

## SUPREME COURT PROGRESS REPORT: MORE HARM THAN GOOD?

*Ofer Raban*<sup>1</sup>

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### ABSTRACT

*Spurred by the conservatism of the Roberts Court, several recent books present critical evaluations of the Supreme Court's historical record. One of those is Erwin Chemerinsky's *The Case Against the Supreme Court*, which accuses the Court of an institutional failure: the failure to protect vulnerable groups from repressive electoral majorities, from powerful interests, and from official abuses of power. The indictment includes decisions dealing with slavery, free speech, Equal Protection, the rights of employees and consumers, criminal prosecutions, and the political process. This sorry record leads Chemerinsky to ask whether, historically-speaking, the Supreme Court has done more harm than good, so that the country would have been better off without it. This article examines this provocative question, the answer to which leads to some insights about the judiciary and the limits of judicial power.*

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1. Professor of Law and Elmer Sahlstrom Senior Fellow, University of Oregon.

## I. INTRODUCTION

A. *The Thesis*

The Roberts Court, described as the most conservative Supreme Court in almost a century,<sup>2</sup> has provoked the indignation of many a liberal with its decisions about campaign finance, affirmative action, abortion, religious freedom, the Fourth Amendment, and other areas of constitutional and statutory law.<sup>3</sup> Faced with what they see as an increasingly grim record, a number of liberal scholars have undertaken comprehensive surveys situating the Roberts Court within a larger historical context of Supreme Court disappointments.<sup>4</sup> One of those historical surveys is Erwin Chemerinsky's *The Case Against the Supreme Court*.<sup>5</sup>

Chemerinsky, one of today's most prominent constitutional law scholars, offers a thesis that is simple and deeply disturbing: on the whole, the Supreme Court of the United States has been an institutional flop.<sup>6</sup> Again and again, the Court has failed at its most fundamental task—i.e., enforcing the U.S. Constitution.<sup>7</sup> The Constitution's primary mission, says

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2. See, e.g., Nate Silver, *Supreme Court May Be Most Conservative in Modern History*, FIVETHIRTYEIGHT, N.Y. TIMES (Mar. 29, 2012), <http://fivethirtyeight.blogs.nytimes.com/2012/03/29/supreme-court-may-be-most-conservative-in-modern-history/> (“One statistical method for analyzing the Supreme Court, in fact, already finds that the current court is the most conservative since at least the 1930s.”); Erwin Chemerinsky, *Supreme Court's Conservative Majority is Making its Mark*, L.A. TIMES (Oct. 4, 2010), <http://articles.latimes.com/2010/oct/04/opinion/la-oe-chemerinsky-scotus-20101004> (“[T]he reality is that this is the most conservative court since the mid-1930s.”); but see Alicia Parlapiano et al., *The Roberts Court's Surprising Move Leftward*, N.Y. TIMES, <http://www.nytimes.com/interactive/2015/06/23/upshot/the-roberts-courts-surprising-move-leftward.html?hp&action=click&pgtype=Homepage&module=photo-spot-region&region=top-news&WT.nav=top-news&abt=0002&abg=0> (last updated June 29, 2015).

3. See, e.g., *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014); *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010); *Herring v. United States*, 555 U.S. 135 (2009); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gonzales v. Carhart*, 550 U.S. 124 (2007).

4. See generally IAN MILLHISER, *INJUSTICES: THE SUPREME COURT'S HISTORY OF COMFORTING THE COMFORTABLE AND AFFLICTING THE AFFLICTED* (2015); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

5. See generally *id.*

6. *Id.*

7. *Id.* at 9.

Chemerinsky, is to constitute a check against the tyranny of the majority.<sup>8</sup> Thus, if the Supreme Court has mostly failed to protect minorities from the “repressive desires of political majorities,” it has failed in its most fundamental task.<sup>9</sup> And Chemerinsky believes that it has.

The claim that the U.S. Supreme Court is an institutional failure has been made before.<sup>10</sup> But the claim rarely comes from inside players of Erwin Chemerinsky’s caliber (Chemerinsky is an active Supreme Court litigator, the author of the leading law school textbook on constitutional law, and a law school dean), who is also a strong believer in the virtues of the Rule of Law.<sup>11</sup> Chemerinsky recounts how he came to his stark conclusions:

For more than thirty years I have taught these cases and been outraged by them. I have wanted to believe that they are the exceptions to the Supreme Court’s overall successful enforcement of the Constitution. But as the years went by. . . I came to realize that it is time for me to reexamine the Supreme Court. It is important to ask directly the question, [h]as the Supreme Court been a success or a failure?<sup>12</sup>

That important question gives rise, in turn, to the following provocative query: has the Supreme Court done more harm than good, and has it “made the country worse off than it would have been without the Supreme Court?”<sup>13</sup> Indeed Chemerinsky inquires whether, given the Court’s historical record, “the Supreme Court—and, more specifically, the power of judicial review—should be kept. . .”<sup>14</sup>

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8. *Id.*

9. *Id.*

10. *See, e.g.*, MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

11. *Biography of Erwin Chemerinsky*, UNIVERSITY OF CALIFORNIA, IRVINE SCHOOL OF LAW, <http://www.law.uci.edu/faculty/full-time/chemerinsky/> (last visited Apr. 6, 2016).

12. CHEMERINSKY, *supra* note 3, at 5.

13. *Id.* at 53, 13.

14. *Id.*

*B. Why the Thesis is Counterintuitive*

The suggestions that the Court may have done more harm than good, and that its very existence, or at least its power of judicial review, should be called into question, are, at the very outset, counterintuitive. Here is why.

The Supreme Court performs two primary tasks: statutory interpretation and constitutional interpretation.<sup>15</sup> It is unlikely that the Court's harmful statutory decisions left the country worse off than it would have been without a U.S. Supreme Court. As an initial matter, why think that eliminating the Supreme Court would rid the country of such harmful decisions? After all, *some* court must interpret these statutes, and eliminating the Supreme Court would presumably only reproduce such harmful decisions at the lower federal courts (where judges are similarly appointed for life via presidential nomination and Senate confirmation). And while eliminating the Supreme Court may do nothing to improve those statutory decisions, it would certainly eliminate the uniformity of federal law (an undesirable result, one would think). Moreover, any harm perpetrated by the Court is mitigated by the fact that the legislature can always overrule the Supreme Court's statutory decisions (as it occasionally does)—a substantial institutional check on the ability of the Supreme Court to cause harm.<sup>16</sup>

In short, since there is no reason to think that other federal courts would decide cases any differently, since any harms resulting from Supreme Court statutory decisions are, in principle, liable for correction by the Legislature, and since eliminating the U.S. Supreme Court would create a hodge-podge of federal law, it is hard to see how harmful statutory cases can ever support the elimination of the U.S. Supreme Court.

Thus, it is not surprising that Chemerinsky himself focuses the “more harm than good” thesis on the Court's harmful *constitutional* decisions. Properly understood, the thesis is therefore not about the elimination of the institution of the Supreme Court, but about the elimination of the power of judicial review.<sup>17</sup> (I take the suggestion to pertain to the elimination of

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15. See generally, *About the Supreme Court*, U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about> (last visited Apr. 6, 2016).

16. For a recent example see, e.g., Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2 § 181 (codified as 42 U.S.C. § 2000e), (overruling *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (interpreting Title VII of the Civil Rights Act in a way that made it difficult to establish a claim of pay discrimination based on gender).

17. CHEMERINSKY, *supra* note 3, at 271.

judicial review by all federal courts, not only the Supreme Court, since there is no reason to think that other federal courts would decide constitutional cases differently, *plus*, removing the power of judicial review only from the U.S. Supreme Court would create a hodge-podge of federal constitutional law.)

But the idea that the Court's *constitutional* decisions may have done more harm than good is also implausible. The Supreme Court reviews executive, legislative, and judicial actions for conformity with the U.S. Constitution. As for the Court's review of judicial actions (both federal and state), such decisions cannot form the basis for the elimination of judicial review, since courts would retain the power to review the constitutionality of their own actions even if the power of judicial review were eliminated; and since, once again, there is no reason to think that other federal courts would perform any better. Thus, whether courts should retain the power of judicial review is a question that revolves exclusively around cases concerned with the constitutionality of legislative and executive actions. But insofar as the Court *upholds* legislative or executive actions, eliminating judicial review would do nothing to eliminate the harm, since in such cases the harm originated from other branches of government (both federal and state) and would therefore remain with or without judicial review. (Surely one cannot claim that the country would have been better off without judicial review because the courts allowed the federal government or the states to run roughshod over the Constitution.) Accordingly, the only harmful Supreme Court decisions militating against the power of judicial review are constitutional *invalidations* — i.e., cases where the Court positively prevented beneficial action by the other branches of government through its constitutional rulings.

Perhaps it could be objected that harmful constitutional *validations* should also be counted, because the conduct of the federal government and the states would *improve* in the absence of judicial review. Perhaps the absence of constitutional validations would rob some bad policies of a judicial stamp of approval, and thereby hasten their demise. And perhaps, as some have argued, the absence of judicial review would mean that non-judicial government officials would be forced to take their obligation to the U.S. Constitution more seriously.<sup>18</sup> Perhaps. But it is just as likely that the absence of judicial review would only embolden officials to flout constitutional commands. The claim that the government will improve its constitutional record once its constitutional supervisor is removed sounds excessively optimistic, and certainly too speculative.

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18. See, CHEMERINSKY, *supra* note 3, at 284.

Accordingly, Chemerinsky acknowledges that “in assessing the impact of the Court, its decisions striking down laws are particularly important, because these are the actions through which the Court usually makes the greatest difference. Laws that are upheld would be on the books whether or not there were a Supreme Court.”<sup>19</sup> But he does not abide by the full force of this concession: his list of condemnable cases includes both statutory and constitutional decisions; and the constitutional decisions include many that *uphold* legislative and executive actions.

## II. THE CASES

Chemerinsky’s list of cases covers the entire history of the Supreme Court, and ranges across large swaths of constitutional and statutory law. Chemerinsky’s list does not purport to be exhaustive (indeed some of the cited opinions stand for entire lines of Supreme Court cases)—in part because of Chemerinsky’s declared (though somewhat questionable) focus on universally condemnable decisions (as opposed to partisan ones).<sup>20</sup> His edifying list of cases is presented below, divided by topic and arranged in a chronological order.

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19. *Id.* at 233.

20. In his Introduction, Chemerinsky promises to “focus especially on examples ... where virtually everyone today—liberal and conservative alike—can agree that the Court was wrong.” *Id.* at 6. He makes a similar point in his final chapter (“[M]y goal was not to write *The Liberal Case Against the Supreme Court*”) *Id.* at 333. (In fact, however, if you are a conservative, you are likely to find Chemerinsky’s list both under- and over-inclusive. Specifically, much of Chemerinsky’s criticism is directed at cases that many conservatives consider perfectly correct and desirable—from affirmative action to enemy combatants to the extent of federal power to economic regulations and campaign finance.)

*A. Failure to Protect Vulnerable Groups*

Most of the following cases involve racial discrimination, although discrimination against women and criminal defendants is also mentioned.

*Barron v. Mayor and City Council of Baltimore*: rejecting the claim that the city of Baltimore violated the Constitution by holding that the Bill of Rights was only binding on the federal government (even though some Bill of Rights provisions are explicitly restricted to the federal government while others are not).<sup>21</sup>

*Prigg v. Pennsylvania*: invalidating a modest anti-slavery Pennsylvania law that prohibited the use of force or violence in returning an escaped slave to his lawful owner, by holding that the statute violated the Fugitive Slave Clause of Article IV.<sup>22</sup>

*Dred Scott v. Sandford*: holding that a slave could not be a United States citizen, and that the Missouri Compromise was unconstitutional<sup>23</sup> (a decision famously charged with paving the way to the Civil War).<sup>24</sup>

*Minor v. Happerset*: holding that it was not a violation of the Equal Protection Clause to deny women the right to vote.<sup>25</sup>

*Plessy v. Ferguson*: holding that it was not a violation of the Equal Protection Clause to maintain a system of official racial segregation.<sup>26</sup> See also *Cumming v. Board of Education* (upholding the constitutionality of a public whites-only school);<sup>27</sup> *Berea College v. Kentucky* (finding no constitutional violation in punishing a Kentucky private college for having integrated classes);<sup>28</sup> *Gong Lum v. Rice* (finding no constitutional violation in assigning a child of Chinese origin to a segregated non-white public school).<sup>29</sup>

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21. 32 U.S. 243, 250-51 (1833).

22. 41 U.S. 539, 625-26 (1842).

23. 60 U.S. 393, 411-12, 423 (1856) (abrogated by U.S. CONST. amend. XIII).

24. CHEMERINSKY, *supra* note 3.

25. 88 U.S. 162, 178 (1874) (abrogated by U.S. CONST. amend. XIX).

26. 163 U.S. 537, 551-52 (1896) (overruled by *Brown v. Bd. of Ed.* 347 U.S. 483 (1954)).

27. 175 U.S. 528, 545 (1899).

28. 211 U.S. 45,58 (1908) (overruled by *Brown*, 347 U.S. 483).

29. 275 U.S. 78, 87 (1927).

*Washington v. Davis*: requiring a showing of a discriminatory racial purpose, above and beyond a racially discriminatory impact, before government action would be subjected to strict constitutional scrutiny under the Equal Protection Clause.<sup>30</sup> As Chemerinsky explains, it is often difficult to show discriminatory purpose, even when such purpose exists; and requiring purpose may be unwarranted in any event, since people's racial biases often manifest themselves in subtle and unconscious ways.<sup>31</sup> See also *Mobile v. Bolden*, (reversing lower courts' determination that an election system in Mobile, Alabama, violated the Equal Protection Clause by insisting on evidence of discriminatory purpose);<sup>32</sup> *McCleskey v. Kemp* (dismissing a lawsuit claiming Equal Protection violation in the application of the death penalty by insisting on evidence of discriminatory purpose).<sup>33</sup>

*Milliken v. Bradley*: reversing a lower court's order and holding that a court may not create inter-district school desegregation plans, but must limit its remedies to the school district found in violation of the Equal Protection Clause.<sup>34</sup> The decision encouraged "white flight" and thus helped create many of today's de facto segregated public schools. A study cited by Chemerinsky concluded that American schools would be 60% less segregated if inter-district remedies were available.<sup>35</sup>

*Wygant v. Jackson Board of Education*<sup>36</sup> and *J.A. Croson v. City of Richmond*<sup>37</sup>: making it extremely difficult to implement affirmative action programs in employment or government contracting by requiring that such action be supported by extremely burdensome factual findings.

*Parents Involved in Community Schools v. Seattle School District No. 1*: forbidding school boards to racially integrate K12 schools through race-conscious admission policies.<sup>38</sup>

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30. 426 U.S. 229, 245-48 (1976).

31. CHEMERINSKY, *supra* note 3, at 41-42.

32. 446 U.S. 55, 74(1980).

33. 481 U.S. 279 (1986).

34. 418 U.S. 717, 718 (1974).

35. Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 634 (2014).

36. 476 U.S. 267, 277-79(1986).

37. 488 U.S. 469, 498-99(1989).

38. 551 U.S. 701, 702 (2007).



*Cullen v. Pinholster*: setting a very low bar for constitutionally adequate criminal defense.<sup>39</sup> *See also Strickland v. Washington*.<sup>40</sup>

### *B. Failure in Times of Crisis*

The second topic covers the Supreme Court's failures to protect constitutional rights and liberties during times of war and national emergency.

*Schenck v. United States*;<sup>41</sup> *Frohwerk v. United States*;<sup>42</sup> *Debs v. United States*;<sup>43</sup> *Abrams v. United States*<sup>44</sup>: affirming criminal convictions and long prison sentences for what was essentially anti-war speech during World War I.

*Minersville School District v. Board of Education*.: upholding a compulsory flag salute and recitation of the Pledge of Allegiance in a public school.<sup>45</sup> (The Supreme Court overruled this decision three years later, in *West Virginia State Board of Education v. Barnette*.)<sup>46</sup>

*Korematsu v. United States*: upholding the constitutionality of years-long internment of over 100,000 Japanese-Americans, most of whom were American citizens, during the Second World War.<sup>47</sup>

*Dennis v. United States*: affirming a criminal conviction and a long prison sentence for the advocacy of communism.<sup>48</sup>

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39. 563 U.S. 170, 176-77 (2011).

40. 466 U. S. 668, 687 (1984).

41. 249 U.S. 47, 49 (1919).

42. 249 U.S.204 (1919).

43. 249 U.S. 211 (1919).

44. 250 U.S. 616 (1919).

45. 310 U.S. 586 (1940), *overruled by* *W.Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943).

46. 319 U.S. 624 (1943).

47. 323 U.S. 214, 223-24 (1944).

48. 341 U.S. 494, 516-17 (1951); *See also* *Gitlow v. New York*, 268 U.S. 652, 672 (1925).

*Padilla v. Hanft*: dismissing on technical grounds and thus refusing to review the constitutionality of the potentially indefinite detention of a U.S. citizen detained on American soil and declared “enemy combatant.”<sup>49</sup>

*Holder v. Humanitarian Law Project*: upholding the constitutionality of a federal law making it a criminal offense to counsel foreign terrorist organizations (in this case the PKK, an organization dedicated to the establishment of a Kurdish state, and the LTTE, an organization dedicated to the establishment of a Tamil state) on how to advance their aims through peaceful means, including petitioning the United Nations.<sup>50</sup>

*Clapper v. Amnesty International*: dismissing a lawsuit challenging the constitutionality of the post-9/11 National Security Agency’s secret surveillance program, for lack of standing.<sup>51</sup>

As for the Supreme Court’s Guantanamo decisions, which rejected the attempts of both President Bush and Congress to deny Guantanamo detainees access to federal courts,<sup>52</sup> and have been lauded by many civil rights advocates:<sup>53</sup> Chemerinsky is less than impressed.<sup>54</sup> He acknowledges that the decisions defended the rights of the Guantanamo detainees in the

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49. 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 547 U.S. 1062, 1064 (2006) (Ginsburg, J. dissenting).

50. 561 U.S. 1, 7 (2010).

51. 133 S. Ct. 1138, 1155 (2013).

52. *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (extending the right of habeas corpus to noncitizen Guantanamo detainees); *Rasul v. Bush*, 542 U.S. 466, 485 (2004) (holding that federal courts have jurisdiction to decide the legality of potentially indefinite detention in Guantanamo Bay); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (finding that due process requires a United States citizen detained as an “enemy combatant” to be heard by a neutral decision maker in challenging his detention).

53. *See Zachary Coile & Bob Eglko, Justices Affirm Rights of Detainees/Terror Suspects Must be Given Access to U.S. Courts*, SFGATE (June 29, 2004), <http://www.sfgate.com/politics/article/Justices-affirm-rights-of-detainees-Terror-2745411.php>; Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES (June 30, 2006), <http://www.nytimes.com/2006/06/30/washington/30hamdan.html?pagewanted=all>; *The Right to a Day in Court*, N.Y. TIMES (Dec. 23, 2008), <http://www.nytimes.com/2008/12/24/opinion/24wed2.html>; *A Victory for the Rule of Law*, N.Y. TIMES (June 30, 2006), <http://www.nytimes.com/2006/06/30/opinion/30fri1.html>.

54. CHEMERINSKY, *supra* note 3, at 77.

face of widespread popular support for the government's harsh policies;<sup>55</sup> but he points out that, when all is said and done, the Supreme Court talked the talk but never walked the walk: since 2008, the Court denied appellate review in *all* cases involving Guantanamo detainees, with the result that its prior decisions remained essentially unenforced.<sup>56</sup> Indeed some of the cases that the Court refused to review allegedly showed contempt to its decisions on the subject.<sup>57</sup>

### *C. Economic Regulations and Federal Power*

Supreme Court invalidation of economic regulations began in earnest in the second half of the 19<sup>th</sup> Century—when the country saw a pronounced increase in such regulations, prompted by the growing complexity of a modern, integrated American economy.<sup>58</sup> Most such invalidations came to an abrupt halt in 1937, following the well-known confrontation between President Franklin D. Roosevelt and the Supreme Court.<sup>59</sup>

*United States v. E.C. Knight Co.*: invalidating the application of a federal anti-monopoly law to a manufacturer, on the ground that the regulation was beyond federal power.<sup>60</sup>

*Lochner v. New York*: invalidating a state law regulating working conditions as a violation of the Due Process Clause's right to contract.<sup>61</sup>

*Adair v. United States*;<sup>62</sup> *Coppage v. Kansas*<sup>63</sup>: invalidating state laws forbidding anti-union employment contracts as a violation of the Due Process right to contract.

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55. See generally *id.* at 77, 88-89.

56. *Id.* at 86.

57. See, e.g., *Latif v. Obama*, 666 F.3d 746 (D.C. Cir. 2011); *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009).

58. See *infra* notes 60-68 and accompanying text.

59. *Id.*

60. 156 U.S. 1, 22(1895); See also *Carter v. Carter Coal Co*, 298 U.S. 238, 312 (1936) (invalidating regulations of labor in the coal industry).

61. 198 U.S. 45, 66(1905), *overruled by West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

62. 208 U.S. 161, 191 (1908).

63. 236 U.S. 1, 11 (1915).

*Hammer v. Dagenhart*: invalidating a federal law forbidding the shipment in interstate commerce of products manufactured by child labor, on the ground that the regulation was beyond federal power.<sup>64</sup>

*Adkins v. Children's Hosp.*: invalidating minimum wage laws for women and children on the ground that the regulation was beyond federal power.<sup>65</sup>

*Weaver v. Palmer Bros. Co.*: invalidating a consumer protection law forbidding the use of certain materials in mattresses as a violation of the Due Process Clause.<sup>66</sup>

*Railroad Retirement Board v. Alton Railroad Co.*: invalidating a law mandating the creation of a pension scheme for railroad employees on the ground that the regulation was beyond federal power.<sup>67</sup>

*United States v. Butler*: invalidating a law regulating agricultural production as a violation of the Tenth Amendment and therefore beyond federal power.<sup>68</sup>

*San Antonio Independent School District v. Rodriguez*: holding that Texas' system of distributing funds to public schools based on property taxes, which resulted in great inequalities of school funding (often along racial lines), did not violate the Equal Protection Clause.

*New York v. United States*: invalidating the Federal Low-Level Radioactive Waste Policy Amendments Act, which required states to provide safe disposal of radioactive waste generated within their borders, as a violation of the Tenth Amendment and therefore beyond federal power.<sup>69</sup>

*Printz v. United States*: invalidating a provision of the Brady Handgun Violence Prevention Act, which required state officials to conduct

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64. 247 U.S. 251, 281(1918).

65. 261 U.S. 525, 561(1923); *see also* *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (invalidating federal wage and hour regulations).

66. 270 U.S. 402, 414 (1926).

67. 295 U.S. 330, 374 (1935).

68. 297 U.S. 1, 77 (1936).

69. 505 U.S. 144, 176-77 (1992).

background checks on gun buyers, as a violation of the Tenth Amendment and therefore beyond federal power.<sup>70</sup>

*United States v. Lopez*: invalidating a federal law criminalizing the possession of guns in school zones on the ground that the regulation was beyond federal power.<sup>71</sup>

*United States v. Morrison*: invalidating a federal law giving victims of gender-based violent crimes a cause of action against their perpetrators (enacted after numerous studies showed that states under-prosecute crimes against women, including rape and domestic violence), on the ground that the regulation was beyond federal power.<sup>72</sup>

*Ledbetter v. Goodyear Tire & Rubber Co.*: making it more difficult for employees to sue employers for gender discrimination under the Federal Civil Rights Act.<sup>73</sup> (Congress effectively repealed the ruling in the 2009 Lilly Ledbetter Fair Pay Act.)<sup>74</sup>

*National Federation of Independent Businesses v. Sebelius*: invalidating a provision of the Affordable Care Act that sought to expand Medicaid coverage to millions of individuals, on the ground that the regulation was beyond federal power.<sup>75</sup>

*AT&T Mobility v. Concepcion*: Interpreting a federal statute to require the enforcement of a contract of adhesion mandating arbitration instead of litigation.<sup>76</sup> (Arbiters are known to favor big corporations, in part because their careers depend on the willingness of these corporations to re-hire them).

*Wal-Mart v. Dukes*;<sup>77</sup> *American Express v. Italian Colors Restaurant*<sup>78</sup>: interpreting a federal statute in a way that puts formidable obstacles in the

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70. 521 U.S. 898, 935 (1997).

71. 514 U.S. 549, 567 (1995).

72. 529 U.S. 598, 627 (2000).

73. 550 U.S. 618, 642-43 (2007).

74. See 42 U.S.C. § 2000e-5(e)(3)(A) (2009).

75. 132 S. Ct. 2566, 2587 (2012).

76. 563 U.S. 333, 350-51 (2011); see also *Circuit City Stores v. Adams*, 532 U.S. 105 (2001) (requiring forced arbitration in an employment dispute).

77. 133 S. Ct. 2304, 2310-11 (2013).

78. 131 S. Ct. 2541, 2553-54 (2011).

way of federal class action lawsuits (thereby making it much more likely that big corporations would get away with unlawfully charging their customers small amounts of money, since only class actions make such lawsuits financially viable).

*PLIVA v. Mensing*; <sup>79</sup> *Mutual Pharmaceutical v. Bartlett*<sup>80</sup>: Interpreting a federal statute to require the dismissal of lawsuits alleging grave injuries resulting from allegedly deficient drug labeling.

#### *D. Governmental Misconduct and Abuses of Power*

It is hard not to turn indignant when reading some of the cases in this section, which involve flagrant governmental abuses of power.

*Buck v. Bell*: upholding the constitutionality of a Virginia statute providing for the forced sexual sterilization of mentally disabled inmates of institutions supported by the State.<sup>81</sup>

*Imbler v. Pachtman*: dismissing a lawsuit, by a man wrongly convicted of murder, against the prosecuting attorney for knowingly using perjured testimony.<sup>82</sup> The Supreme Court dismissed the lawsuit by holding that prosecutors were absolutely immune from lawsuits seeking compensation for their abuses of power in the performance of their official duties.<sup>83</sup>

*Stump v. Sparkman*: dismissing a lawsuit against a state judge who unlawfully ordered the forced sterilization of a 15-year-old girl, by holding that judges were entitled to absolute immunity from lawsuits seeking compensation for their abuses of power in the performance of their official duties.<sup>84</sup> See also *Mireles v. Waco* (dismissing a lawsuit against a judge alleging a deliberate violation of constitutional rights by relying on absolute judicial immunity).<sup>85</sup>

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79. 131 S. Ct. 2567, 2580-82 (2011).

80. 133 S. Ct. 2466, 2480 (2013).

81. 274 U.S. 200, 207 (1927).

82. 424 U.S. 409, 430-31 (1976).

83. *Id.*

84. 435 U.S. 349, 364 (1978).

85. 502 U.S. 9, 12 (1991).

*Nixon v. Fitzgerald*: dismissing a lawsuit against Richard Nixon for unlawfully firing a whistleblower by holding that the President was entitled to absolute immunity from lawsuits seeking compensation for his abuses of power in the performance of his official duties.<sup>86</sup>

*Harlow v. Fitzgerald*: addressing the same lawsuit above in regard to other executive branch defendants, and holding that all government officials enjoy *qualified* immunity from lawsuits seeking compensation for their abuses of power in the performance of official duties.<sup>87</sup> Thus, government officials (including, importantly, police officers) who violate people's legal rights can be held liable in damages for their abuses of power only if they violated legal rights that were "clearly established" at the time of the violation.<sup>88</sup>

*Briscoe v. LaHue*: dismissing a lawsuit against a police officer for giving perjured testimony at the defendant's criminal trial by holding that police officers have absolute immunity from lawsuits seeking compensation for perjury committed as part of their official duties.<sup>89</sup>

*United States v. Stanley*: dismissing a lawsuit by a soldier who was subjected to LSD experimentation without his knowledge or consent by holding that the U.S. Military was constitutionally immune from monetary liability for such conduct.<sup>90</sup>

*Board of the County Commissioners v. Brown*: dismissing a lawsuit against a municipality over injuries caused by a police officer by requiring an extremely high evidentiary showing. (The Court determined that the plaintiff failed to demonstrate that the municipality acted in conscious disregard for a high risk that the officer would use excessive force in violation of respondent's legal rights—despite the fact that the officer had pleaded guilty to various misdemeanors, including assault and battery, before he was hired for the job by the local sheriff, his uncle).<sup>91</sup>

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86. 457 U.S. 731, 757-58 (1982).

87. 457 U.S. 800, 819-20 (1982).

88. *Id.* at 818-19.

89. 460 U.S. 325, 341-42 (1983).

90. 483 U.S. 669, 683-85 (1987).

91. 520 U.S. 397, 404 (1997).

*Bogan v. Scott-Harris*: dismissing a lawsuit against a mayor and the vice president of the city council for firing a government employee after she filed a legitimate complaint against another employee, by holding that local legislators, like their federal and state counterparts, were absolutely immune from lawsuits seeking monetary compensation for abuses of power in the performance of their official duties.<sup>92</sup>

*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*: dismissing a lawsuit against a state entity for patent infringement by holding that states were immune from monetary liability for violating federal laws enacted by Congress under its Article I powers.<sup>93</sup>

*Hui v. Castaneda*: dismissing a lawsuit by the estate of a prisoner who died after he was repeatedly refused a badly needed medical checkup, on the ground that, although the complaint was based on constitutional violations, a federal statute provided immunity against such lawsuits.<sup>94</sup>

*Van de Kamp v. Goldstein*<sup>95</sup> and *Connick v. Thompson*<sup>96</sup>: dismissing lawsuits by individuals who were wrongly convicted and imprisoned for decades (twenty four and eighteen years respectively, the latter mostly on death row) for prosecutors' failure to disclose exculpatory evidence to the defense, in violation of the U.S. Constitution, by holding that the prosecutors, those who trained and supervised them, and the District Attorney's Offices that brought the prosecutions, were all absolutely

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92. 523 U.S. 44, 49 (1998).

93. 527 U.S. 627, 647-48 (1999). Congress may override states' sovereign immunity when it legislates, say, pursuant to its Fourteenth Amendment enforcement power, but not when it legislates under its Article I constitutional powers. *Id.* at 636-67. See also *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (dismissing a lawsuit by a state employee by holding that states were constitutionally immune from monetary liability for violating the federal Americans with Disabilities Act); *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (dismissing a lawsuit by a state employee against the state by holding that the states are constitutionally immune from monetary liability for violating a federal law forbidding age discrimination in employment); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Congress does not have the power to authorize private suits for damages against the states under the Commerce Clause in state courts).

94. 559 U.S. 799, 805-06 (2010).

95. 563 U.S. 51, 65 (2011).

96. 555 U.S. 335, 344 (2009).



immune from lawsuits seeking monetary damages for such unconstitutional conduct.

*Ashcroft v. al-Kidd*: dismissing a lawsuit against the U.S. Attorney General for violating the plaintiff's constitutional rights by declaring, *inter alia*, that the Attorney General enjoyed qualified immunity;<sup>97</sup> that qualified immunity bars lawsuits for violations of people's constitutional rights unless the official violated a clearly established law;<sup>98</sup> and that "[a] Government official's conduct violates clearly established law [only] when, at the time of the challenged conduct . . . every 'reasonable official would have understood that what he is doing violates that right.'"<sup>99</sup>

Chemerinsky recounts that, under this very demanding standard, the Ninth Circuit Court of Appeals found that "extreme isolation; interrogation under threat of torture, deportation and even death; prolonged sleep adjustment and sensory deprivation; exposure to extreme temperatures and noxious odors; denial of access to necessary medical and psychiatric care; . . . and incommunicado detention for almost two years, without access to family, counsel or the courts" did not constitute a violation of an American citizen's "clearly established" constitutional rights,<sup>100</sup> because although such practices were unconstitutional, not "every reasonable official would have understood" that they were.<sup>101</sup>

*Clapper v. Amnesty International*: dismissing a lawsuit alleging that the National Security Agency's secret surveillance program was unconstitutional, on the ground that the plaintiffs lacked standing.<sup>102</sup> The case joins a number of other Supreme Court cases tightening the standing requirement, thus making it more difficult to vindicate legal wrongs in federal courts.<sup>103</sup>

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97. 563 U.S. 731, 733 (2011).

98. *Id.*

99. *Id.* at 741 (citations omitted) (emphasis added).

100. *Padilla v. Yoo*, 678 F.3d 748, 752 (9th Cir. 2012); see *CHEMERINSKY*, *supra* note 3, at 15-16.

101. *Ashcroft*, 563 U.S. at 741.

102. 133 S. Ct. 1138, 1152 (2013).

103. See, e.g., *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (dismissing a lawsuit seeking to block the Los Angeles Police Department from using chokeholds for lack of standing because plaintiff could not prove he is likely to be subjected to another chokehold).

Chemerinsky sees in these cases a systemic obstruction of ordinary citizens' ability to vindicate their legal and constitutional rights.<sup>104</sup> He cites (without irony) to Justice Marshall's words in *Marbury v. Madison* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>105</sup> Too often, the Supreme Court allows unlawful injuries to go unaddressed.

### *E. Interference with the Political Process*

The Court has interfered with the political process in ways that damaged, and continue to damage, the integrity of American democracy.

*Bush v. Gore*: ending the Florida recount of thousands of votes—and thus, as a practical matter, ordaining George W. Bush as the winner of the 2000 presidential elections—on the ground that the recount violated the Equal Protection Clause.<sup>106</sup>

*Citizens United v. Federal Election Commission*: invalidating a federal law that prohibited corporations and unions from spending unlimited amounts of money on behalf of political candidates, for violating the First Amendment.<sup>107</sup>

*Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*: invalidating Arizona's system of public financing for political campaigns (which granted publicly funded candidates additional funds when certain spending thresholds were crossed by privately funded candidates or by outside groups spending money on their behalf) for violating the First Amendment.<sup>108</sup>

*Shelby County, Alabama v. Holder*: invalidating a provision of the Voting Rights Act that made it more difficult for some counties and states

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104. CHEMERINSKY, *supra* note 3, at 208-28.

105. *Id.* at 197 (citing *Marbury v. Madison*, 5 U.S. 137, 163 (1803)). *Marbury* was unlawfully injured, but the Court refused him his remedy. *See* 5 U.S. 137.

106. 531 U.S. 98, 105-06 (2000).

107. 558 U.S. 310, 365 (2010).

108. 131 S. Ct. 2806, 2828-29 (2011).

to discriminate on the basis of race in their voting procedures, for going beyond Congressional power.<sup>109</sup>

These cases seem particularly condemnable because they appear to conform to a partisan impulse (Chemerinsky notes that all four cases benefitted the Republican party, and that all five justices in the five justice majorities of all four cases were nominated by Republican Presidents); and because they impacted the very composition of the elected branches of government, thus potentially distorting these branches' own positions on these matters (legislators elected with the help of unlimited corporate expenditures, or with the help of racially discriminatory voting procedures, may be less inclined to purge the political system of such alleged harms).

### III. ASSESSING THE THESIS

So: does the evidence support the argument that, when judged against the Supreme Court's historical performance, the country may have been better off without judicial review?

Chemerinsky's cases constitute a formidable indictment; but they cannot support that strong thesis. To begin with, only half the cases listed by Chemerinsky are constitutional invalidations. The rest are all cases of statutory interpretation, or cases upholding the constitutionality of legislative or executive acts—i.e., cases that cannot support the thesis because the harms they produced would have existed with or without judicial review. These include half the cases concerned with the failure to protect vulnerable groups—including *Minor v. Happerset*<sup>110</sup> and *Plessy v. Ferguson*;<sup>111</sup> all the cases concerned with failure in times of crisis—including the failures to protect free speech, the failure to address Post-9/11 abuses, and the notorious *Korematsu v. United States*;<sup>112</sup> most of the recent cases concerned with economic regulations (since the constitutional doctrines most responsible for the invalidation of economic regulations were effectively abandoned in 1937);<sup>113</sup> and most cases extending

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109. 133 S. Ct. 2612, 2631 (2013).

110. 88 U.S. 162, 178 (1874) (holding that it was not a violation of the Equal Protection Clause to deny women the right to vote).

111. 163 U.S. 537, 548 (1896) (holding that it was no violation of the Equal Protection Clause to maintain a system of racial segregation).

112. 323 U.S. 214, 223 (1944).

113. See *United States v. Carolene Products Co.*, 304 U.S. 144, 147 (1938) (explaining Congress' extensive regulatory power over the economy); *West Coast Hotel v. Parrish*, 300 U.S. 379, 392 (1937) (overruling *Lochner*, 198 U.S. 45).

immunities for official abuses of power (including the overly broad immunity enjoyed by police officers and prosecutors).<sup>114</sup>

What remains, of course, is not insubstantial: judicial review certainly inflicted some damage on the nation. Moreover, as already noted, Chemerinsky's list is far from complete. Many more cases could be added to the list, especially if one is willing to abandon the claim for non-partisanship. These cases may include the Court's tremendously important determination that Congress could not regulate private action when enforcing the Equal Protection Clause,<sup>115</sup> as well as *D.C. v. Heller*,<sup>116</sup> *Boy Scouts of America v. Dale*,<sup>117</sup> or (one of my *bêtes noires*) *United States v. Stevens*.<sup>118</sup> The list, of course, can go on and on—all depending on one's constitutional taste and ideological flavor.

And yet, at least so far as liberals are concerned, the balance remains firmly against the thesis. Supreme Court judicial review has done far more liberal good than liberal evil—including in the areas most criticized by Chemerinsky. Thus, in regard to the protection of vulnerable minorities, the Court ended official racial segregation and outlawed a huge variety of racially discriminatory practices.<sup>119</sup> It invalidated numerous laws and regulations that discriminated on the basis of gender,<sup>120</sup> national origin,<sup>121</sup>

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114. See generally, Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L. J. 2195, 2210 (2003) (“[T]he Court's cases in this area are premised on the theory that qualified immunity existed at common law, and that Congress did not clearly abolish it in § 1983.”).

115. See *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

116. 554 U.S. 570, 636 (2008) (holding it a violation of the Second Amendment to forbid gun possession in the home).

117. 530 U.S. 640, 661 (2000) (holding it a violation of the First Amendment to forbid the Boy Scouts of America to discriminate against homosexuals).

118. 559 U.S. 460, 481 (2010) (holding it a violation of the freedom of speech to make it a crime to create, sell, or possess depictions of animal torture for commercial purposes).

119. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 99 (1986) (holding that prosecutors may not use peremptory challenges to dismiss jurors based on their race.); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating the prohibition on interracial marriages); *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (holding segregated schools to be unconstitutional); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Smith v. Allwright*, 321 U.S. 649 (1944).

120. See, e.g., *United States v. Virginia*, 518 U.S. 515, 557 (1996); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973).

121. See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982).

sexual orientation,<sup>122</sup> mental retardation,<sup>123</sup> cultural nonconformity,<sup>124</sup> religious belief,<sup>125</sup> and poverty.<sup>126</sup> Specifically regarding the economically disadvantaged, the Court required judicial proceedings before the termination of welfare payments,<sup>127</sup> forbade the arbitrary withdrawal of food stamps,<sup>128</sup> forced the government to pay for counsel and other court-related services for indigent criminal and even some civil defendants,<sup>129</sup> invalidated prohibitions on the co-habitation of extended families,<sup>130</sup> forbade the state to imprison a person solely because he lacked the resources to pay a fine,<sup>131</sup> and invalidated the denial of welfare benefits to new residents.<sup>132</sup> The Court also held unconstitutional a wide variety of official abuses of power including brutal police practices,<sup>133</sup> forced confessions,<sup>134</sup> incommunicado detentions,<sup>135</sup> and various forms of searches and seizures.<sup>136</sup> The Court defended constitutional rights at times of war by forbidding the executive from trying civilians in military courts,<sup>137</sup>

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122. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996).

123. *See, e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

124. *See, e.g.*, *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

125. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 547 (1993).

126. *See, e.g.*, *Edwards v. California*, 314 U.S. 160 (1941).

127. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970).

128. *Moreno*, 413 U.S. at 538.

129. *See, e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

130. *Moore v. City of E. Cleveland*, 431 U.S. 494, 506 (1977).

131. *Bearden v. Georgia*, 461 U.S. 660, 674 (1983).

132. *Shapiro v. Thompson*, 394 U.S. 618, 642 (1969), *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974) (overruling on the Eleventh Amendment holding).

133. *Rochin v. California*, 342 U.S. 165, 174 (1952).

134. *See, e.g.*, *Brown v. Mississippi*, 297 U.S. 278, 285 (1936).

135. *Miranda v. Arizona*, 384 U.S. 436, 462-63 (1966).

136. *See, e.g.*, *Riley v. California*, 134 S. Ct. 2473, 2495 (2014) (requiring police to obtain a warrant in order to search digital information on a cell phone seized from an individual who has been arrested); *Florida v. J.L.*, 529 U.S. 266, 273-74 (2000); *Payton v. New York*, 445 U.S. 573, 602 (1980) (invalidating a warrantless felony home arrest); *Katz v. United States*, 389 U.S. 347, 359 (1967); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961).

137. *Ex parte Milligan*, 71 U.S. 2, 20 (1866).

invalidating the President's attempt to take control of private property as part of the war effort,<sup>138</sup> allowing newspapers to publish secret military documents,<sup>139</sup> and by keeping the doors of federal courts open to foreign terrorism suspects despite popular opposition from both Congress and the President.<sup>140</sup> The Court has also done much to improve American democracy through its exercise of judicial review: the Court invalidated poll taxes<sup>141</sup> and cumbersome fees on candidates running for office,<sup>142</sup> invalidated racially discriminatory drawing of voting districts,<sup>143</sup> mandated equal voting power for all voters,<sup>144</sup> opened up primaries to all eligible voters irrespective of race,<sup>145</sup> invalidated long residency requirements for voting in state elections,<sup>146</sup> and immunized criticism of government officials from defamatory liability.<sup>147</sup> The Court has also invalidated excessively harsh criminal punishments,<sup>148</sup> invalidated prohibitions on the use of contraceptives,<sup>149</sup> invalidated the criminalization of abortion<sup>150</sup> and homosexual sodomy, invalidated a ban on the teaching of foreign languages,<sup>151</sup> government attempts to introduce religious doctrine into public school curriculums,<sup>152</sup> and so on and so forth—liberals have had

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138. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952).

139. *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971).

140. *Boumediene*, 553 U.S. at 770.

141. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (finding a state's conditioning of the right to vote of the payment of a fee or tax violated the Equal Protection Clause of the Fourteenth Amendment).

142. *Bullock v. Carter*, 405 U.S. 134, 149 (1972).

143. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (holding that electoral district boundaries drawn only to disenfranchise blacks violate the Fifteenth Amendment).

144. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964).

145. *Smith v. Allwright*, 321 U.S. 649, 656-57 (1944).

146. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

147. *N. Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

148. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008) (ruling that the death penalty is unconstitutional in all cases that do not involve murder or crimes against the state such as treason); *Roper v. Simmons*, 543 U.S. 551 (2005) (holding that it is cruel and unusual punishment to execute persons for crimes they committed before age 18); *Solem v. Helm*, 463 U.S. 277 (1983).

149. *See Griswold v. Connecticut*, 381 U.S. 479 (1965).

150. *See Roe v. Wade*, 410 U.S. 113 (1973).

151. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

152. *See, e.g., Lee v. Weisman*, 505 U.S. 577 (1992); *Edwards v. Aguillard*, 482 U.S. 578 (1987), *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963).

much to rejoice over the years in Supreme Court constitutional invalidations of legislative and executive actions. When these decisions are weighed against Chemerinsky's harmful cases, the balance, in truth, is not even close.

Conservatives, on the other hand, may be more likely to agree with the 'more harm than good' thesis. From abortion to police conduct to homosexuality to Guantanamo to school prayer to the rights of criminal defendants — the cases that liberals celebrate are often the ones that conservatives decry. At the very least, the conservative balance sheet is less clear than the liberal one. And so, in the end, Chemerinsky (a staunch liberal) agrees: judicial review, he says, is clearly beneficial for the proper enforcement of the U.S. Constitution, and clearly beneficial for the nation.<sup>153</sup> Here is why.

#### IV. JUDICIAL REVIEW

Several factors make the judiciary the superior repository of constitutional authority. One is the fact that elected officials may simply not care for the interests of disfavored minorities. Chemerinsky gives the example of California's prisons,<sup>154</sup> which have been in open violation of the Eighth Amendment's prohibition on cruel and unusual punishment since the 1990s (a result of operating at twice their capacity, and of failing to provide prisoners with adequate medical care).<sup>155</sup> Apparently, these well documented violations could have continued indefinitely if not for judicial intervention.<sup>156</sup> Indeed even as liberal a governor as Jerry Brown has refused to comply with the constitutional requirements: like his predecessors, Brown was unwilling to spend the required funds, and equally reluctant to release prisoners.<sup>157</sup> Judicial review has been crucial for assuring compliance with the Federal Constitution.

Still, in many constitutional cases the question is not *whether* to comply with the Constitution, but what it means to comply with it. In other words, when examining the power of judicial review, one principal question is not who should *enforce* the Constitution, but who should determine what its numerous vague and indeterminate provisions (like the Equal Protection

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153. "It is not realistic, or desirable, to eliminate constitutional decision making by the courts" CHEMERINSKY, *supra* note 3, at 283.

154. *Id.* at 277.

155. *Brown v. Plata*, 563 U.S. 493 (2011).

156. *Id.*

157. *See* CHEMERINSKY, *supra* note 3, at 278-79.

Clause or the Due Process Clause) actually require. Opponents of judicial review claim that, in a democracy, elected representatives should make such determinations, not unelected and unaccountable federal judges.<sup>158</sup>

This claim, says Chemerinsky, again fails to address the concern over elected officials' potential indifference to electoral minorities.<sup>159</sup> It is also incompatible with the fact that the Constitution was deliberately designed as a check on the power of electoral majorities.

Chemerinsky repeats many of the time-honored arguments in favor of judicial review.<sup>160</sup> But he overlooks one often neglected consideration, which concerns institutional decision-making methodologies and institutional duties. Simply put, judicial constitutional interpretation employs a method that is superior to the decision-making methodology that legislators or other government actors may employ when they determine what the Constitution requires. Judges must articulate principled reasons for their positions; they must do so in writing; and they must publish these explanations—thereby exposing them to public scrutiny. Their explanations must show consistency with past decisions, and with the underlying values and purposes of the relevant constitutional provision. By contrast, politicians (or police officers, or the President for that matter) need not articulate or publish any explanation for their constitutional positions. In fact, they are not required to *have* an explanation: a legislator may adopt a constitutional position simply because she feels this is the right position, or because her constituents favor it, or because it is the position that her party leaders favor, or because it is politically expedient for her to do so. And she does not need to be consistent either: not only can she change her position from one week to the next (sometimes courts do that too), but she may be inconsistent *in principle*: she can opt for an expansive freedom of speech in one context, and oppose that very freedom in another, without the need to reconcile the two positions. Consistency is not one of her professional duties. It is, however, a professional duty for judges.<sup>161</sup> In other words, the question of who should decide what the Constitution requires is also about whether we want constitutional requirements to assume the form of the Rule of Law.

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158. *See id.* at 276.

159. *See id.* at 284 (“A populist constitutional law, almost by definition, would reflect popular attitudes. But why believe that this would be better than the courts in enforcing the Constitution? The judiciary can be a moral leader and protect our core values from hostile public pressure”).

160. *See id.* at 276-84.

161. *Id.* at 269-70.



Moreover, the Constitution is indisputably the paramount consideration only for judges.<sup>162</sup> Law is what judges are about; it is not what politicians or executive officers are necessarily about.<sup>163</sup> Elected officials are responsible, first and foremost, with running a country.<sup>164</sup> For politicians, constitutional law is only one of various considerations that determine their actions. Take the case of Arlen Specter and the 2006 Military Commissions Act.<sup>165</sup> Specter, who represented Pennsylvania in the U.S. Senate for three decades, was a lawyer, an ex-chairman of the Senate Judiciary Committee, and a man with deep knowledge of the U.S. Constitution.<sup>166</sup> When the 2006 Military Commissions Act came before Congress, Specter opposed its provision stripping Guantanamo detainees of their ability to file federal habeas corpus petitions.<sup>167</sup> Specter claimed that the provision was unconstitutional, proposed an amendment to it, and delivered an impassioned speech on the Senate floor in defense of the constitutional right of habeas corpus.<sup>168</sup> When his proposed amendment was narrowly defeated, he vowed to vote against the legislation.<sup>169</sup> Twenty four hours later he voted for it.<sup>170</sup>

According to a November 2008 New York Times article, Specter's vote followed a request from Rick Santorum, a fellow Republican and the second senator from Pennsylvania at the time.<sup>171</sup> Santorum supported Specter's primary campaign in 2004, when Specter faced a tough challenge from a more conservative candidate.<sup>172</sup> In the fall of 2006, Santorum was

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162. *Id.* at 276.

163. CHEMERINSKY, *supra* note 3, at 281.

164. *Id.*

165. Military Commissions Act, 10 U.S.C. §§ 948–949 (2006).

166. See United States Senate Historical Office, *Biography of Arlen Specter*, BIOGRAPHICAL DIRECTORY U.S. CONG., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=s000709> (last visited Feb. 27, 2016).

167. 152 CONG. REC. S10243-01 (daily ed. Sept. 27, 2006) (statements of Sen. Specter).

168. *Id.*

169. *Id.*

170. *Id.* See also *U.S. Senate Roll Call Votes 109th Congress*, U.S. SENATE (Sept. 28, 2006), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=109&session=2&vote=00259](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00259); *Final Vote Results for Roll Call 491*, U.S. HOUSE OF REPRESENTATIVES (Sept. 27, 2006), <http://clerk.house.gov/evs/2006/roll491.xml> (noting that the Act was passed 65 to 34 in the Senate, 253 to 168 in the House).

171. Jonathan Mahler, *After the Imperial Presidency*, N. Y. TIMES (Nov. 7, 2008), <http://www.nytimes.com/2008/11/09/magazine/09power-t.html?pagewanted=all>.

172. *Id.*

engaged in a tough re-election campaign of his own, and was fearful that Specter's opposition to the Military Commissions Act would hurt his campaign among hard-nosed conservatives who remembered his own support of Specter.<sup>173</sup> He asked Specter to support the bill, and Specter assented.<sup>174</sup>

Was Specter wrong in voting for the Act? I hesitate to say that he was. Specter was a politician, not a judge. And while a judge's primary, overriding obligation is to follow the law, a politician's primary, overriding obligation is to implement the best possible policies.<sup>175</sup> That may take making compromises, maintaining alliances, and employing considerations that judges do not and should not take into account. Compliance with the U.S. Constitution was, of course, one of the institutional duties of Senator Specter; but it was not his defining institutional duty.<sup>176</sup> There may be constitutional principles that even politicians should not flout. But Specter did not think this was one, and he may have been right.<sup>177</sup>

#### V. CONCLUSION

In the Federalist 78, Alexander Hamilton argued for the judiciary's final authority over constitutional interpretation by maintaining that the federal judiciary:

Will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The Executive...holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.... [T]hough individual oppression may now and then proceed

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173. *Id.*

174. *See id.* (noting that Specter claimed that he voted as he did because he knew that the Supreme Court would invalidate that provision).

175. *See* U.S. CONST. art. VI, § 1, cl. 2 (declaring that members of Congress have the duty to make laws which shall govern the nation).

176. *Id.*

177. *See Boumediene*, 553 U.S. 723 (holding that the Military Commissions Act's revocation of Guantanamo detainees' right of habeas corpus was unconstitutional, as anticipated by Specter).

from the courts of justice, the general liberty of the people can never be endangered from that quarter[.]<sup>178</sup>

The answer to the “more harm than good?” question is a vindication of Hamilton’s thesis. Over its long history, judicial review—exercised by unelected judges appointed for life and sometimes out of touch with the times—appeared to have done far less harm than good.

And yet, as Hamilton conceded, “oppression may now and then proceed from the courts of justice”,<sup>179</sup> and it certainly has. It is therefore important to examine the genealogy of the harmful cases making up Chemerinsky’s list.

Unsurprisingly, the principal constitutional sources of the lists’ harmful decisions follow two principal preoccupations of the U.S. Constitution: federalism, and constitutional liberties. Limiting the powers of the federal government was the basis for invalidating numerous beneficial economic regulations; the basis for the immunity that allows states to violate many beneficial federal laws with practical impunity; and the basis, among other things, for the invalidation of provisions of the Voting Rights Act, the Violence Against Women Act, the Affordable Care Act, and other allegedly beneficial federal legislation.<sup>180</sup> Still, federalism appears to be the lesser concern: overall, the federal government maintains extensive regulatory powers,<sup>181</sup> and—perhaps most importantly—where federal power has been limited, the way remains open for remedial action by the states.

The same, however, cannot be said about constitutional invalidations grounded in the protection of individual rights: such decisions place remedial action completely beyond the reach of both the federal government and state or local governments. And while conservatives may have a longer list of grievances when it comes to invalidations based on constitutional rights, liberals have much to fear as well. Chemerinsky’s list includes cases invalidating economic regulations for violating the right to contract;<sup>182</sup> invalidating affirmative action programs for violating the Equal Protection Clause (which also formed the constitutional basis for the notorious *Bush v.*

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178. Alexander Hamilton, *The Judiciary Department*, THE FEDERALIST NO. 78, June 14, 1788.

179. *Id.*

180. *See Shelby County*, 133 S. Ct. 2612; *Morrison*, 529 U.S. 598; *see also*, Nat’l Fed’n of Indep. Business v. Sebelius, 132 S. Ct. 2566 (2012).

181. *See, e.g.*, *United States v. Comstock*, 560 U.S. 126 (2010).

182. *See, e.g.*, *Lochner*, 198 U.S. at 66.

*Gore*);<sup>183</sup> and invalidating numerous campaign finance regulations for violating the First Amendment.<sup>184</sup> Thus, economic constitutional rights were used to invalidate laws aimed at economic justice,<sup>185</sup> free speech rights unleashed the influence of big money over American politics,<sup>186</sup> and Equal Protection rights prevented—and continue to prevent—fuller racial integration.<sup>187</sup>

In fact, this is only the tip of the iceberg. Religious rights have been used to invalidate laws forbidding employment discrimination,<sup>188</sup> the right to a fair trial has been employed to silence lawyers wishing to discuss their cases with the press,<sup>189</sup> and the constitutional right of association prevented the government from protecting homosexuals from private discrimination.<sup>190</sup> Cigarette manufacturers claim that health warnings violate their First Amendment rights;<sup>191</sup> companies assert a constitutional right to make allegedly misleading statements about their unseemly labor practices;<sup>192</sup> and both companies and public officials claim that the Free Exercise Clause allows them to engage in discrimination against homosexuals in employment, in services, and in the performance of official

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183. See, e.g., *Parents Involved in Cmty. Sch.*, 551 U.S. 701.

184. See, e.g., *Citizens United*, 558 U.S. 310.

185. See *Comstock*, 560 U.S. at 126.

186. See *Lochner*, 198 U.S. at 45.

187. See *Parents Involved in Cmty. Schs.*, 551 U.S. at 701.

188. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694 (2012).

189. See, e.g., *In re Morrissey*, 168 F.3d 134(4th Cir. 1999); *In re Dow Jones & Co.* 842 F.2d 603(2d Cir. 1988); *In re Russell*, 726 F.2d 1007 (4th Cir. 1984). See generally Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 859 (1998) (“Restrictions on lawyers' speech are increasingly common. In most high profile cases since the O.J. Simpson criminal trial, judges have imposed gag orders on the attorneys and parties precluding them from speaking with the press.”).

190. *Boy Scouts of Am.*, 530 U.S. 640.

191. See, e.g., Jessica Dye, *Tobacco Companies Sue FDA Over Label Approvals*, REUTERS (Apr. 14, 2015), <http://www.reuters.com/article/2015/04/14/us-fda-tobacco-lawsuit-idUSKBN0N51V120150414>.

192. *Nike v. Kasky*, 539 U.S. 654 (2003). The Court granted certiorari for the question whether “a corporation participating in a public debate [can] be subjected to liability for factual inaccuracies...” *Id.* at 658. The issue concerned Nike’s denial of using sweatshops in manufacturing its products. *Id.* The Court ended up dismissing the writ of certiorari as improvidently granted. *Id.*

duties.<sup>193</sup> One case that reached the Supreme Court involved the claim that the Federal Constitution's Takings Clause forbade California to protect the freedom of speech in privately-owned shopping malls.<sup>194</sup> Justice Potter Stewart once suggested that the Free Exercise Clause may grant parents the right to have public schools open their school days with readings from the Bible.<sup>195</sup> In *Roe v. Wade*, Texas has argued that "the fetus is a 'person'" protected by the Fourteenth Amendment's Due Process Clause.<sup>196</sup> And in 1995, a federal judge held that Oregon's Death With Dignity Act, which provided terminally ill patients a limited statutory right to receive assistance in dying, violated the Equal Protection Clause.<sup>197</sup> Casting grievances as violations of individuals' and corporations' constitutional rights remains a favorite of American lawyers.

But although constitutional rights and liberties can be used to harm the causes of liberty and justice, American liberals have far more to fear from the elected branches of government. Since 1789, over 11,600 proposed constitutional amendments have been introduced in Congress (members of the House and Senate propose approximately 50 constitutional amendments

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193. See *Miller v. Davis*, 15-44-DLB (E.D. KY, Aug. 12, 2015); *Burwell*, 134 S. Ct. 2751; *Romer*, 517 U.S. 620; *N. Coast Women's Care Med. Grp. v. San Diego Cnty.*, 44 Cal. 4th 1155, 1158 (2008).

194. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejecting the claim that California expansion of free speech rights to privately owned shopping malls violated the Federal Constitution).

195. *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205, 308-20 (1963) (Stewart, J., dissenting).

196. 410 U.S. 113, 156 (1973). See generally Ofer Raban, *Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties*, 64 RUTGERS L. REV. 381 (2012).

197. *Lee v. Oregon*, 891 F. Supp. 1429, 1431 (D. Or. 1995) (reversed on other grounds by *Lee v. Oregon*, 107 F.3d 1382, 1390-91 (9th Cir. 1997)). According to the opinion, the violation consisted of discriminating *against* terminally ill patients by failing to provide them with the same legal protections against suicide enjoyed by everyone else. See *id.* (citing to laws criminalizing assisted suicide; laws providing that a person may use reasonable physical force to thwart a suicide attempt; laws authorizing the Board of Medical Examiners to take disciplinary action against a physician for conduct endangering the health of a patient; and the absence of a requirement of an *expert* determination, above and beyond the determination of the attending physician, that a terminally ill patient was competent).

every year);<sup>198</sup> and many of these proposals seek to qualify or outright repeal existing constitutional protections—from limiting free speech,<sup>199</sup> to weakening the separation between church and state,<sup>200</sup> carving exceptions to the Equal Protection Clause,<sup>201</sup> eliminating the right to procure an abortion,<sup>202</sup> or reversing the right to birth citizenship.<sup>203</sup> Whereas most federal judges regard themselves as the guardians of constitutional protections, many of our elected officials seem to regard existing constitutional protections as mere impediments to their power. That factual record is one more justification, in addition to the many that we already saw, for the salubrious institution of judicial review.

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198. *See Measures Proposed to Amend the Constitution*, U.S. SENATE, [http://www.senate.gov/pagelayout/reference/three\\_column\\_table/measures\\_proposed\\_to\\_amend\\_constitution.htm](http://www.senate.gov/pagelayout/reference/three_column_table/measures_proposed_to_amend_constitution.htm)(last visited Feb. 24, 2016).

199. S. REP. NO. 108-334 (2004) (disallowing the desecration of the American flag).

200. H.J. REP. NO. 6 (2009) (making public school prayer constitutional).

201. H.R. REP. NO. 51 (2013) (prohibiting same sex marriages).

202. H.R. REP. NO. 816 (2015) (declaring that life begins at conception).

203. H.R. REP. NO. 6294 (2005) (removing automatic citizenship for those born in the U.S. to a non-U.S. parent).