REFORMING THE SUPREME COURT

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Reviewing Erwin Chemerinsky, *The Case Against the Supreme Court* (New York: Viking Penguin, 2014)

Erwin Chemerinsky does not like the Supreme Court. And not only does he, as a self-avowed liberal, not like the Supreme Court under the relatively recent Chief Justice-ships of John Roberts, William Rehnquist, and Warren Burger, but he is also not thrilled even with the Supreme Court in the Earl Warren era. And the Court before Warren fares as badly or worse in his eyes as does the Court after Warren.

Chemerinsky, who is the dean of the law school at the University of California at Irvine, is a prolific author on various topics within constitutional law, and has also been a frequent advocate before the Supreme Court and other courts. These experiences inform his views, and indeed the book has a flavor that seems partly autobiographical and partly confessional. Although he previously admired the Supreme Court because it often (and certainly more often than the other branches of government) upheld the rights of the disempowered against the forces of government, he has now come to believe that even in its best periods the Supreme Court did far too little to help those who needed it most, and that in its worst periods (one of which is, in his view, more or less now) its efforts have been affirmatively detrimental. But for Chemerinsky the solution to the problem of the Supreme Court is not to give it less power, but rather to reform the way in which the Justices are selected and in which cases are decided. And although his

proposals for reform come after the rather lengthy windup that dominates the early part of the book, it is the proposals for reform that are most interesting, and which will be my focus here.

Before turning to the proposals for reform, however, it is worthwhile spending a bit of time on Chemerinsky's case in chief against the Supreme Court, and thus on his reasons for thinking that reform is in order. These reasons are largely based on outcomes, initially those outcomes over the Supreme Court's history that he (and most others) find simply outrageous: the 1854 conclusion in *Dred Scott v. Sanford* that slaves were property and not people; the 1896 judgment in *Plessy v. Ferguson* upholding "separate but equal" racial segregation; *Buck v. Bell*, the Supreme Court's 1927 approval of forced eugenically-based sterilization, and the case in which Oliver Wendell Holmes notoriously observed that "three generations of imbeciles are enough"; and *Korematsu v. United States*, the 1944 decision upholding the internment camps for even those Japanese-Americans who were American citizens.

Chemerinsky admirably understands that a successful argument against the Supreme Court as an institution should be more than the claim that its outcomes are not those that would please one end of the political spectrum. Rather, he maintains that the case against the Supreme Court is premised largely on those outcomes that would be widely rejected by people of widely varying political persuasions. But although Chemerinsky thus announces that he will focus on cases in which both liberals and conservatives would reject the results (12), he unfortunately fails to deliver on this promise. He does spend some time on the aforesaid *Dred Scott, Plessy, Buck*, and *Korematsu*, but as further evidence in the case against the Supreme Court he also includes extensive criticisms of cases in which the criticism is in reality largely restricted to those who share Chemerinsky's political preferences. There is much that has been said, for example, against the Supreme Court's resolution of the 2000 presidential election in *Bush v. Gore* (234-49), its

protection of corporate campaign advocacy in *Citizens United v. Federal Election Commission* (249-60), its dilution of the Voting Rights Act of 1965 in *Shelby County v. Holder* (260-63), its unwillingness to consider racial discriminatory effect (absent proof of intent) as constitutionally suspect in *Washington v. Davis*, *McCleskey v. Kemp*, and *Mobile v. Bolden (42-44),* its approval in *Rumsfeld v. Padilla* of the detention without trial of even those enemy combatants who are American citizens (74-77), its narrowing of the scope of federal power under the Commerce Clause of the Constitution in *United States v. Lopez*, *United States v. Morrison,* and *National Federation of Independent Business v. Sebelius* (110-19), and its pro-business decisions in a host of cases narrowing the remedies available to consumers and employees (173-91). But these are decisions that are as widely defended from the right side of American politics as they are criticized from the left. Setting aside the question whether these and other similar cases that Chemerinsky criticizes were actually rightly or wrongly decided, it is simply incorrect to claim that these cases, all of which get a considerable amount of attention in this book, are examples of outcomes that both liberals and conservatives would condemn.

The better characterization of Chemerinsky's case, therefore, is not that the Supreme Court has systematically reached outcomes that both liberals and conservatives would reject, but rather that the Court has been more hostile to a liberal conception of what the Court should be doing than, according to Chemerinsky, most liberals believe. And although Chemerinsky's patent anger that the recent Supreme Court has been more pro-business and pro-government (at least as against certain politically powerless individuals and groups) is little more than the conventional liberal wisdom (a conventional wisdom with which, I should note, I am more often in agreement than disagreement, but the fact that Chemerinsky's conclusions are in my view often correct does not entail the further conclusion that the correct conclusion is in any way new or surprising), he purports to depart from the conventional wisdom in finding fault even with the

most famous decisions of the Warren Court. Although he plainly agrees with the Warren Court's decisions in *Brown v. Board of Education* (123-27) and *Miranda v. Arizona* (130-37), for example, he argues that here and elsewhere even the Warren Court could have done much more (138-56), especially by way of implementation and extension of decisions such as these, but, sadly, did not.

In the final analysis, Chemerinsky's conclusions, many of which, to repeat, I find congenial, comprise largely a compendium of moderately standard liberal opinions. The reader will find few surprises here, for even the view that the Warren Court might not have deserved all of the cheering it formerly garnered has been widely discussed and written about in liberal circles for some time. But Chemerinsky departs from a number of modern liberal critics of judicial review in refusing to abandon a faith that the Supreme Court might be a more faithful defender of the disempowered against the powerful, and against the government. He is no advocate for eliminating or even constricting judicial review (267-82, 285-92), or for a popular constitutionalism (282-84) that would leave many determinations of constitutional meaning to the public and to the political process. But he adheres to this faith in the idea of judicial review and an extensive role for the Supreme Court in enforcing the Constitution by his proposals for changing the way in which we select the Justices and even set the conditions for their service. These proposals come towards the end of the book, but they are sufficiently valuable and provocative that they deserve a careful hearing.

First, Chemerinsky proposes the so-called merit selection of Supreme Court justices (298-302), roughly modeled on the way manner in which judges, especially appellate court judges, are selected in some of the states. Indeed, Chemerinsky draws some support from the system in Alaska, where he says that the judges are routinely of high quality and relatively non-

ideological, even when the official appointing officer has strong political leanings, as with Sarah Palin when she was governor. Inspired by such systems, Chemerinsky proposes that the President create by executive order bipartisan and otherwise diverse merit selection panels similar to those created by President Carter for nominations to the federal Courts of Appeals, and that the President, for both the Supreme Court and lower federal courts, publicly commit to nominating one of the individuals chosen by the merit panel.

Although such merit selection panels may well have salutary consequences at the state level, and although there is some evidence that merit selection might for lower court judges produce a judiciary whose politics are closer to those of the median lawyer, and so too for the lower federal courts, it is difficult to see how such an approach would even be relevant to Chemerinsky's self-described case against the Supreme Court. It is true, as he says (302), that justices of lesser qualifications (than Chief Justice Roberts and Justice Ginsburg, whom he mentions by name as being of clear merit) may in the past have been excluded by a merit selection process, but it is hard to know, without any names, who he has in mind when he says that there are "others, throughout history, of lesser qualifications [who] would not have made it through [a merit selection] process" (302). Even among those with whom he disagrees, it is hard to imagine Justices Alito and Scalia being excluded by such a process, and among those with whom he agrees more often, so too for Justices Breyer, Sotomayor, and Kagan. And if he believes that Justices with somewhat less distinguished records on lower appellate courts or in public or private legal practice should have been excluded, or would not have been selected by a well-functioning merit selection process, does he mean Justice Kennedy? Justice Thomas? Justice O'Connor? Chief Justice Rehnquist? Justice Powell? Justice Blackmun? Justice Brennan? Or if he believes that those whose primary experience was in the political world should have been excluded, would he have excluded, again, Justice O'Connor? Justice Brennan?

Justice Black? Chief Justice Warren? One is left with the conclusion that this proposal for reforming the Supreme Court might not only not produce justices with genuinely superior backgrounds than what has generally been produced for at least the past seventy or more years by the existing process, but also, and more clearly, would not address Chemerinsky's case against the Court.

Dean Chemerinsky also proposes that the nomination and confirmation process be more transparent to the politics and ideologies and attitudes of the nominees (302-10). It is by now well-known, even if routinely and disingenuously denied by the nominees themselves, that first order substantive attitudes on high salience and divisive constitutional issues such as abortion, affirmative action, executive war power, sexual orientation, and government and religion, among many others, is the single best (but not exclusive) predictor of the votes of individual justices. Serious political science research has been making this clear for decades, and by now it is taken as so axiomatic that the only seriously debated questions are about the size of other factors such as precedent, text, long-term strategy, and institutional legitimacy. And not only is the role of first-order substantive attitudes now widely accepted in the academic literature, it is equally accepted both by the public and by the members of the Senate in exercising their power of confirmation. Moreover, ever since the hearings on the nomination of Judge Robert Bork in 1987, such first-order substantive considerations have been front and center in the confirmation process itself. Chemerinsky's proposal that these attitudes and their influence by confronted squarely in the confirmation process is a good one, but it seems to have been widely accepted for almost the past three decades, and indeed was almost certainly accepted, for example, by Senator Obama (and forty-one others) in voting against the nomination of Justice Alito, and by President Obama in nominating Justices Sotomayor and Kagan. Yes, it would be a good idea to be frank about the effect of political attitudes on Supreme Court decisions, but Chemerinsky's claim that

"we all share the perception that the Court is 'objective' and decides cases based on the law, separate from the ideologies of the justices" (10), has not been true either in the academic literature or in the minds of those who nominate and confirm for decades or more.

Another of Chemerinsky's proposals, slightly but only slightly reminiscent of Franklin Roosevelt's ill-fated "court-packing" plan, would limit the Justices to eighteen year terms, as opposed to the current and constitutionally guaranteed life tenure. Chemerinsky recognizes that this would most probably require a constitutional amendment, but he argues that the result would be beneficial, not only in ensuring a greater degree of turnover on the Court, not only to make it less likely that Justices will be "out of step with society's needs" (311), and not only to provide at least some degree of "democratic control of the Court" (311), but also to "make Supreme Court appointments much more important in presidential elections" (312).

Term limits for Supreme Court justices would seem to bring some advantages and some disadvantages, but it is again hard to see how term limits would address Chemerinsky's case against the Supreme Court. Even if Supreme Court appointments were a greater topic in presidential elections, it appears unlikely that this would bring anything other than a greater degree of majoritarianism to an institution that Chemerinsky (correctly, in my view) sees as importantly anti-majoritarian (276-84). When George Wallace and Richard Nixon made the Supreme Court an important issue in the 1968 presidential election, the consequence was a focus on criminal procedure and an electoral desire, reflected in part in the outcome, to populate the Supreme Court with a greater number of "law and order" justices. And although it is possible today that having Supreme Court appointments play a central role in presidential elections would produce what is in effect a referendum on abortion (with uncertain outcome), it might also produce referendums on criminal procedure, the role of religion in public life, and the national

security powers of the president, among others, and there is little indication that such referendums would systematically – or even more than rarely – produce the outcomes that Chemerinsky appears to prefer.

Chemerinsky's other proposals for Supreme Court reform, although also worth taking seriously in their own right, are even more disconnected from the substantive basis for the "case against the Supreme Court." As he correctly observes, the Court has multiple audiences, including the parties, the press, and the scholarly community, most obviously, but also lower courts and government officials, most importantly. Especially but not only when making constitutional decisions, the Court is making the law that governs the decisions of numerous state and federal courts, and also, even more pervasively, the daily decisions of legions of police officers, school teachers and principals, city councilors, and the rest of the vast array of officials for whom, most often, the Constitution is, as Chief Justice Charles Evans Hughes said in 1907 (long before he was on the Court), "what the judges say it is." Yet although all of these audiences are present and important, Chemerinsky is right in supposing that the Court is not especially good at communicating its decisions and processes to any of them. Indeed, he is especially right with respect to the front-line officials just noted, who rarely have the time, resources, and training to do careful research about how the Supreme Court has interpreted the Constitution, but who are nevertheless bound by those interpretations. And Chemerinsky is right as well in suggesting that that the overwhelmingly reason-free opaque decisions to refuse to hear cases – denials of certiorari – in 7000 or more cases a year is problematic as well. These refusals to hear do not technically have precedential or other formal effect, but they are part of the fabric of the law that governs our lives, and even a brief statement of reasons could have significantly beneficial consequences.

The Supreme Court's deficiencies as communicator, like Chemerinsky's proposals to allow post-argument briefs on issues that arise in oral argument (326) and to pay closer attention to recusal and related issues of ethics and conflict of interest (326-29), are once again worthy of serious consideration. But they are also, and perhaps even more, disconnected from Chemerinsky's objections to the outcomes of many Supreme Court cases. Indeed, it might be not be amiss to suggest that in some respects the order and concentration of the two main features of this book might better have been reversed. Even those who share Chemrinsky's general political and ideological outlook may well find his case against the Supreme Court too conventional in conclusion, too commonplace in argument, and too self-referential in presentation, but both those who agree with his substantive case against the Supreme Court and those who disagree ought to find his suggestions for reforming the Court's procedures and larger institutional character worthy of very serious consideration. It would have been preferable for Chemerinsky not to have left these issues to the latter and briefer part of the book, and not to have left the further development of (and debate about) these proposals to others. But it would be a mistake for readers and others to ignore the interesting and provocative proposals for reform of the Supreme Court that he has asked the American public and its leaders to consider.

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