

## Reading Erwin Chemerinsky

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In 2014, Erwin Chemerinsky, dean and Jesse H. Choper distinguished professor of law at the University of California, Berkeley School of Law, published *The Case Against the Supreme Court*,<sup>1</sup> a breathtaking evaluation and, some may argue, indictment of the Supreme Court. Throughout the book, Chemerinsky unpacks cases in which he argues that “the Supreme Court sanctioned terrible injustices.”<sup>2</sup> He confesses that for more than thirty years, he taught many of the cases and, even while outraged by them, he “wanted to believe that they are the exceptions to the Supreme Court’s overall successful enforcement of the Constitution.”<sup>3</sup>

The notorious 1927 Supreme Court case *Buck v. Bell*<sup>4</sup> (an 8–1 decision), which legalized and catalyzed the domestic eugenics movement, is a prime example. In that case, the Court upheld Virginia’s eugenics law.<sup>5</sup> Carrie Buck, the subject of the litigation, had been raped by her foster parents’ nephew and later sentenced to the Virginia Colony of Epileptics and Feeble Minded, where even children were surgically sterilized.<sup>6</sup> Carrie was seventeen at the time of the assault.<sup>7</sup> As Chemerinsky underscores, even though Carrie had committed no crime and was of normal intelligence, the Court declared her “a feeble minded white woman . . . the daughter of a feeble minded mother . . . and the mother of an illegitimate feeble minded child.”<sup>8</sup>

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<sup>1</sup> See generally ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.*

<sup>4</sup> 274 U.S. 200 (1927).

<sup>5</sup> *Id.* at 207.

<sup>6</sup> *Id.* at 205–06; CHERMERINSKY, *supra* note 1, at 1.

<sup>7</sup> CHERMERINSKY, *supra* note 1, at 1.

<sup>8</sup> *Buck*, 274 U.S. at 205.

Justice Oliver Wendell Holmes Jr.—one of the most revered justices to serve on the Court—famously declared, “Three generations of imbeciles are enough.”<sup>9</sup> The opinion is punctuated by Justice Holmes’s observation that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”<sup>10</sup>

Chemerinsky acknowledges that tragically misguided, troubling cases fill law school casebooks and syllabi without critical examination. Hence, his important work asks the question: “Has the Supreme Court been a success or a failure?”<sup>11</sup> His daring conclusion—that the Court has frequently failed to vindicate the rights of the most vulnerable—challenges constitutional law scholars and judges to critically examine whether the Court has lost sight of its role. Chemerinsky’s raw honesty—buttressed by compelling stories and chapters examining the Supreme Court’s history, the Roberts Court, and a sophisticated analysis of judicial review and the future of the Court—exemplifies not only the work of a careful and meticulous scholar but also a committed civil rights lawyer and civil libertarian.

This Essay is a tribute to my frequent coauthor, Professor Erwin Chemerinsky, one of the most-cited constitutional scholars in the academy. If law had an EGOT,<sup>12</sup> Chemerinsky would be a recipient. He is a distinguished teacher, prolific scholar, sought-after appellate lawyer, acclaimed administrator and dean, and public intellectual. His constitutional law scholarship spans the First Amendment, LGBTQ equality, race discrimination, sex equality, and more.

He is currently the Dean and Jesse H. Choper Distinguished Professor of Law at the University of California, Berkeley School of Law and was the founding dean of the University of California, Irvine School of Law. His pro bono appellate litigation includes serving as counsel of record and arguing in front of the Supreme Court in *Comcast v. National Ass’n of African-American Owned Media*,<sup>13</sup> *Franchise Tax Board v. Hyatt*,<sup>14</sup> *United States v. Apel*,<sup>15</sup>

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<sup>9</sup> *Id.* at 207.

<sup>10</sup> *Id.*

<sup>11</sup> CHEMERINSKY, *supra* note 1, at 5.

<sup>12</sup> “EGOT” refers to the accomplishment of winning an Emmy, Grammy, Oscar, and Tony Award.

<sup>13</sup> 140 S. Ct. 1009 (2020).

<sup>14</sup> 139 S. Ct. 1485 (2019).

<sup>15</sup> 571 U.S. 359 (2014).

*Scheidler v. National Organization for Women*,<sup>16</sup> *Van Orden v. Perry*,<sup>17</sup> *Tory v. Cochran*,<sup>18</sup> and *Lockyer v. Andrade*.<sup>19</sup>

Chemerinsky's distinctions are numerous. In 2016, he was named a fellow of the American Academy of Arts and Sciences. In 2017, *National Jurist* magazine again named him the most influential person in legal education in the United States.<sup>20</sup> Beyond any doubt, Chemerinsky's influence has shaped legal education, influenced constitutional scholarship, and revived the importance of public interest lawyering as a noble and worthwhile calling.

### I. READING CHEMERINSKY ON RACE

Years before the current, urgent call for racial justice, in *The Case Against the Supreme Court*, Professor Chemerinsky urges that any critique of the Supreme Court must begin by considering its legacy on race. He explains, "[T]hroughout American history, at its most important tasks, at its most important moments," the Court sidestepped, deflected, and evaded its responsibility as "the primary institution in society that exist[s] to stop discrimination and to protect people's rights."<sup>21</sup> Chemerinsky centers a dialogue about racial equality, urging that if there is any uncertainty related to the Supreme Court's record, a study of the Constitution itself and the Court's jurisprudence on race will yield insightful answers.<sup>22</sup>

When scholars examine the Court's record on slavery, Chemerinsky notes, "[A]t every opportunity until the Civil War, the Supreme Court acted to protect the rights of slave owners and denied all rights to those who were enslaved."<sup>23</sup> Cases like *Prigg*

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<sup>16</sup> 537 U.S. 393 (2003).

<sup>17</sup> 545 U.S. 677 (2005).

<sup>18</sup> 544 U.S. 734 (2005).

<sup>19</sup> 538 U.S. 63 (2003).

<sup>20</sup> Professor Chemerinsky is also the recipient of the Hubert H. Humphrey First Amendment Freedoms Prize from the Anti-Defamation League, the Bernard E. Witkin Award of the California State Bar, and the Ramona Ripston Civil Liberties and Civil Rights Award from the ACLU of Southern California, among others. Professor Chemerinsky has been teacher of the year at Duke Law School and the University of Southern California Gould School of Law.

<sup>21</sup> CHEMERINSKY, *supra* note 1, at 5.

<sup>22</sup> *See id.* at 21 ("If the failures of the Supreme Court are to be chronicled, the place to begin must be race. And to be fair, that failure begins with the Constitution itself.").

<sup>23</sup> *Id.* at 22.

*v. Pennsylvania*<sup>24</sup> and *Dred Scott v. Sandford*<sup>25</sup> are more obvious examples of the Court's failure to "significantly limit slavery or even raise serious questions about its constitutionality or legitimacy."<sup>26</sup>

In *Dred Scott*, the petitioner based his claim for freedom (and that of his wife and daughters) on the fact that he lived in a free territory and therefore lawfully was no longer a slave. Chief Justice Roger Taney, author of the opinion, wrote that enslaved Black people were "beings of an inferior order . . . unfit to associate with the white race . . . they had no rights which the white man was bound to respect; and [ ] the negro might justly and lawfully be reduced to slavery for his benefit."<sup>27</sup> The Court struck down the Missouri Compromise.

According to Chemerinsky, "[t]he Court could have held that slaves were U.S. citizens—especially those who were born in this country." Alternatively, "[o]nce it held that it lacked jurisdiction to hear the case, the matter should have been dismissed."<sup>28</sup> There was no need to strike down the Missouri Compromise, but, by doing so, the Court acted with "enormous hubris."<sup>29</sup>

The Court's record on race after slavery equally disappoints. Consider, for example, the *Civil Rights Cases*<sup>30</sup> and *Plessy v. Ferguson*,<sup>31</sup> Supreme Court cases that hastened the end of Reconstruction and undermined the equal protection and due process rights of African Americans. In 1883, barely beyond the grasp of slavery's hungry clutches, the Court opined in the *Civil Rights Cases*,

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws.<sup>32</sup>

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<sup>24</sup> 41 U.S. (16 Pet.) 539 (1842); *id.* at 539 (striking down a Pennsylvania law that prevented the use of "force and violence" in removing and returning slaves).

<sup>25</sup> 60 U.S. (19 How.) 393 (1857).

<sup>26</sup> CHEMERINSKY, *supra* note 1, at 24.

<sup>27</sup> *Dred Scott*, 60 U.S. at 407.

<sup>28</sup> CHEMERINSKY, *supra* note 1, at 26–27.

<sup>29</sup> *Id.* at 27.

<sup>30</sup> 109 U.S. 3 (1883).

<sup>31</sup> 163 U.S. 537 (1896).

<sup>32</sup> *The Civil Rights Cases*, 109 U.S. at 25.

Even while the Reconstruction Amendments “were adopted to transform government, especially with regard to race,” Chemerinsky writes that their promise was largely unrealized until *Brown v. Board of Education*,<sup>33</sup> in large part because of the Supreme Court’s narrow, or “cramped,” interpretation of these important amendments.<sup>34</sup> The result of the Court’s limited vision of the Fourteenth Amendment, including the finding in the *Slaughter-House Cases*<sup>35</sup> that it applied only to the formerly enslaved and those of African descent, meant women’s later claims to challenge sex-based discrimination would also fail.<sup>36</sup>

According to Chemerinsky, “It is astounding that five years after the Constitution was amended to prevent states from denying citizens their basic rights, their privileges or immunities of citizenship, the Court said that the federal judiciary could not use that provision to strike down state and local laws.”<sup>37</sup> Nor are his concerns quieted by *Brown* and the Warren Court. He explains that it took the Court eighty-six years after the ratification of the Fourteenth Amendment to reach this fundamental ideal of African American equality.<sup>38</sup>

## II. READING CHEMERINSKY ON REPRODUCTIVE RIGHTS

In 2017, Professor Chemerinsky and I published *Abortion: A Woman’s Private Choice*.<sup>39</sup> It was the first of three coauthored papers that addressed reproductive rights in the past five years. In the article, written before the confirmation of Justice Brett Kavanaugh, the death of Justice Ruth Bader Ginsburg, and the confirmation of Justice Amy Coney Barrett, we warned, “Abortion rights in the United States are in serious jeopardy.”<sup>40</sup> We were concerned about Justice Neil Gorsuch’s record in the Tenth Circuit; conservative, white-male-dominant state legislatures enacting restrictive abortion laws; and the potential that Justice Stephen Breyer and Justice Ginsburg might not survive the Trump administration or might retire while he was in office.

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<sup>33</sup> 347 U.S. 483 (1954).

<sup>34</sup> CHEMERINSKY, *supra* note 1, at 30.

<sup>35</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>36</sup> *See generally* *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

<sup>37</sup> CHEMERINSKY, *supra* note 1, at 33.

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *See generally* Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189 (2017).

<sup>40</sup> *Id.* at 1189.

We cautioned that if all or even some of what we predicted materialized, then poor women would greatly suffer.<sup>41</sup> We also believed “[a]ffluence will not spare women the indignity of traveling to another state or country to obtain abortions.”<sup>42</sup> Sadly, our concerns have come to fruition.

We continue to believe that the uncertainty about abortion rights makes it especially important to provide a strong constitutional foundation for their protection. This still might not be enough even if Chief Justice John Roberts could be viewed as a sympathetic and potential swing vote after *June Medical v. Russo*.<sup>43</sup> Five Justices appear committed to overruling *Roe v. Wade*.<sup>44</sup> Yet abortion rights should have the best possible constitutional defense. That is our purpose across several articles.

In *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*,<sup>45</sup> we critiqued the Supreme Court’s holding in *National Institute of Family and Life Advocates v. Becerra*,<sup>46</sup> arguing that the case is only secondarily about speech. In that case, the Court held that a preliminary injunction should have been issued against a California law that required reproductive health care facilities to post notices containing truthful, factual information.<sup>47</sup> As we noted, all that California required was posting a notice that the state provided free access to basic reproductive health care.<sup>48</sup> As we argued, the Court’s ruling placed all laws requiring disclosure in jeopardy—requiring them to meet a strict scrutiny standard.<sup>49</sup> We emphasized that the Court ignored its prior precedent and it applied a more demanding standard of review based on the content of the speech.<sup>50</sup>

Chemerinsky and I believed that the Court’s 5–4 decision in *NIFLA* reflected the conservative Justices’ hostility to abortion rights and an indifference to the rights and interests of poor women. Our warning in 2019 was that the decision was likely a

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<sup>41</sup> *Id.* at 1191.

<sup>42</sup> *Id.*

<sup>43</sup> 140 S. Ct. 2103 (2020).

<sup>44</sup> 410 U.S. 113 (1973).

<sup>45</sup> See generally Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61 (2019).

<sup>46</sup> 138 S. Ct. 2361 (2018).

<sup>47</sup> *Id.* at 2379.

<sup>48</sup> Chemerinsky & Goodwin, *supra* note 45, at 72.

<sup>49</sup> *Id.* at 117–18.

<sup>50</sup> *Id.* at 66.

harbinger for what is to come, including the weaponization of the First Amendment to undermine abortion rights.

### III. READING CHEMERINSKY AS GREAT DISSENTER

A close reading of Chemerinsky's scholarship reveals a pattern: a commitment to defending the vulnerable and distinguishing right from wrong. These values define important aspects of his scholarship. He does not equivocate even when others might for some career advantage. It made newspaper headlines when his liberal views became a matter of public debate regarding the UC Irvine Law deanship.<sup>51</sup> Chemerinsky stood his ground.

Nor is his work reductive, inconsistent, or mired by cherry picking cases that fit his view or argument while ignoring others. Neither is his scholarship flawed by blindness to ideology, commitment to political expedience, nor blunt expression when greater nuance is called for. To the contrary, like Justice John Marshall Harlan in *Plessy* and the *Civil Rights Cases* or Justice Ginsburg in *Shelby County v. Holder*,<sup>52</sup> Chemerinsky is a master of dissent when he believes justice has not been served.

His dissenting views are not kept to his books (fifteen at last count) or numerous law review articles (well over one hundred); he is also a prolific commentator and public intellectual.<sup>53</sup> He has been critical of liberal and conservative Justices. Famously, and to much criticism and hate mail, he urged in *Politico* that Justice Ginsburg should retire while President Barack Obama was in office.<sup>54</sup> He penned an earlier article in March 2014 in the *Los Angeles Times*, presciently warning that

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<sup>51</sup> See, e.g., Garrett Therolf & Henry Weinstein, *UC Irvine Post Is Taken from Liberal Legal Scholar*, L.A. TIMES (Sept. 13, 2007), <https://perma.cc/A8U8-DHZ3>.

<sup>52</sup> 570 U.S. 529 (2013); *id.* at 590 (Ginsburg, J., dissenting) (“Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.”).

<sup>53</sup> Between May and July 2020, Chemerinsky published nearly twenty commentaries, including Erwin Chemerinsky, Opinion, *Trump Can't Postpone the Election. But Here's Why We Have to Take His Tweet Seriously*, L.A. TIMES (July 30, 2020), <https://perma.cc/SY3P-PUPB>; Erwin Chemerinsky, *Blockbuster Decisions in 6 Areas of Law Made This a SCOTUS Term to Remember*, ABA J. (July 15, 2020), <https://perma.cc/3DVY-9YNY>; and Erwin Chemerinsky, Opinion, *Does Roberts' Surprise Supreme Court Vote Today Mean Abortion Rights Are Safe for the Long Haul?*, L.A. TIMES (June 29, 2020), <https://perma.cc/3735-7SE5>.

<sup>54</sup> Erwin Chemerinsky, *Love Ya Ruth, But It's Time to Go: Why Justice Ginsburg Should Retire—Yesterday*, POLITICO MAG. (Sept. 24, 2014), <https://perma.cc/E3XQ-A6UF>:

Yet—as I've said before—I was hoping that come the first Monday in October, when the Supreme Court starts its new term, we would see a new face on the

simply leaving before the next election isn't enough. If Ginsburg waits until 2016 to announce her retirement, there is a real chance that Republicans would delay the confirmation process to block an outgoing president from being able to fill a vacancy on the Supreme Court. In fact, the process for confirming nominees for judicial vacancies usually largely shuts down the summer before a presidential election.<sup>55</sup>

Similarly, in the *William and Mary Bill of Rights Journal*, he criticized Justice Breyer's concurring opinion in *Van Orden v. Perry*,<sup>56</sup> a case that Professor Chemerinsky argued before the Court.<sup>57</sup> He wrote that, from the outset, "I was convinced that the outcome would turn on Justice Sandra Day O'Connor. As I wrote the brief and as I stood before the Justices, I saw O'Connor as being the swing vote."<sup>58</sup> He was wrong; Justice Breyer, to his surprise, was the fifth vote for the majority.

In *Van Orden*, a plurality decision written by Chief Justice William Rehnquist, the Court considered whether a Ten Commandments monument on the grounds of the Texas State Capitol Building violated the First Amendment's Establishment Clause.<sup>59</sup> Four of the Court's conservatives answered no, and Justice Breyer wrote a concurrence. For Chemerinsky, both opinions were flawed because "[t]he Ten Commandments are a preeminent symbol of some, but not of other, religions and that they express a profoundly religious message: there is a God, and that God has commanded rules for behavior."<sup>60</sup>

Those who litigate before the Court might be cautious about alienating a Justice through criticism. Professor Chemerinsky offers a different view: only if we are honest about the Court and "admit that this emperor has no clothes," can we begin to hold it accountable for its decisions.<sup>61</sup>

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bench in Ginsburg's place. And I say this with all the respect due to a woman who has been a pioneer on and off the bench.

<sup>55</sup> Erwin Chemerinsky, Opinion, *Much Depends on Ginsburg*, L.A. TIMES (Mar. 15, 2014), <https://perma.cc/4GRW-L554>.

<sup>56</sup> 545 U.S. 677 (2005).

<sup>57</sup> Erwin Chemerinsky, *Why Justice Breyer Was Wrong in Van Orden v. Perry*, 14 WM. & MARY BILL RTS. J. 1, 2 (2005) ("In other words, Breyer did not see a six-foot-high, three-foot-wide Ten Commandments monument between the Texas State Capitol and the Texas Supreme Court as symbolically endorsing religion.").

<sup>58</sup> *Id.* at 1.

<sup>59</sup> *Van Orden*, 545 U.S. at 681.

<sup>60</sup> Chemerinsky, *supra* note 57, at 15.

<sup>61</sup> CHEMERINSKY, *supra* note 1, at 342.



## CONCLUSION

Few legal scholars of this century or the last will have achieved the stature of Erwin Chemerinsky as a scholar, professor, dean, lawyer, and activist. Yet, those important aspects of his professional life may obscure other critical insights about him, namely his character, deep humility, and modesty.

Finally, great dissents are jurisprudence in exile. They set the stage for future generations of jurists and scholars. In the case of Chemerinsky, his critiques of the Court and his scholarship laying a foundation for abortion rights, immigration protections, affirmative action, LGBTQ equality, and free speech offer a view that centers a different vision and expectation for the Supreme Court. The honesty that Chemerinsky demands of the Justices and scholars is an acknowledgment that the Court makes value judgments. And Chemerinsky demands greater accountability of the Court, because there is “[n]o institution in society [ ] more important than the Supreme Court in ensuring liberty and justice for all.”<sup>62</sup>

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<sup>62</sup> *Id.*