www.gpo.gov/fdsys/pkg/GPO-CONAN-2014/pdf/GPO-CONAN-2014.pdf> [perma.cc/H45U-MGE7].

22. The Court has invalidated more state laws. As of May 23, 2014, the Congressional Research Service reports that throughout its history, the Court has invalidated 953 state laws. S. DOC. NO. 112-9, at 2331–2506 (2014). However, this does not support the claim that the Court has been an active enforcer of minority rights. Rather, it simply reflects the fact that there are a large number of states that enact many laws.

23. CHRISTOPHER G. TIEDEMAN, *A TREATISE ON THE LIMITATIONS OF POLICE POWERS IN THE UNITED STATES* vi (1886).

man, the absolutism of a democratic majority.”²⁴ However, all was not lost, because the wealthy and the privileged had the protection of the Constitution and the Court. “The principal object of the present work,” Tiedeman wrote, is “to awaken the public mind to a full appreciation of the power of constitutional limitations to protect private rights against the radical experimentations of social reformers”²⁵ In 1911, then Senator and later Supreme Court Justice George Sutherland reiterated this view, noting that the “[w]ritten Constitution . . . is the shelter and the bulwark of what might otherwise be a helpless minority.”²⁶ The “helpless minority” to whom he referred was, of course, the wealthy.

In the early twentieth century the Progressives and the labor movement understood the Court as a defender of the privileged. In 1912, in a speech to the American Federation of Labor, Progressive Senator Robert M. La Follette blasted the Court for its conservative decisions, proposing that lower federal court judges be stripped of the power of judicial review and Congress be given the power to override Supreme Court decisions invalidating congressional acts.²⁷ Reflecting on Supreme Court decisions in 1912, newspaper commentator Jesse F. Orton facetiously wrote, “[w]ere the Constitution and its Amendments written this way? Or has some one inserted a ‘joker’ clause which favors privilege?”²⁸ In 1924, the Progressive Party platform called for the election of federal judges for ten-year terms and a congressional override of Court decisions.²⁹ Returning, then, to Chemerinsky, it appears that he has finally come to see what politicians, political activists, and their academic proponents have known for more than a century; that the Court is principally a protector of privilege.

It is not only political activists who have understood the Court’s historic role as a protector of privilege. In an oft-cited article published in 1957, Robert Dahl investigated whether the Court was a protector of minorities against majorities, Chemerinsky’s asserted role of the Court.³⁰ Dahl found this was not the case. “By itself,” Dahl wrote, “the Court is almost powerless to affect the course of national

24. *Id.* at vii.

25. *Id.* at vii–viii.

26. BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 173 (2009).

27. WALTER F. MURPHY, *CONGRESS AND THE COURT* 50–51 (1962).

28. FRIEDMAN, *supra* note 26, at 189.

29. MURPHY, *supra* note 27, at 51.

30. See generally Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

policy.”³¹ This is largely for two reasons, explored in the following sections. First, Dahl argued that due to the appointment process “the Supreme Court is inevitably part of the dominant national alliance.”³² Second, he discovered that when Congress responded negatively to Court decisions it did not like, the Court backed down.³³ In addition, writing nearly sixty years before Chemerinsky, Dahl catalogued the conservative nature of the Supreme Court. He noted that historically, rather than protecting minorities against majorities:

[T]he Court used the protections of the Fifth, Thirteenth, Fourteenth, and Fifteen Amendments to preserve the rights and liberties of a relatively privileged group at the expense of the rights and liberties of a submerged group: chiefly slaveholders at the expense of slaves, white people at the expense of colored people, and property holders at the expense of wage earners and other groups.³⁴

While Chemerinsky provides an updated list of conservative Supreme Court decisions, his case against the Supreme Court has been well known for a very long time.

Robert G. McCloskey, writing a few years after Dahl, also reached similar conclusions. In his book-length study of the history of the Supreme Court, first published in 1960 and forthcoming in 2016 in its sixth edition, McCloskey argued that the Court both supported majority preferences and remained on the margins of major issues facing the country.³⁵ When it tried to do more, McCloskey found, it risked its independence and its ability to influence society. In particular, rather than standing up to repressive majorities to protect minorities, McCloskey argued that the Court “seldom strayed very far from the mainstreams of American life.”³⁶ Reviewing the role of the Court over time, McCloskey concluded that it is “hard to find a single historical instance when the Court has stood firm for very long against a really clear wave of public demand.”³⁷ Further, McCloskey found that the Court lacked the power to resolve heated controversies. “The Court’s greatest successes have been achieved,” McCloskey wrote, “when it has operated near the margins rather than in the center of political controversy, when it has nudged and gently tugged the nation, instead of trying to rule it.”³⁸ In the end, McCloskey concluded,

31. *Id.* at 293.

32. *Id.*

33. *Id.* at 288 tbl.5, 290 tbl.6.

34. *Id.* at 292 (citations omitted).

35. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (5th ed. 2010).

36. *Id.* at 261.

37. *Id.* at 260.

38. *Id.* at 264.

the “great fundamental decisions that determine the course of society must ultimately be made by society itself.”³⁹

The arguments of Dahl and McCloskey were elaborated and built upon in 2009 by two distinguished legal academics, Lucas Powe Jr. of the University of Texas and Barry Friedman of New York University.⁴⁰ The central argument of both books is that the U.S. Supreme Court is part of the government and the society in which it operates, reflecting the views of the society at large. Powe examines the interests and demands of political elites and how the Court works with them to further their interests. His “dominant theme is that the Court is a majoritarian institution”⁴¹ reflecting majority interests, not protecting minorities. Friedman focuses on public opinion, providing a “chronicle of the relationship between the popular will and the Supreme Court as it unfolded over two hundred-plus years of American history.”⁴² Like McCloskey, Friedman finds that “history shows” that Supreme Court decisions will inevitably “come into line” with public opinion over time.⁴³ If the Court deviates from majoritarian views, it will be disciplined. For example, writing of the Roberts Court, Friedman states, “[T]he long-run fate of the Roberts Court is not seriously in doubt; its decisions will fall tolerably within the mainstream of public opinion, or the Court will be yanked back into line.”⁴⁴

Taken together, the work of Dahl, McCloskey, Powe, and Friedman challenge Chemerinsky’s claim that the role of the Court is to protect the relatively disadvantaged. All four works find that the Court is not countermajoritarian. That is, because its decisions are in line with the preferences of political elites and majority views, the Court’s decisions reflect widely held societal views rather than constrain or impose on them in defense of the relatively disadvantaged. As long as the political system and broader society are not committed to reducing privilege, furthering equality, and protecting rights, neither will be the Court. Chemerinsky’s understanding of the role of the Supreme Court is historically and institutionally inaccurate.

39. *Id.* at 60.

40. LUCAS A. POWE, JR., *THE SUPREME COURT AND THE AMERICAN ELITE, 1789-2008*, at viii (2009); FRIEDMAN, *supra* note 26. For a review of both books, comparing them to the work of Dahl and McCloskey, see Gerald N. Rosenberg, *The Wonder of It All*, 45 *TULSA L. REV.* 679 (2010).

41. POWE, *supra* note 40, at ix.

42. Friedman, *supra* note 26, at 4.

43. *Id.* at 382.

44. *Id.* at 369.

II. STRUCTURAL LIMITATIONS

The Supreme Court is not an all-powerful institution. It is institutionally structured by the Constitution to both reflect the interests of the public and elected officials, and to be unable to successfully challenge them when they repress minorities. The selection process the Constitution created is explicitly political, giving elected officials the power to select Supreme Court justices. This selection procedure goes a long way towards ensuring that the views of Supreme Court Justices will be well within the political mainstream. In addition, the Constitution does not grant the Court any powers of implementation, making it entirely dependent on the other branches for the implementation of its decisions. Writing in 1788 in *Federalist 78*, Alexander Hamilton famously noted that the Court lacked the power of the “sword or the purse” and was uniquely dependent on the Executive “even for the efficacy of its judgments.”⁴⁵ Looking to the Court to act in countermajoritarian ways in the face of these institutional constraints, as Chemerinsky does, mistakes an institutionally unconstrained, mythical Court for the constitutionally and politically constrained real one.

A. *The Selection Process*

Justices do not spring out of Athena’s—or in the context of this work—Chemerinsky’s head. They are the product of an explicitly political process. The U.S. Constitution specifies that justices of the Supreme Court are appointed by the President with the advice and consent of the Senate.⁴⁶ Presidents are not famous for appointing justices who disagree with them on fundamental issues. Sometimes they get it wrong, perhaps like the first President Bush’s appointment of Justice Souter. Sometimes justices change their views, as arguably Justice Blackmun did. And sometimes presidents appoint justices for non-ideological and political reasons, such as President Eisenhower’s appointments of Chief Justice Earl Warren and Justice William Brennan. Yet much more often than not, presidents chose nominees who, as justices, accurately and consistently reflect the president’s views. Examining the differences between the predicted ideology of nominees and their voting records once confirmed from 1955–2010, Professor Geoffrey Stone found that for 17 of 22 justices “their actual voting records on the Court were reasonably close to their expected

45. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

46. U.S. CONST. art. II, § 2.

ideology at the time of nomination.”⁴⁷ In addition, presidents historically have the opportunity to make multiple Supreme Court appointments. Since the first justices held Court in 1790, 112 people have served on the Supreme Court. That works out to just about one appointment every two years. More recently, the rate of appointment has slowed down. Over the last half century, since President Johnson’s appointment of Abe Fortas in 1965 through the end of 2015, seventeen justices have been appointed, a rate of one new justice roughly every - 2.9 years, or 35 months. This means, that a one-term president is likely to make one appointment and a two-term president two or three appointments.

The result of this appointment process, and the frequency with which appointments occur, means that the views of a majority of Supreme Court justices are likely to accord with the views of current and recent presidents and senators. The Warren Court that Chemerinsky loves was largely made up of appointees of Democratic presidents. Because Democrats held the presidency for all but eight years in the thirty-six year period of 1932–1968, only five of the seventeen justices who served on the Warren Court (including Warren) were appointed by a Republican president. And two of those Republican appointees, William Brennan and Warren himself, were quite liberal. Similarly, because Republicans held the presidency in twenty-eight of the forty years between 1968 and the election of Barack Obama in 2008, of the fourteen justices appointed to the Court, only two were appointed by Democratic presidents. It is no surprise, then, that Supreme Court decisions largely are in line with elite and public preferences.

Over the last several decades the Republican Party has become increasingly conservative. Given this, justices appointed by recent Republican presidents should be quite conservative. This, indeed, is the case. Examining the voting records of all forty-three members of the Supreme Court who served from 1937 to 2008, the five with the most conservative voting records served or are currently serving on the Rehnquist and Roberts Courts!⁴⁸ Even Justice Kennedy, the “moderate swing justice” on the current Roberts Court, is the tenth

47. Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 403–04 n.41.

48. They are, in order of their conservative voting, Thomas, Rehnquist, Scalia, Roberts, and Alito. William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 2 J. LEGAL ANALYSIS 755, 782–83 tbl.3 (2009). For a graphic presentation of the data, see *The Vanishing Liberal Justice*, N.Y. TIMES (Feb. 1, 2009), http://www.nytimes.com/imagepages/2009/02/01/weekinreview/20090201_LIPTAK_GRFK.html [<https://perma.cc/JQ2S-9UVM>] (citing a study conducted by the University of Chicago).

most conservative justice to have served over this period. The point is that the membership of the Court is constitutionally structured to reflect the political preferences of the President and the Senate. When voters prefer one party over an extended period of time, the Court inevitably comes to reflect that party's interests and preferences. Chemerinsky should not blame the Court for decisions he does not like, but rather the electorate or, more broadly, the American people.

B. *The Limits of Judicial Independence*

The preceding discussion showed that the Supreme Court is unlikely to protect minorities or limit repressive majorities in large part because the selection procedure for Supreme Court justices is political, producing justices who reflect majority preferences. But what happens if the Court, for whatever reasons, makes decisions not in line with public or elite preferences? In such circumstances, can it protect minorities against majority prejudice? In Chemerinsky's view, the answer should be yes. After all, justices have life tenure and a constitutional guarantee that their salaries will not be lowered. However, such an idealistic viewpoint overlooks the various tools Congress and the President have to constrain the Court. These include, among others, the ability to alter the Court's jurisdiction, control its budget, overrule its statutory decisions, decline to implement its decisions by refusing to provide funding or enforce its mandate, and decline to raise the justices' salaries.⁴⁹ A well-established body of work finds that when faced with credible threats from Congress or the President to use one or more of these tools, the Court responds by reversing or moderating the line of decisions that were out of line with majority preferences.

In an article published in 1992, I identified nine periods of intense congressional hostility to the Supreme Court and examined how the Court responded.⁵⁰ I found that in six of the nine periods the Court either acquiesced to Congress and reversed its unpopular opinions or backed off. In the three periods where the Court maintained its positions, general elections occurred in which Court

49. See generally Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369 (1992). For a discussion of congressional action to punish the justices for their reapportionment decisions by lowering the amount of a proposed pay raise, see Walter F. Murphy, *Deeds Under a Doctrine: Civil Liberties in the 1963 Term*, 59 AM. POL. SCI. REV. 64, 64 (1965) ("Three thousand dollars a year poorer because of their work in recent terms, the Justices were reminded of one use for congressional control of the purse strings.").

50. Rosenberg, *supra* note 49, at 379 tbl.1.

opponents were soundly defeated, removing the threats to the Court.⁵¹ One of the most interesting periods occurred in the 1950s when southern segregationists teamed up with cold warriors and law-and-order supporters to threaten the Court over its recent decisions on civil rights, subversion, and the rights of criminal defendants.⁵² In response, the Court reversed its subversion decisions and refrained from further development of its decisions on civil rights and the rights of criminal defendants until the political climate changed in the 1960s.⁵³ The clear finding of this and other studies is that the Court is unable to protect minorities from repressive majorities, even if it wishes to do so.⁵⁴

The Court's inability to protect individuals against repressive majorities is clearly seen in times of crisis.⁵⁵ Chemerinsky acknowledges this, writing that "[w]henver there has been a crisis, especially a foreign-based crisis, the response has been repression."⁵⁶ But as the crisis recedes, and the public relaxes, the Court has more leeway to protect rights. This is exactly what happened in the wake of the terrorist attack on New York City on September 11, 2001. In January 2002, just a few months after the attack, forty-seven percent of respondents told Gallup that they would be willing to have their "basic civil liberties" violated if "necessary to prevent additional attacks of terrorism in the U.S." But over time their fear diminished. A year after the attacks that percentage had dropped to thirty-three percent. And two years later, in both August and November, 2003, by better than two-to-one, respondents were unwilling to have their basic liberties violated.⁵⁷ Similarly, starting in 1999 the First Amendment Center read respondents the First Amendment and then asked them if it "goes too far in the rights its guarantees?" In 1999 and 2000, twenty-eight percent and twenty-two percent of respondents respectively said that it did. In the wake of the terrorist attack, in the

51. One example of this occurred in 1924 when the Progressive Party adopted several court-curbing planks in its party platform. However, Robert La Follette, its presidential candidate, received only seventeen percent of the vote, signaling the Court that the threat of congressional action lacked popular support and was not credible. See Murphy, *supra* note 27, at 52.

52. For a fascinating study of this episode, see *id.*

53. Rosenberg, *supra* note 49, at 389–94.

54. See generally TOM S. CLARK, *THE LIMITS OF JUDICIAL INDEPENDENCE* (2011).

55. Lee Epstein et al., *The Supreme Court During Crisis*, 80 N.Y.U. L. REV. 1, 9 (2005) ("The justices are, in fact, significantly more likely to curtail rights and liberties during times of war and other international threats.").

56. CHEMERINSKY, *supra* note 1, at 59.

57. GALLUP HISTORICAL TRENDS: CIVIL LIBERTIES, GALLUP (Mar. 15, 2016) <http://www.gallup.com/poll/5263/Civil-Liberties.aspx> [https://perma.cc/Q4RP-DJZV].

summer of 2002, more respondents thought the First Amendment went too far (forty-nine percent) than thought it did not (forty-seven percent). However, by 2006 and 2007 the responses reverted to roughly their pre-September 11, 2001 levels, eighteen percent and twenty-five percent, respectively.⁵⁸

I present these figures because they help explain a decision of the Court, *Boumediene v. Bush*,⁵⁹ that Chemerinsky writes is “a strong example refuting my thesis that the Court fails to enforce the Constitution in times of crisis.”⁶⁰ When looked at through the lens of public opinion, it is clear that in 2008 the public was much less concerned about terrorism, and more willing to protect rights than it had been earlier. Further, 2008 was an election year and the virtually certain presidential candidates at the time the decision was handed down in June, Senators John McCain and Barack Obama, had both made clear their opposition to the policies of President Bush. The justices were likely aware that they would not be threatened for siding with Lakhdar Boumediene. The decision in *Boumediene* fits nicely into the literature on the relationship between the Court, the other branches, and public opinion.

The sensitivity of the justices to elections was poked fun at over one hundred years ago. In 1901, Finley Peter Dunne’s fictional character, Mr. Dooley, opined that “th’ supreme coort follows th’ iliction returns.”⁶¹ Writing in 1937, in the wake of the Court’s capitulation to President Roosevelt’s court-packing plan, then Professor Felix Frankfurter wrote to Justice Harlan Stone, “I must confess I am not wholly happy in thinking that Mr. Dooley should, in the course of history turn out to have been one of the most distinguished legal philosophers.”⁶² Taken as a whole, Chemerinsky’s longings for a countermajoritarian Court that protects politically unpopular minorities is an admirable fiction, part of a romantic myth that confuses rights with reality.

58. *State of the First Amendment 2007*, FIRST AMENDMENT CENTER, <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/SOFA2007results.pdf> (last visited Mar. 15, 2016) [https://perma.cc/77KV-HFWU].

59. 553 U.S. 723 (2008).

60. CHEMERINSKY, *supra* note 1, at 85.

61. Peter Dunne Finley, *The Supreme Court’s Decisions, in MR. DOOLEY’S OPINIONS* 21, 26 (1901).

62. David M. O’Brien, “*The Imperial Judiciary: of Paper Tigers and Socio-Legal Indicators*,” 2 J.L. & POL. 1, 22 (1985) (quoting Letter from Felix Frankfurter, Professor, Harvard Law Sch., to Justice Harlan Stone (Oct. 15, 1937) (on file in Library of Congress, Manuscript Div., Stone Papers, Frankfurter File)).

III. COURTS AND POLITICAL CONTEXT

The insights of Dahl, McCloskey, Powe, and Friedman, along with understandings derived from the judicial appointment process and the institutional limits on the Court, help explain several important decisions over the last several decades, some of which Chemerinsky discusses. In the following section I briefly discuss, first, the Court's dismal record of protecting political dissent in times of crisis and, second, several of the Court's most famous decisions protecting the rights of disadvantaged minorities. I show that these decisions, although radically different in outcomes, share in common the fact that they reflected public opinion and elite beliefs. The underlying point is that the Court, and the justices who serve on it, are the products of the political system and culture in which they live. To ask them to step out of it, and to berate them when they don't, as Chemerinsky does, is to focus on the symptoms of a conservative political culture, not its cause.

A. Dissident Speech, Racial Minorities, and War

In chapter two, Chemerinsky discusses Court decisions that repressed political speech critical of the United States during World War I and the Cold War. These decisions, although disappointing, are not surprising. It was not until 1965, nearly 175 years after the adoption of the First Amendment, that the Court first invalidated an Act of Congress on free speech grounds.⁶³ Moreover, the decisions reflected elite and majority preferences. In 1917 and 1918 Congress passed the Espionage Act⁶⁴ and the Sedition Act,⁶⁵ in essence making it a crime to criticize the government. In late 1919 and early 1920, the Department of Justice launched the so-called "Palmer Raids," aimed at arresting political dissidents and deporting immigrants who held "radical" political views. It is no surprise, then, that the justices, products of the political system, acted in similar ways. Similarly, in 1951, in *Dennis v. U.S.*,⁶⁶ the Court upheld, by a vote of 7-2, the conviction of the leaders of the American Communist Party for conspiracy to advocate the overthrow of the U.S. government by force. Their "crime" was reading and teaching four Marxist texts.

63. *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965).

64. Espionage Act, Pub. L. No. 65-24, 40 Stat. 217 (1917) (codified in scattered sections of 22 & 50 U.S.C. (2012)).

65. Sedition Act, Pub. L. No. 65-150, 40 Stat. 553 (1918) (repealed 1920).

66. 341 U.S. 494 (1951).

In upholding the convictions in *Dennis*, the Court was following elite and public opinion. Starting in 1947, federal, state, and local governments, as well as some private employers such as universities, began requiring current and potential employees to swear loyalty oaths as a condition of employment. Executive Order 9835 (1947), for example, required an investigation into the loyalty of every person seeking or holding employment with the United States. Section 9(h) of the Taft-Hartley Act of 1947⁶⁷ required every union officer to swear that “he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.” In 1950 Congress enacted the Internal Security Act of 1950, aimed at silencing dissent.⁶⁸ The American Bar Association joined the fight when its House of Delegates voted in 1951 that all state and local bar associations expel from their ranks any member of the Communist Party or anyone who “advocates Marxism-Leninism”⁶⁹ And public opinion overwhelmingly supported these repressive measures. In 1953 and 1954, for example, Gallup and the Michigan Survey Research Center found that only twenty-nine percent and twenty-seven percent of respondents, respectively would allow “a person known to favor Communism” or an “admitted Communist” to make a public speech.⁷⁰ From 1953 to 1964, no more than twenty percent of respondents told the National Opinion Research Center (NORC) that Communists should be allowed to speak on the radio.⁷¹ To wish that the Court would act differently is understandable; to expect it to do so is historically, politically, and institutionally naive.

The Cold War repression to which the Supreme Court lent its support is all the more telling when compared to the treatment political dissidents received in other democratic nations. The United Kingdom, France, and Australia all dealt with issues of domestic subversion and Communism in the Cold War years. In comparison to the United States, none of the three countries had a full-fledged First Amendment, and neither the United Kingdom nor France had a tradition of judicial review whereby courts could invalidate the acts of

67. Pub. L. No. 80-101, 61 Stat. 143 (1947) (codified as amended at 29 U.S.C. § 159 (2012)).

68. Pub. L. No. 81-831, 64 Stat. 987 (1950) (codified at 50 U.S.C. §§ 831, 832, 834, 835 (2012)).

69. *Proceedings of the House of Delegates: February 26-27, Chicago*, 37 A.B.A. J. 309, 312-13 (1951).

70. Hazel Erskine, *The Polls: Freedom of Speech*, 34 PUB. OP. Q. 483, 489 (1970).

71. *Id.* at 488.

the other branches of government. Further, both Britain and France were "weaker militarily and economically" than the United States, and, in terms of "proximity," both were closer to the Soviet Union.⁷² Yet despite these differences, all three countries did a substantially better job in protecting political dissent than did the United States. Indeed, in Australia the voters rejected a referendum outlawing the Communist Party. The United States' treatment of political dissent in the Cold War years stands out among western democratic nations, being characterized by Dahl as a "deviant case"⁷³ and, more bluntly by Shapiro, as "pathological."⁷⁴ A repressive political culture produced justices who shared its views. How could it be otherwise?

Perhaps no case more powerfully and poignantly illustrates the Court's unwillingness to protect even the most fundamental civil liberties and civil rights when popular and elite support are lacking than *Korematsu v. United States* (1944).⁷⁵ In this World War II case the Court upheld the conviction of Fred Korematsu, an American citizen born in the United States, for remaining near his home in California in a military control area in violation of an Executive Order requiring all persons of Japanese ancestry on the West Coast to report to Civilian Control Stations. As commentators have repeatedly pointed out, none of the 112,000 or so people of Japanese ancestry subject to the order, including approximately 70,000 U.S. citizens, was charged with a crime.⁷⁶ No evidence was presented that they had violated any laws and no hearings were held. Yet they were all shipped to what were in essence prisoner-of-war camps where they remained throughout the war.⁷⁷ It is hard to imagine a more blatant violation of civil liberties. Indeed, in 1988 Congress agreed, enacting legislation giving all living survivors of the camps a \$20,000 payment. In addition, Congress offered an apology: "For these fundamental violations of the basic civil liberties and constitutional rights of these

72. Herbert H. Hyman, *England and America: Climates of Tolerance and Intolerance*, in *THE RADICAL RIGHT* 269, 274 (1964). Although Hyman was writing about Britain, his statements apply to France as well.

73. Robert A. Dahl, *Epilogue to POLITICAL OPPOSITIONS IN WESTERN DEMOCRACIES* 391 (Robert A. Dahl, ed. 1966).

74. Martin Shapiro, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 109 (1966).

75. 323 U.S. 214 (1944).

76. See e.g., PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983); U.S. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS* 3 (1983); Eugene Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L. J.* 489, 496-97 (1945).

77. Rostow, *supra* note 76, at 502 (noting the "camps were in fact concentration camps").

individuals of Japanese ancestry, Congress apologizes on behalf of the nation.”⁷⁸

To be clear, like Chemerinsky, I am outraged by these decisions. But unlike Chemerinsky, I do not expect the Court to behave differently. The justices are the product of the political system and generally share its biases and prejudices. Historically, the Court has supported repressive majorities against vulnerable minorities. Civil liberties have only been protected when there has been more than a minimum of elite and popular support for them.⁷⁹ Looking to the Court to protect core freedoms is unlikely to work. Elliott Richardson put the point well, writing more than half a century ago:

The great battles for free expression will be won, if they are won, not in courts but in committee rooms and protest-meetings, by editorials and letters to Congress, and through the courage of citizens everywhere.⁸⁰

B. Vindicating Rights

The history of the Court’s treatment of people of color, women, and the relatively disadvantaged is not all doom and gloom. There have been some victories. Inevitably, they occur when there is elite and popular support for them. In this section I briefly consider several examples.

In 1954, in *Brown v. Board of Education*,⁸¹ a unanimous Supreme Court invalidated racial segregation in public elementary and secondary schools. At the time, seventeen southern and border states, plus the District of Columbia, either permitted or required such segregation by law. This meant, of course, that school segregation was not legally mandated in the majority of states and was limited to the states of the old Confederacy and border states. The United States repeatedly urged the Court to invalidate laws requiring segregation, appearing as an *amicus* in cases such as *Shelley v. Kraemer*,⁸² *Sweatt v. Painter*,⁸³ *McLaurin v. Oklahoma*,⁸⁴ and on re-

78. Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 904 (1988) (codified at 50 U.S.C. § 4202 (2012)).

79. For a more detailed examination of this argument, see Gerald N. Rosenberg, *The Sorrow and the Pity: Kent State, Political Dissent and the Misguided Worship of the First Amendment*, in THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN A DEMOCRATIC SOCIETY 17–37 (2001).

80. Elliott L. Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV. L. REV. 1, 54 (1951).

81. 347 U.S. 483 (1954).

82. 334 U.S. 1 (1948).

83. 339 U.S. 629 (1950).

84. 339 U.S. 637 (1950).

argument in *Brown* itself. President Truman's Committee on Civil Rights called for an end to segregation in its 1947 report, "To Secure These Rights."⁸⁵ And the little public opinion data that exists on the question of racial segregation in public schools suggests that by 1950, four years before *Brown*, only a minority of Americans supported school segregation. When asked about whether they thought that eventually children of all races would go to school together, including in the south, over half of respondents who had an opinion said yes.⁸⁶ While intense white opposition in the South and lack of presidential support prevented implementation, school desegregation had substantial support.⁸⁷

*Roe v. Wade*⁸⁸ is another example of a Supreme Court decision with substantial elite and popular support at the time it was decided.⁸⁹ In January, 1973, when *Roe* was decided, there was little political opposition to it on the federal level, widespread support among professional elites, successful law reform movements in seventeen states, large and rapidly increasing numbers of legal abortions being performed, and growing public support. Four states, including New York, had repealed their prohibitions on abortions. Seventy-five leading national groups endorsed the repeal of all abortion laws between 1967 and the end of 1972, including twenty-eight religious and twenty-one medical groups. Among the religious groups, support ranged from the American Jewish Congress to the American Baptist Convention. Medical groups included the American Public Health Association, the American Psychiatric Association, the American Medical Association, the National Council of Obstetrics-Gynecology, and the American College of Obstetricians and Gynecologists. Among other groups, support included the American Bar Association and a host of liberal organizations. Even the YWCA supported repeal. And in 1972, the year before *Roe*, there were nearly 600,000 legal abortions performed in the United States.

In his zeal to defend his lost love, Chemerinsky mischaracterizes my work on *Roe*, writing that I argue that it "made

85. PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS (1947).

86. Roper Center for Public Opinion Research, *Roper Commercial Survey*, LIFE MAGAZINE, July 1950, at Q12, Q13A.

87. That support manifested itself with the passage of the 1964 Civil Rights Act and the 1965 Voting Rights Act. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 42-172 (2d ed., 2008).

88. 410 U.S. 113 (1973).

89. For an in-depth study of the support for legal abortion prior to *Roe*, see ROSENBERG, *supra* note 87, at 175-201, 247-68.

little difference.”⁹⁰ That is emphatically not my argument! *Roe* made a difference, but an uneven one. It made a difference for two reasons: the support for legal abortion noted above and the ability of market forces (clinics) to meet that demand, overcoming implementation constraints. To repeat a fundamental point that Chemerinsky, and others, often overlook; in the year before *Roe* there were nearly 600,000 legal abortions performed in the United States, a result of political action and organizing. However, since *Roe*, implementation has been uneven. In states where there is less support for access to abortion, legal abortions are virtually impossible to obtain. In 2011, for example, thirty-eight percent of women lived in counties with no abortion providers.⁹¹ In 2015, there were five states that had only one abortion provider.⁹² As the executive director of a Missoula, Montana abortion clinic destroyed by arson in 1993 put it, “It does no good to have the [abortion] procedure be legal if women can’t get it.”⁹³

A revealing comparison that underscores the point that the Court protects minorities and the relatively disadvantaged when there is elite and popular support to do so can be seen by comparing two cases on gay rights, *Bowers v. Hardwick*⁹⁴ in 1986 and *Lawrence v. Texas*⁹⁵ in 2003. In *Bowers*, the Court upheld a Georgia law that criminalized sodomy defined as oral or anal sex. Justice White, writing for the Court, noted that “today, 24 States and the District of Columbia” criminalize sodomy.⁹⁶ He might also have pointed out that in 1986 only thirty-two percent of respondents to a Gallup Poll said that “homosexual relations between consenting adults should . . . be legal.”⁹⁷ Add to this the full-blown AIDS crisis and the decision is no surprise. Yet seventeen years later, in *Lawrence v. Texas*, the Court reversed itself and struck down a Texas law that specifically targeted sodomy with a same-sex partner. In invalidating the Texas law, Justice Kennedy, writing for the Court, noted the “emerging

90. CHEMERINSKY, *supra* note 1, at 289.

91. Rachel K. Jones & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2011*, 46 PERSP. ON SEXUAL AND REPROD. HEALTH 3 (2014).

92. Esmé E. Deprez, *The Vanishing U.S. Abortion Clinic*, BLOOMBERG QUICKTAKE, (December 8, 2015, 11:48 AM), <http://www.bloombergtake.com/quicktake/abortion-and-the-decline-of-clinics> [https://perma.cc/V4A9-GBLL].

93. Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, in CONTEMPLATING COURTS 417 (Lee Epstein ed., 1995).

94. 478 U.S. 186 (1986).

95. 539 U.S. 558 (2003).

96. *Bowers*, 478 U.S. at 193.

97. *Gay and Lesbian Rights*, GALLUP (1986), <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> [https://perma.cc/7F9L-B9F5].

awareness” of changing views.⁹⁸ He explicitly compared state legislation at the time of *Bowers* to the situation in 2003: “The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct.”⁹⁹ He might have added, too, that in response to the same Gallup Poll question noted above in May, 2003, the month before the *Lawrence* opinion was delivered, sixty percent of respondents thought that homosexual relations between consenting adults should be legal.¹⁰⁰

A final example of the Court protecting minorities when there is elite and public support to do so is marriage equality. In *Obergefell v. Hodges*,¹⁰¹ in 2015, the Court invalidated state prohibitions on issuing marriage licenses to same-sex couples. At the time there was large and growing elite and popular support for marriage equality. In terms of elite support, President Obama announced his support for marriage equality in May 2012, and the Democratic Party endorsed marriage equality in its 2012 party platform. As early as 2013, a majority of U.S. Senators supported it. Major American corporations supported it as did a group of more than three hundred Republican party activists who filed a brief in *Obergefell* in support. Similarly, public opinion polls recorded majority support for marriage equality, with Gallup recording consistent majority support starting in 2012¹⁰² and other polls recording majority support somewhat earlier.¹⁰³ The point is that when the Court issues liberal decisions that Chemerinsky supports, it is likely that there is pre-existing elite and public support for them. The Court, rather than protecting disadvantaged minorities against repressive majorities, is reflecting public opinion and elite support, typically against local outliers.

98. *Lawrence*, 539 U.S. at 572.

99. *Id.* at 573.

100. *Gay and Lesbian Rights*, *supra* note 97; see also Karlyn Bowman, Andrew Rugg & Jennifer Marsico, *Polls on Attitudes on Homosexuality & Gay Marriage*, AMERICAN ENTERPRISE INST. FOR PUB. POL’Y RES. 6 (Mar. 2013) (noting the growing acceptance of homosexuality in the United States).

101. 135 S. Ct. 2584 (2015).

102. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx?utm_source=SAME_SEX_RELATIONS&utm_medium=topic&utm_campaign=tiles [<https://perma.cc/E5ZU-2EUQ>].

103. Nate Silver, *Gay Marriage Opponents Now in Minority*, FIVETHIRTYEIGHT (Apr. 20, 2011), <http://nyti.ms/19JbW0Z> [<https://perma.cc/HN87-J5QR>].

IV. THE INSTITUTIONAL CONSTRAINTS ON JUDICIAL IMPLEMENTATION

It is one thing to win a Supreme Court decision in favor of the rights of minorities. It is quite another for that decision to be implemented, to actually change the lives of the people it purports to help. As I noted earlier in this article, the Court lacks the power of the sword or the purse, the power to compel compliance with its decisions through financial incentives or physical force. However, Chemerinsky overlooks the institutional constraints on courts, uncritically assuming that Supreme Court decisions are implemented easily and un-problematically. No one would make such claims about acts of Congress, the President, or the bureaucracy. Yet Chemerinsky, so enamored of the mythical Court, writes as if the Court is somehow freed of the implementation challenges facing other institutions. Two examples illustrate how Chemerinsky is wrong on this point.

A. Rights of Criminal Defendants

Chemerinsky gushes with his praise of the Warren Court decisions on the rights of criminal defendants. In particular, he points to *Gideon v. Wainwright*,¹⁰⁴ the case that held that indigent criminal defendants facing possible imprisonment were entitled to lawyers at no cost, and *Miranda v. Arizona*,¹⁰⁵ holding that before questioning people held in custody, police must inform them of a prescribed set of rights. Chemerinsky believes that these decisions are “unquestionably successes for the Supreme Court that made American society better.”¹⁰⁶ But how does he know? He does not cite or discuss any literature that has measured the differences these decisions have made in the choices and behavior of criminal defendants, particularly those who are indigent.

There is a well-established and long-standing literature that finds that the Warren Court’s criminal rights revolution did not make very much difference for indigent criminal defendants.¹⁰⁷ This is due to insufficient funding, the enormous power imbalance between the police and the people they hold in custody, and a general lack of a societal commitment to the rights of criminal defendants. Although police resisted the *Miranda* requirements at first, they soon discovered they could turn them to their advantage. Studies have

104. 372 U.S. 335 (1963).

105. 384 U.S. 436 (1966).

106. CHEMERINSKY, *supra* note 1, at 137.

107. For a summary of this literature, see ROSENBERG, *supra* note 87, at 304–38.

repeatedly found that given the enormous power imbalance between the police and those in custody, the police are usually able to persuade those in custody that the rights have little value. Thus, Chemerinsky is correct that “[*Miranda*] has become widely accepted,”¹⁰⁸ but this is not because the Supreme Court has successfully protected the rights of criminal defendants. David Simon, a journalist, spent a year observing Baltimore homicide detectives. He describes a conversation with a detective and a suspect in custody this way:

[H]e [the detective] wants you [the suspect] to know—and he’s been doing this a lot longer than you, so take his word for it—that your rights to remain silent and obtain qualified counsel aren’t all they’re cracked up to be . . . Once you up and call for the lawyer, son, we can’t do a damn thing for you . . . once I walk out of this room any chance you have of telling your side of the story is gone and I gotta write it up the way it looks.¹⁰⁹

Police learned pretty quickly that if those in custody signed forms acknowledging that they had been given their *Miranda* warnings, then any statements and confessions they went on to make were protected from legal challenge. As early as 1970, Leiken, examining police practice in Denver, found that the police had learned that “one of the latent functions of *Miranda* . . . appears to be to aid the police in overcoming their evidentiary burden with respect to proving the suspect’s knowledge and waiver of his constitutional rights.”¹¹⁰ Summing up the impact of *Miranda* in 1987, Schulhofer concluded that it has not delivered “even a fraction of what it seems to promise.”¹¹¹

The provision of counsel to indigent criminal defendants facing possible imprisonment, announced first in *Gideon* and expanded in *Argersinger v. Hamlin*¹¹² in 1972, also has not greatly improved the life of indigent criminal defendants. This is largely the result of insufficient funding and the incentives of the judicial process. Malcolm Feeley spent six months sitting in a criminal court room in New Haven, Connecticut in the late 1970s, observing the proceedings. Cataloging over 1,600 criminal court cases, Feeley discovered that only half of the defendants were represented by counsel and that “[r]oughly 20 percent of those charged with felonies, and one-third of those receiving jail sentences, were not represented by counsel.” In not

108. CHEMERINSKY, *supra* note 1, at 136.

109. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* (1991), *quoted in* LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW 566 (Stewart Macauley et al. eds., 1995).

110. Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 48 (1970).

111. Stephen J. Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865, 892 (1981).

112. 407 U.S. 25 (1972).

one case out of the over 1,600+ that Feeley observed did a defendant request a trial.¹¹³ “In court,” Feeley writes, “the prosecutor’s first question to an unrepresented defendant is: ‘Do you want to get your own attorney, apply for a public defender, or get your case over with today?’”¹¹⁴ For those who could not make bail, the choice was even starker. As Feeley understood the incentive structure presented to criminal defendants, the constitutional rights the Supreme Court required did not help: “When the choice is between freedom for those who plead guilty and jail for those who want to invoke their right to trial, there is really no choice at all.”¹¹⁵

More recent work has corroborated the failure of the criminal justice system to implement the rights the Court has held are constitutionally required. In 1987, in a nearly four-hundred-page study of treatment of the poor in New York City courts, McConville and Mirsky found woefully inadequate representation.¹¹⁶ In 2004, the American Bar Association issued a report. Its title, “*Gideon’s Broken Promise*,” conveys the findings. The “disturbing conclusion[s]” of the report were that

thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring¹¹⁷

Further, in 2009, the National Right to Counsel Committee of the Constitution Project published a major report on the provision of counsel to indigent criminal defendants. The Honorary Co-Chairs of the Committee were Walter F. Mondale, who served as Vice-President of the United States from 1997 to 1981 in the Carter Administration and William S. Sessions, Director of the FBI in the administration of George H. W. Bush. Here, too, its title, “Justice Denied,” neatly summarized its findings. Noting that *Gideon* was decided more than 45 years earlier, the report finds woeful inadequacies in the provision of counsel:

Yet, today, in criminal and juvenile proceedings in state courts, sometimes counsel is not provided at all, and it often is supplied in ways that make a mockery of the great promise of the *Gideon* decision and the Supreme Court’s soaring rhetoric. Throughout

113. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 9, 9–10 (1979).

114. *Id.* at 220.

115. *Id.* at 206.

116. See generally Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1987).

117. AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE: AMERICANS CONTINUING QUEST FOR EQUAL JUSTICE* iv (2004).

the United States, indigent defense systems are struggling. Due to funding shortfalls, excessive caseloads, and a host of other problems, many are truly failing¹¹⁸

To be fair to Chemerinsky, he shows awareness of the dismal treatment of the poor in court. He notes that police have “discovered that *Miranda* did not keep them from gaining confessions”¹¹⁹ and that in practice the “constitutional assurance of the right to counsel is rendered illusory”¹²⁰ He notes, too, that from 2008–2011 forty-two states cut funding to their courts.¹²¹ Yet somehow he thinks this is the fault of the Supreme Court, not the broader society. For Chemerinsky the problem seems to be that “the Supreme Court created a mandate without securing adequate funding”¹²² Even in the face of all this evidence Chemerinsky cannot shake his romantic faith in the Court. We have no reason to believe that a different Court decision would have produced different results. Unless and until the society commits to ensuring adequate resources for the defense of indigent criminal defendants, there is virtually nothing the Court will be able to do.

Despite the consistent findings noted above, Chemerinsky still clings to the importance of the Court, writing that the “importance of *Gideon* as a symbol [] cannot be overstated.”¹²³ In addition to not providing a shred of evidence for this assertion, the facts on the ground show that the symbol is practically meaningless. Writing in the “Foreword” to the *Harvard Law Review* in 1970, Michael Tigar powerfully made the point:

[T]he constitutional revolution in criminal procedure has amounted to little more than an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside.¹²⁴

B. School Desegregation and Civil Rights

School desegregation provides a second example of implementation difficulties for “landmark” Supreme Court decisions. In 1954, a unanimous Supreme Court invalidated laws requiring

118. CONSTITUTION PROJECT, NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED: AMERICAN'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<https://perma.cc/SE8U-T6LQ>].

119. CHEMERINSKY, *supra* note 1, at 137.

120. *Id.* at 150.

121. *Id.*

122. *Id.* at 154.

123. *Id.* at 134.

124. Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 7 (1970).

racial segregation in public elementary and secondary schools in *Brown v. Board of Education*.¹²⁵ The decision was followed by a series of largely *per curiam* decisions invalidating racial segregation in public parks and recreation facilities, in intrastate and interstate commerce, in courtrooms, and in facilities in public buildings. "These cases," Chemerinsky writes, "dramatically changed society and are a powerful example of what the Court exists to accomplish."¹²⁶ Countless legal scholars have praised *Brown*,¹²⁷ including Chemerinsky. "*Brown's* significance," he writes, "cannot be overstated."¹²⁸

Oh yes it can! As a factual matter, it did not lead to either short-term or long-lasting school desegregation. The school desegregation that was achieved was the direct result of congressional action. In particular, it was the result of the passage of Title VI of the 1964 Civil Right Act, which prohibited federal funding of programs that discriminated, and the 1965 Elementary and Secondary Education Act, which provided substantial federal funds to poor school districts.¹²⁹ As I have shown in detail, the passage of these bills was independent of *Brown* and other Court decisions.¹³⁰

Chemerinsky admits that the public schools of the United States are increasingly and highly racially segregated. "Ironically," he writes, "the area of society that remains most segregated, where the Supreme Court has most failed, is the one that was the focus of *Brown*: public school education. American public schools are racially separate, and this segregation is increasing at an accelerating rate."¹³¹ There is nothing ironic about this. It only appears ironic if one has an uncritical belief that Supreme Court opinions are implemented unproblematically. The United States has racially segregated public schools because it has racially segregated housing. The actions of white people show very clearly that they prefer to live in all or mostly white neighborhoods and to send their children to all or mostly white schools. The National Center for Education Statistics's most recent estimates, for the 2015–2016 school year, were that white, non-

125. 347 U.S. 483 (1954).

126. CHEMERINSKY, *supra* note 1, at 127.

127. See ROSENBERG, *supra* note 87, at 39–40 (providing numerous quotations praising the *Brown* decision).

128. CHEMERINSKY, *supra* note 1, at 125.

129. See ROSENBERG, *supra* note 87, at 99 tbl.3.2 (providing sweeping statistical data detailing different states' reception of federal funds and integration of schools throughout the 1960s).

130. See *id.* at 107–56 (providing an examination of the mentioned bills' passages in relation to judicial civil rights decisions).

131. CHEMERINSKY, *supra* note 1, at 138.

Hispanic students would comprise 49.3% of public school students from pre-kindergarten through grade twelve, less than a majority.¹³² Compare this with the finding that in 2009 about seven-in-ten (73%) of the estimated 4.7 million children enrolled in kindergarten through grade twelve in private schools were white.¹³³ In the city of Chicago, with the fourth largest school district in the country, only 9.4% of public school children are white.¹³⁴ While Chicago may have the nation's most racially segregated public school system, other large cities are not far behind.¹³⁵

According to Chemerinsky, the Supreme Court “deserves a good deal of the blame” for the segregated nature public schools in the United States.¹³⁶ He argues: “The Warren Court could have done much more to bring about desegregation. It did not need to wait a decade after *Brown*, in 1954, before declaring that there had been all too much deliberation and not enough speed”¹³⁷ If only it were this easy to bring about change! Chemerinsky overlooks the lack of political and social support for the Court's decision in the states with segregated schools, and the unwillingness of national leaders to compel them to act until Congress acted in 1964. An unidentified Justice, showing more political awareness than Chemerinsky, reportedly explained the Court's refusal to hear an anti-miscegenation

132. See *Fast Facts*, NAT'L CTR. FOR EDUC. STATS., <http://nces.ed.gov/fastfacts/display.asp?id=372> [<https://perma.cc/4WZE-73ZE>] (last visited Mar. 18, 2016) (estimating that 24.7 million of the projected 50.1 million public school students entering prekindergarten through grade twelve in 2015 will be white, non-Hispanic).

133. Jens Manuel Krogstad and Richard Fry, *Dept. of Ed. Projects Public Schools Will Be 'Majority-Minority' this Fall*, PEW RES. CTR.: FACT TANK (Aug. 18, 2014), <http://www.pewresearch.org/fact-tank/2014/08/18/u-s-public-schools-expected-to-be-majority-minority-starting-this-fall/> [<https://perma.cc/J3ZC-HVYZ>].

134. *CPS Stats and Facts*, CHI. PUB. SCH. (Mar. 9, 2016), http://cps.edu/About_CPS/At-a-glance/Pages/Stats_and_facts.aspx [<https://perma.cc/9ZTU-224U>]. But see *2016 Largest School Districts in America*, NICHE.COM, <https://k12.niche.com/rankings/public-school-districts/largest-enrollment/> [<https://perma.cc/WQU9-QNJB>] (last visited Mar. 18, 2016) (reporting Chicago Public Schools as the third largest school district in the United States for 2016 based on student enrollment).

135. See Ford Fessenden, *A Portrait of Segregation in New York City's Schools*, N.Y. TIMES (May 11, 2012), <http://www.nytimes.com/interactive/2012/05/11/nyregion/segregation-in-new-york-city-public-schools.html?ref=education> [<https://perma.cc/R8KJ-MR2N>] (providing infographic detailing the high percentage of segregation in a number of large cities' public school systems, including Chicago, Dallas, and New York).

136. CHEMERINSKY, *supra* note 1, at 138–39.

137. *Id.* at 156.

case (*Naim v. Naim*¹³⁸) in the year following *Brown* with the following statement: “One bombshell at a time is enough.”¹³⁹

Chemerinsky’s critique of the Court’s desegregation decisions is not limited to the Warren Court. He points to two decisions of the Burger Court, *Milliken v. Bradley*¹⁴⁰ and *San Antonio Independent School District v. Rodriguez*¹⁴¹ which, he writes, have had an “enormous” negative effect on desegregation.¹⁴² In the former, the Court overturned an inter-district desegregation plan which included both Detroit and some of its suburbs. In *Rodriguez*, the Court declined to invalidate school funding schemes that resulted in schools in poor locations having fewer resources than those in wealthier ones. In Chemerinsky’s Court-centric view, the “promise in *Brown* of equal educational opportunities has been unfulfilled because of the Supreme Court’s failures.”¹⁴³ The data suggest not. The promise of a racially equal society has not been achieved because white Americans are not sufficiently committed to that promise. The “Black Lives Matter” movement is a chilling reminder that the United States was built on a belief in white racial supremacy that still exerts far too strong a pull on too many white people. There is nothing the Supreme Court can do about that. While I share Chemerinsky’s critique of cases like *Milliken* and *Rodriguez*, the problem lies much deeper than disappointing Supreme Court decisions. In criticizing Chief Justice Taney’s decision in *Dred Scott*, the women’s right leader Susan B. Anthony poignantly made this point: “Judge Taney’s decision, infamous as it is, is but the reflection of the spirit and practice of the American people, North as well as South.”¹⁴⁴

In sum, while it is true that on occasion the Court has acted to protect the rights of the relatively disadvantaged, implementation of these decisions has been at best uneven and at worst, largely lacking. This is because the Court is dependent on public opinion and elite

138. 87 S.E.2d 749 (Va. 1955), *vacated per curiam*, 350 U.S. 891 (1955), *cert. dismissed*, 350 U.S. 985 (1956) (dismissed for lack of a properly presented federal question).

139. STEPHEN L. WASBY, ANTHONY A. D’AMATO & ROSEMARY METRAILER, *DESEGREGATION FROM BROWN TO ALEXANDER* 141 (1977); *see generally* *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955) (providing a guideline for implementing the desegregation of school districts across the United States); Gerald N. Rosenberg, *Tilting at Windmills: Brown II and the Hopeless Quest to Resolve Deep-Seated Social Conflict Through Litigation* 24 L. & INEQ. 31 (2006) (providing a detailed examination of whether a different order in *Brown II* would have made a difference).

140. 418 U.S. 717 (1974).

141. 411 U.S. 1 (1973).

142. CHEMERINSKY, *supra* note 1, at 142–44.

143. *Id.* at 144.

144. Mark A. Graber, *Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory*, 14 CONST. COMMENT. 271, 285 (1997).

support for its decisions to be implemented. When that support is not sufficiently deep and widely spread, the biggest effects of Court decisions may be more on law school casebooks than on peoples' lives.

V. CHERMERINSKY'S COURT-CENTRIC VIEW OF
THE VINDICATION OF RIGHTS

"Our rights are meaningless," Chemerinsky writes, "if they cannot be vindicated."¹⁴⁵ He is absolutely right. He is mistaken, however, 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. From Social Security to wage and hour regulations, from Medicaid and Medicare to Obamacare, from the Clean Air and Clean Water Acts, from the Equal Pay Act, the 1964 Civil Rights Act, the 1965 Voting Rights Act, the Americans with Disabilities Act, and other civil rights acts, it is Congress that provides the most important, most far-reaching, and most lasting protections of rights. And where there is political support, Congress can overturn Court decisions that fail to protect rights. Three examples illustrate the point.

The first example is the Court's decision in *General Electric Co. v. Gilbert*,¹⁴⁶ where the Court held that a workplace disability plan that excluded pregnancy-related disability was not sex discrimination under Title VII of the 1964 Civil Rights Act. Congress disagreed, rewrote the law, and the Court upheld it.¹⁴⁷ Similarly, the Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,¹⁴⁸ as Chemerinsky notes, was overturned by Congress. In this case, the Court held that plaintiffs bringing Title VII discrimination law suits must file an EEOC charge within 180 days after the alleged unlawful employment practices occurred, or lose their claim. The Lilly Ledbetter Fair Pay Act, removing the 180 day limit, was the first piece of legislation signed into law by President Obama. Third, in a series of cases in the late 1980s, the Court narrowed the ability of plaintiffs to bring civil rights discrimination suits under Title VII of the 1964 Civil Rights Act.¹⁴⁹ Congress responded by enacting the 1991 Civil Rights Act, essentially returning the law to the status quo. There was

145. CHERMERINSKY, *supra* note 1, at 228.

146. 429 U.S. 125 (1976).

147. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

148. 550 U.S. 618 (2007).

149. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659–60 (1989) ("The ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff *at all times*.").

sufficient support for the legislation in Congress that Republican President George H. W. Bush signed the bill. These examples show that Congress can and does protect and extend rights much more effectively than the Court.

Unfortunately, there are other cases where Congress has not acted to overturn Supreme Court decisions that weaken democracy or harm consumers and the most vulnerable members of American society. Chemerinsky discusses some of them, including cases shielding makers of generic drugs from liability,¹⁵⁰ arbitration and class action suits,¹⁵¹ campaign finance,¹⁵² and voting rights.¹⁵³ Like Chemerinsky, I find these decisions appalling and destructive. The problem, however, is that the voters have elected a Republican Congress that is beholden to big business and hostile to civil rights. There is little chance that a Congress with Republican majorities will act to overturn these decisions. The Roberts Court, as long as there is a conservative majority in Congress, can act with little fear of repercussions to protect business and gut campaign finance restrictions and voting rights protections. Change will come about only from a change in partisan makeup of Congress or the replacement of one or more of the current conservative, Republican-appointed Supreme Court justices with liberal, Democratic-appointed justices. The point should be clear that the kind of decisions the Court will make, as always, will be largely determined by presidential elections and the justices the president appoints. Change, then, requires political organization and electoral success. It will not come from the Court.

In several other horrific cases that Chemerinsky discusses, some remedy was provided by non-judicial actors. For example, Chemerinsky tells the outrageous story of master sergeant James B. Stanley who, without his knowledge or consent, was secretly given LSD by the Army as part of an experiment. In 1987, the Supreme Court held that the United States had sovereign immunity, precluding Stanley from recovering from his injuries.¹⁵⁴ Chemerinsky summarizes his discussion this way: "James Stanley was left without any remedy for the injuries he suffered."¹⁵⁵ Fortunately for Stanley, this is not correct. Stanley was left without a judicial remedy but that

150. CHEMERINSKY, *supra* note 1, at 164–72.

151. *Id.* at 173–84.

152. *Id.* at 249–60.

153. *Id.* at 260–63.

154. See *United States v. Stanley*, 483 U.S. 669, 683–84 (1987) ("We hold that no . . . remedy is available for injuries that 'arise out of or are in the course of activity incident to service.'").

155. CHEMERINSKY, *supra* note 1, at 219.

is not the equivalent of no remedy. In 1994, Congress passed a private claims bill, and in 1966, an arbitration panel awarded Stanley \$400,477, the maximum amount permitted under the legislation.¹⁵⁶ Similarly, Chemerinsky tells the stories of Tommy Lee Goldstein and John Thompson, wrongfully convicted and imprisoned. Goldstein spent twenty-four years in prison for a crime he did not commit and Thompson spent eighteen years, including fourteen years on death row, for a crime he did not commit.¹⁵⁷ To make matters worse, once exonerated neither man found relief from the Supreme Court.¹⁵⁸ Thus, Chemerinsky concludes, "Tommy Lee Goldstein and John Thompson are without any recourse for all of the years they spent wrongly imprisoned."¹⁵⁹ However, Goldstein reached a settlement with the city of Long Beach, California, for \$7.95 million.¹⁶⁰ And Thompson is apparently statutorily entitled to \$250,000 under a Louisiana statute that awards wrongfully convicted people \$25,000 per year for each year of incarceration with a maximum payment of \$250,000. To be clear, Chemerinsky is absolutely right to criticize the Court for these decisions. And I am pretty confident that no amount of money can make up for the years lost from Goldstein's and Thompson's lives. My point is that to look only the Supreme Court for the vindication of rights is to forget that the Court is only one among many actors.

Overall, in sections II, III, IV and V, I have shown that the actual Supreme Court, as opposed to Chemerinsky's mythical one, is reflective of the society in which it operates. From the selection procedure by which its members are chosen, to its vulnerability to threats from the other branches, to its dependence on their support, the Court will almost always reflect mainstream views. In times of war or crisis, when public and elite opinion favors repression, so will the Court. If and when the Court does issue decisions furthering the rights of the relatively disadvantaged, its lack of power means its decisions can be thwarted unless support for them is widespread and deep. But all is not lost because the Court is neither the most

156. Bob Erlandson, *Ex-Sergeant Compensated for LSD Experiments Tests by Army, CIA Done at Edgewood*, BALT. SUN (Mar. 7, 1996), http://articles.baltimoresun.com/1996-03-07/news/1996067079_1_stanley-bsd-fort-knox [<https://perma.cc/RKV8-QYA6>].

157. CHEMERINSKY, *supra* note 1, at 192–95.

158. *See Connick v. Thompson*, 563 U.S. 51, 71–72 (2011) (reversing lower courts' decisions to hold Connick, as policymaker for the district attorney's office, liable for damages to Thompson); *Van de Kamp v. Goldstein*, 555 U.S. 335, 349 (2009) (*per curiam*) (holding that the prosecutors in Goldstein's trial possessed absolute immunity against the charges).

159. CHEMERINSKY, *supra* note 1, at 225.

160. Rebecca Cathcart, *Wrongly Convicted Man Gets \$7.95 Million Settlement*, N.Y. TIMES (Aug. 12, 2010), <http://www.nytimes.com/2010/08/13/us/13goldstein.html> [<https://perma.cc/9SV5-JUSQ>].

important nor the most efficacious institution for protecting and furthering rights. Chemerinsky's Court-centric focus leads him to overlook the crucial role of the political process in extending rights and, sometimes, in providing remedies even where courts fail to do so. The sobering reality is that in the democratic system of the United States, rights do not trump politics, as much as Chemerinsky wishes they did.

VI. REFORM PROPOSALS: ADDRESSING THE WRONG PROBLEMS

In the penultimate chapter of the book, Chemerinsky makes recommendations that he believes "would change the Court significantly for the better."¹⁶¹ His proposals include merit selection for both the Supreme Court and the lower federal courts,¹⁶² term limits for Supreme Court justices,¹⁶³ changes to the confirmation process,¹⁶⁴ and a host of recommendations to provide the public more information about the Court's actions.¹⁶⁵ Only one of these proposals, term limits, has the potential to make much difference in the decisions of the Court. The others, although sensible, do not speak to the root cause of the problem, structural and institutional constraints that produce a Court that more often than not protects unequal privilege and power.

A. Merit Selection

Merit selection of judges confuses ability with values. In the last several decades the caliber of Supreme Court Justices has been very high. Two political scientists, Jeffrey Segal and Albert Cover, have examined the qualifications of Supreme Court nominees starting in 1937 with Justice Black. They rank justices on a scale of 0 (least qualified) to 1 (most qualified) based on newspaper editorials from two liberal and two conservative newspapers from the time of nomination to the Senate vote. Table 1 presents the rankings of the members of the Roberts Court serving in 2015, before the death of Justice Scalia. As the data show, only one justice, Thomas, was rated below .5.

161. CHEMERINSKY, *supra* note 1, at 297.

162. *Id.* at 301.

163. *Id.* at 310–12.

164. *Id.* at 302–10.

165. *Id.* at 324–25 (explicitly stating suggestions for improving communication by the Supreme Court).

Table 1

Segal-Cover Qualification Scores, Roberts Court, 2016 ¹⁶⁶			
Republican-Appointed Justices		Democratic-Appointed Justices	
Justice	Score	Justice	Score
Scalia	1.000	Ginsburg	1.000
Kennedy	.890	Breyer	.545
Thomas	.415	Sotomayor	.810
Alito	.810	Kagan	.730
Roberts	.970		
Average	.817		.771

The remaining four justices appointed by Republican presidents have qualifications equal to or exceeding three of the Democratic-appointed justices. Indeed, even including Justice Thomas in the calculation, the Republican-appointed justices were perceived as better qualified than the Democratic-appointed justices at the time of their nominations and appointment. What about the Warren Court, the Court that inspired Chemerinsky to become a lawyer? The average qualification score of the sixteen justices who served with Chief Justice Warren (including Warren) is .77, below that of the Republican-appointed members of the Roberts Court. The problem with the Court, then, is not the qualifications of its members.

What about the quality of appointees to the lower federal courts? Chemerinsky praises President Carter for creating the United States Circuit Court Nominating Commission to recommend nominees based on "merit" rather than cronyism.¹⁶⁷ President Carter also urged Senators to establish similar commissions for federal district court nominations.¹⁶⁸ "The results," Chemerinsky writes, "were stunning."¹⁶⁹ He appears to mean by this that "Carter's approach substantially increased the diversity of the federal bench." He also writes that his "sense is that Carter's picks to the federal courts of appeals were the

166. Jeffrey Segal and Albert Cover, *Ideological Values and the Votes of Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989), <http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf> [<https://perma.cc/E7K7-2J8L>].

167. CHEMERINSKY, *supra* note 1, at 300-01.

168. For scholarly studies of the work of the nominating commissions, see generally Larry C. Berkson and Susan B. Carbon, *The United States Circuit Judge Nominating Commission: Its Members, Procedures and Candidates*, AM. JUDICATURE SOC'Y (1980); and Alan Neff, *The United States District Judge Nominating Commissions: Their Members, Procedures and Candidates*, AM. JUDICATURE SOC'Y (1981).

169. CHEMERINSKY, *supra* note 1, at 300.

best in terms of consistent merit of any president" over the past several decades.¹⁷⁰

For many decades, political scientist Sheldon Goldman has been collecting and analyzing a broad array of data on federal judicial court nominations. Examining President Carter's appointments, Goldman found that in terms of gender and race, Carter surpassed past presidents. On the district court level, 14.4% of his appointees were women, many times higher than past presidents. Similarly, 13.9% of his federal district court nominees were black, again many times higher than past presidents.¹⁷¹ Carter's circuit court appointees were historically diverse as well. In terms of gender, 19.6% were women, compared to no female appointees for both Presidents Ford and Nixon, and only 2.5% for President Johnson.¹⁷² As for race, 16.1% of Carter's circuit court appointees were black. Neither Presidents Ford nor Nixon appointed an African-American to the circuit courts and only 5% of President Johnson's circuit court appointees were black.¹⁷³

Presidents who followed Carter continued to appoint female and black judges. In terms of gender, while Reagan appointed a smaller percentage of women to both the federal district and circuit courts than did Carter, subsequent presidents equaled or surpassed Carter. For example, 20.7% of President George W. Bush's district court appointees were female,¹⁷⁴ as were 25.4% of his circuit court appointees.¹⁷⁵ And in his first six years in office, President Obama's district court appointees were 41.2% female and his circuit court appointees were 46.8% female, breaking all previous records.¹⁷⁶ As for race, the record is less good. President Clinton (17.4%) and President Obama in his first six years (18.4%) appointed a higher percentage of African-Americans to the federal district courts than did Carter. Only President Obama exceeded Carter's appointments of African-Americans to the circuit court, with 19.1% of his appointees being African-American in his first six years.¹⁷⁷ Chemerinsky is correct to praise Carter for the diversity of his federal judicial appointments.

170. *Id.* at 301.

171. Sheldon Goldman, *Carter's Judicial Appointments: A Lasting Legacy*, 64 JUDICATURE 344, 348 (1981).

172. *Id.* at 350.

173. *Id.*

174. Elliot Slotnick, Sheldon Goldman & Sara Schiavoni, *Writing the Book of Judges: Part 1 Obama's Judicial Appointments Record after Six Years*, 3 J.L. & CTS. 331, 356 (2015).

175. *Id.* at 364.

176. *Id.* at 356, 364.

177. *Id.*

What about their merit? Were Carter's nominees chosen for their political commitments to the Democratic party or were they chosen on meritocratic grounds without regard to their partisan activities as Chemerinsky suggests? Goldman recorded the party identification and past party activism of each appointee. In terms of party affiliation, a whopping 94.1% of Carter's district court appointees were Democrats, higher than the proportion of President Ford's and Nixon's district court appointees who were Republican.¹⁷⁸ On the federal circuit courts, President Carter's appointees were 89.3% Democrats, a bit lower than but roughly in line with past presidents.¹⁷⁹ As for past party activism, 60.4% of Carter's district court nominees and 73.2% of his circuit court appointees were politically active for the Democrats, surpassing the percentages of the appointees of Presidents Ford, Nixon and Johnson who were politically active.¹⁸⁰ For example, the difference between the past party activism of President Carter's and President Nixon's appointees was 11.8 percentage points for district court appointees and 13.2 percentage points for circuit court appointees.¹⁸¹ So President Carter's federal court appointees, influenced by "merit" selection, were predominately politically active Democrats. No wonder Chemerinsky likes them so much!

The presidents who followed Carter continued to appoint party activists to the federal courts, but at a lower rate than did Carter. With the exception of the first President Bush (64.2%), the district court appointees of the presidents who followed Carter had a lower rate of party activism. For example, 52.5% of President George W. Bush's federal district court nominees were party activists, 7.9 percentage points lower than Carter's rate.¹⁸² With the circuit courts, President Carter appointed party activists at a higher rate than all the presidents who followed him, exceeding the rates of Republican Presidents Reagan (66.7%) by 6.5 percentage points, George H. W. Bush (70.3%) by 2.9 percentage points and George W. Bush (67.8%) by 5.4 percentage points.¹⁸³

The American Bar Association (ABA) assesses the qualifications of federal judicial nominees. President Carter's nominees are not appreciably different than those of past presidents.

178. Goldman, *supra* note 171, at 348.

179. *Id.* at 350.

180. *Id.* at 348, 350.

181. *Id.*

182. Slotnick et al., *supra* note 174, at 357.

183. *Id.* at 364.

If anything, the ABA ranked his appointees slightly lower. On the district court level, 4% of Carter's appointees were ranked "exceptionally well qualified," a bit lower than Nixon's appointees and only slightly more than half (54%) the percentage of Johnson's appointees who were ranked extremely well qualified.¹⁸⁴ A slightly higher percentage were ranked "well qualified" and a slightly lower percentage were ranked "qualified" than the nominees of past recent presidents.¹⁸⁵ For the circuit courts, 16.1% of Carter's appointees were ranked "exceptionally well qualified," a rate slightly lower than Ford's, a bit higher than Nixon's and almost 60% lower than Johnson's appointees.¹⁸⁶

The ABA changed its rating system after Carter left office, making comparisons inexact. Under the revised ratings, the ratings are "well qualified," "qualified," and "not qualified." Adding the Carter ratings of "exceptionally well qualified" and "well qualified" together allows for a rough comparison. On this measure, 51% of Carter's district court appointees were well qualified, a lower rate than the presidents who followed him. Indeed, 70.1% of President George W. Bush's district court appointees received a ranking of well qualified.¹⁸⁷ With the circuit courts, 75% of Carter's appointees were ranked well qualified, a higher rate than the appointees of Presidents Reagan, George H. W. Bush and George W. Bush, but lower than Presidents Clinton and Obama through the latter's first six years in office.¹⁸⁸ Overall, Chemerinsky's claim about the quality of President Carter's "merit" federal court appointees lacks support. They appear to be largely liberal Democrats who share Chemerinsky's values.

B. Term Limits

Chemerinsky recommends that Supreme Court justices be term-limited. He appears to support an eighteen-year term. This recommendation, supported by data, experience, and the findings of the branch relations literature, makes sense. As he notes, the average length of service of justices has increased dramatically over the last several decades. In 2015, for example, a majority of the justices had served for over twenty years. This includes Justices Scalia (30

184. Goldman, *supra* note 171, at 348.

185. *Id.*

186. *Id.* at 350.

187. Slotnick et al., *supra* note 174, at 356.

188. *Id.* at 364.

years),¹⁸⁹ Kennedy (28 years), Thomas (25 years), Ginsburg (23 years), and Breyer (22 years). The challenge judicial longevity presents is that justices may out-serve the political coalition that appointed them. A result may be judicial obstinance in the face of political change. The classic example of this is the New Deal, where the Court was threatened with being packed before it came into line with the new political reality. In 1937, two of the conservative justices, McReynolds and Van Devanter, had served for more than eighteen years. If they had been replaced, the Court-packing scheme may not have been necessary.¹⁹⁰

A related proposal is to adopt a mandatory retirement age. As Chemerinsky notes, none of the fifty states have life tenure, nor do other democracies.¹⁹¹ In 1937 a majority of the justices were seventy-five years old or older. A mandatory retirement age of seventy-five would have avoided the New Deal crisis all together. On the Roberts Court of 2016, after the death of Justice Scalia, a mandatory retirement age would remove three of the four longest serving justices—all except Justice Thomas.

C. *The Confirmation Process and Improved Communication*

Chemerinsky argues for a more openly ideological confirmation process as well as more communication by the Court. Neither will make much difference in the role of the Court. Complaining that the current confirmation process for Supreme Court justices is “an exercise in Kabuki theater,”¹⁹² Chemerinsky urges that it is “time to create a more meaningful confirmation process.”¹⁹³ It is not clear what difference this will make other than to remove the level of hypocrisy that surrounds the process. Chemerinsky admits as much at the conclusion of his section on the confirmation process.¹⁹⁴

Similarly, the host of recommendations Chemerinsky makes for improving communications by the Court will have little effect. Decades-old literature informs us that most Americans aren't

189. Justice Scalia died on February 13, 2016, after thirty years of service. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html> [<https://perma.cc/CX7D-R5L5>].

190. Whether the Court would have accepted the New Deal absent a threat depends on who replaced Justices McReynolds and Van Devanter. McReynolds would have resigned in the Coolidge Administration and Van Devanter in the waning months of the Hoover Administration.

191. CHEMERINSKY, *supra* note 1, at 311.

192. *Id.* at 303 (quoting then-Senator Joseph Biden, chair of the Senate Judiciary Committee).

193. *Id.* at 304.

194. *Id.* at 310.

interested in, and do not follow, what the Supreme Court does. *The Supreme Court Compendium*, presenting thirty-eight tables of public opinion data, notes the “stunning picture of the American public’s general ignorance of the Court and its day-to-day activity.”¹⁹⁵ This is in part because very few decisions are given more than episodic treatment in the media.¹⁹⁶ Since the “vast majority of information Americans learn about Supreme Court decisions comes from the news media,”¹⁹⁷ most Americans will remain blissfully unaware of what the Court does. They become engaged when political elites and interest groups mobilize them.¹⁹⁸ And political elites and interest groups are aware of what the Court does. Providing more information to an uninterested public will not make a difference. Chemerinsky’s recommendations will help lawyers and scholars; they will not make a difference for everyday citizens.

VII. JUDICIAL REVIEW: THE HEART OF THE PROBLEM

“The Court’s performance over the past two decades,”¹⁹⁹ Chemerinsky writes, leads him to question the practice of judicial review. In the end, however, he argues for the maintenance of the status quo because he believes that the Court can do much good, if it only it lives up to its proper role as he understands it. Alas, as I have argued throughout this Essay, the Court will not do so. Historically, the practice of judicial review has done more harm than good to those lacking power and privilege. And in those relatively rare instances when the Court has sided with the relatively disadvantaged, its decisions have only improved their treatment when there was substantial elite and popular support to do so. This is not to argue that Supreme Court decisions do not matter. Of course they do! They can have all sorts of effects, some positive and many profoundly negative.²⁰⁰ But what they cannot do is to protect the vulnerable when the broader society is unwilling to do so.

195. LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH & THOMAS G. WALKER, *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS AND DEVELOPMENTS* 738 (6th ed. 2015).

196. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 *AM. J. POL. SCI.* 66 (2000); Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* 352, 357 (Lee Epstein ed., 1995).

197. MICHAEL A. ZILIS, *THE LIMITS OF LEGITIMACY* 5 (2015).

198. Franklin & Kosaki, *supra* note 196, at 355.

199. CHEMERINSKY, *supra* note 1, at 271.

200. Gerald N. Rosenberg, *The Impact of Courts on American Life*, in *BENCHMARK: JUDGING COURTS IN AMERICAN DEMOCRACY* 280, 281 (Kermit Hall & Kevin McGuire eds., 2005).

For Chemerinsky, the “most powerful” argument for judicial review is “the need to enforce the limits of the Constitution.”²⁰¹ Tellingly, to reach this position Chemerinsky ignores the preceding 275 pages of his book where he argued that the Court has repeatedly failed to do so! He is unwilling to let go, arguing, despite all the evidence that he has presented, that the Court will still protect minorities against prejudiced majorities and uphold constitutional rights against repressive ones. Once again, Chemerinsky’s longing for the triumph of rights over politics, his love for a mythical Court, clouds his vision.²⁰²

The choice Chemerinsky presents, the status quo or the abolition of judicial review, overlooks alternatives. Chief among them is continuing with the Court’s power of judicial review while vesting appellate power over decisions invalidating state and federal laws in Congress. This is neither a new nor radical proposal. The great Chief Justice John Marshall himself suggested giving the Senate appellate power over the Court.²⁰³ Other democracies that do as well as or better than the United States in protecting minority rights either lack full-fledged judicial review (the U.K., New Zealand), lack a constitutional bill of rights (New Zealand, Australia), or allow for legislative override of judicial decisions (Canada). Other scholars, particularly Mark Tushnet, have developed the case for more democratic alternatives than the either/or choice that Chemerinsky presents.²⁰⁴

The reader who has plowed through all I have written may think she has found a contradiction in my argument. Throughout this Essay I have argued that the Court is fundamentally a majoritarian institution, one that is more or less in line with political preferences and public opinion, and only one among several institutions that act to protect and enlarge rights. Why, then, do I care about judicial review? Doesn’t it follow that the Court will only exercise it in support of majority preferences? The logic behind this concern is sound. However, practice teaches us that the relationship between Court action and political preferences is not perfect. Although it may be the case that absent elite and popular support the Court can accomplish

201. CHEMERINSKY, *supra* note 1, at 276.

202. There is both an older and a newer, growing literature in the U.S. that challenges the belief that judicial review is a positive good. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); JAMES BRADLEY THAYER, *LEGAL ESSAYS* 40 (1908); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2006).

203. Letter from John Marshall to Samuel Chase (January 23, 1805), in 6 *THE PAPERS OF JOHN MARSHALL* 347 (Charles F. Hobson & Fredrika J. Trute eds., 1990).

204. See generally MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).

little over the long term, it does not follow that the Court cannot do short-term damage. For example, in two cases in the first few decades of the twentieth century the Court protected child labor from congressional attempts to ban it.²⁰⁵ In the end, of course, the Court lost as public opinion and elections brought it into line during the New Deal. However, for several decades the Court protected child labor, stunting the lives of untold numbers of children. The practice of judicial review can and has done harm to the most vulnerable in the society.

CONCLUSION

Towards the end of the book Chemerinsky writes, "I have spent the past thirty-five years arguing appeals . . . on behalf of those who have been convicted of crimes and those whose civil liberties have been violated."²⁰⁶ I admire his convictions, and his actions, but not his analysis of the role of the Court. The problem of the Supreme Court is not simply that too often justices make decisions that Chemerinsky does not like. If that were the case, then all one would have to do is to appoint "better" justices. The underlying problem is structural. It will only be solved if the role of the Court is reduced. Tinkering around the margins, as Chemerinsky proposes, will do little.

The "Supreme Court," Chemerinsky writes in the beginning of the book, "is not the institution that I once revered."²⁰⁷ Alas for Chemerinsky, as C. Herman Pritchett put it in 1968, the "Supreme Court isn't what it used to be; and what's more, it never was."²⁰⁸

205. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922); *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

206. CHEMERINSKY, *supra* note 1, at 292.

207. *Id.* at 5.

208. WALTER F. MURPHY, JOSEPH TANENHAUS & DANIEL L. KASTNER, PUBLIC EVALUATIONS OF CONSTITUTIONAL COURTS: ALTERNATIVE EXPLANATIONS 29 (1973).
