

# Letter To Supreme Court (Erwin Chemerinsky is Mad. Why You Should Care.)

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Dear Supreme Court:

You may be wondering why I'm writing. Let me tell you.

I was asked to participate in a symposium about Erwin Chemerinsky's *The Case Against the Supreme Court*. I'm sure you know Chemerinsky. His book is a stinging condemnation of much that you do. And his goal—in which he does not nearly succeed—is to show your work to be unacceptable to the left and the right alike. He fancies that he is offering a non-partisan, non-ideological, non-denominational challenge to your hegemony.

I started to write my piece, and realized early on that I was talking to the wrong crowd. I was producing standard fare for a law journal audience.

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What occurred to me was that *you* needed to hear this; that I had to take a different approach and see if I could break through your Olympian façade.

Here's why. Although I think Chemerinsky is off base, that doesn't mean he is wrong. By which I mean to say there *is* some trouble at One First. He sees the pieces of the problem, but doesn't put the puzzle together in quite the way I would.

As you know, I've spent probably too many years paying attention to how the public regards you.<sup>1</sup> Although you're pretty much as solid as Mount Rushmore, this is in fact an odd time, one that does find you under attack from both the left and the right. That alone is exceedingly rare in American history, but it is much more than that. Your legitimacy is steadily being undermined by a series of attacks not just on your decisions—*that* is to be expected—but on your ethics, your refusal to do business in anything approaching an acknowledgement of the twenty-first century, your appearing to be so quite full of yourself at a time when that sort of attitude does not sit well with the public. The icing on the cake, though, is what people see as a certain hypocrisy: they observe the globe-trotting, speech-giving, public persona of many of you and can't help but notice how that sits uneasily at best with your claims of a need to remain aloof from us all.

In the end, no doubt, what matters to people are the results in decisions you render. And they tend at times to overvalue their losses and undervalue their wins. For that reason alone, it is no wonder you are making many across the ideological spectrum unhappy. But that, combined with the other phenomena I describe here, has led to your serious slide in the polls. All this may not affect you—but it might. Which is why although Chemerinsky is wrong on many accounts, you nonetheless should listen to at least some of what he has to say, and care about it.

I'm about to drop into the weeds a bit, so I should be clear about my line of argument. I'm going to take a little time explaining Chemerinsky's argument, and why you can dismiss a lot of it for what it is: a typical challenge to your work motivated by a left-leaning agenda. But then I'm going to make the point that what's unique in our time is a strangely similar attack coming from the right. As I say, it is quite rare for both extremes of the ideological spectrum to be unhappy simultaneously.

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1. See generally, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2011); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596 (2003).

What I very much want to nip in the bud though is any self-congratulatory sense you might have that cross-ideological unhappiness is simply a happy incident of your neutrality. To the contrary, poll numbers and public commentary suggest people are seeing you as ideological and result-oriented rather than reasoned lawgivers.

From there I want to turn from your decisions on the merits to your way of doing business, because here there is a resounding cry for change. To which you have been largely unresponsive. And that is precisely the problem. You won't get taken down a notch for how you do business; you may, however, pay a price for seeming close-minded and indifferent to suggestions people are making in all seriousness. You are, after all—like everyone in government—servants of the people. You at least need to listen thoughtfully to what they have to say. Instead, you appear not to care in the least, then exacerbate the situation with a set of public activities that really do at times seem deeply inconsistent with the institutional role that you play.

Finally, I will return briefly to the merits, just to suggest that at some level what all this adds up to is perhaps a confusion on your part about what it means to be a court.

Ultimately, I have three recommendations. The first, oddly enough, is process based. I think you need an Advisory Committee, to help you navigate the challenges of how an institution like yours should do business in the twenty-first century. These questions are complicated and you clearly need some help. The second is a plea for a little self-restraint in your personal behavior and pronouncements. The third, on which I close, is a suggestion for getting back to judicial basics.

You don't need to care about any of this. You are pretty invincible. But, as I'll point out within, not entirely so. This is something the Chief Justice seems to appreciate quite a bit. That's not the real reason to care, though. The real reason is because—if you buy the argument here—it is simply the right thing to do.

#### I. THE PROBLEM WITH CHERMERINSKY'S "*CASE AGAINST THE SUPREME COURT*"

Let's start with Erwin Chemerinsky's argument. He is deeply unhappy, there's no getting around it, but he's made an effort—at least he thinks he has—to point a non-denominational finger. He didn't want his book to be a liberal rant, he wanted to find common ground. He sought to make the case that you are failing at your most fundamental obligations, in a way everyone can agree upon.

For the most part, though, Chemerinsky's case is a liberal's case, even as he tries to avoid that conclusion. He's pretty entrenched in his own world view. That, for what it is worth, makes him only human—though to many he deservedly appears superhuman in what he manages to accomplish in any given day. Still, he can't get enough distance to see that he's hardly speaking for the entire crowd.

Chemerinsky's blinders are apparent when he claims to be speaking for the whole congregation and yet says things like "[t]hroughout American history, the Court has usually been on the side of the powerful—government and business—at the expense of individuals whom the Constitution is designed to protect."<sup>2</sup> Or: "In times of crisis, when the passions of the moment have led to laws that compromise basic rights, the Court has failed to enforce the Constitution."<sup>3</sup> That ignores the fact that business is what this Constitution was about from the outset. The Constitution is careful to ban trade restrictions, prohibit seizing of private property—it even protected slave owners.

Chemerinsky's primary tactic is to use some of your most despised decisions against you. He leads with *Buck v. Bell* ("three generations of imbeciles are enough"), devotes a lot of space to the forty-year attack on social legislation during the *Lochner* era, and then of course there's the rest of the familiar hit parade, including *Dred Scott*,<sup>4</sup> and *Korematsu*.<sup>56</sup>

Still, Chemerinsky's case is not quite as damning as he thinks.

First, and most important, Chemerinsky suffers from a serious "that was then, this is now" problem. Yes, *Lochner* is widely reviled today, and so too *Buck v. Bell* and many of the other decisions he points to. But they were not as universally condemned in the same way at the time you decided them. While you certainly had contemporaneous critics of these decisions, the fact is you had a lot of friends and defenders too, people who celebrated what you'd done. It hardly seems fair of Chemerinsky to call you out-of-step back then based on an appraisal of your work from today's perspective. At the least, Chemerinsky's attempt at appealing to bi-partisan (or bi-ideological) instincts requires showing that everyone was unhappy at the time.

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2. ERWIN CHERMERINSKY, THE CASE AGAINST THE SUPREME COURT 10 (2014).

3. *Id.*

4. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

5. *Korematsu v. United States*, 323 U.S. 214 (1944).

6. *Buck v. Bell*, 274 U.S. 200, 207 (1927); CHERMERINSKY, *supra* note 2, at 6.

Chemerinsky's likely to respond that I'm not quite representing him faithfully here, that he establishes a metric and that is what he accuses you of violating. He says (based on his view of your constitutionally-assigned role) there are two questions we should be asking: "How [have you] done in protecting the rights of minorities of all types? How [have you] done in upholding the Constitution in the face of the repressive desires of political majorities?"<sup>7</sup>

But it's precisely here that Chemerinsky's case unravels. Because arguably that is exactly what you and your predecessors believed they were doing in many of the cases Chemerinsky deplors. Certainly that is what you thought you were up to in *Dred Scott*, and in most of the forty years of judicial history Chemerinsky attacks between the Progressive Era and New Deal. As you saw it, you were protecting besieged parties (slaveholders, the upper classes) and built-in constitutional protections (mostly for property) against the pillaging mob.

Now, to give credit where it is due, what Chemerinsky seems to have put his finger on—and there is something to it—is that you often find yourselves on the wrong side of history. You bet an awful lot on the losers. But it is precisely on this score that it becomes clear Chemerinsky has put you in an impossible position.

Chemerinsky says he went to law school "because I believed that law was the most powerful tool for social change and that the Supreme Court was the primary institution in society that existed to stop discrimination and protect people's rights."<sup>8</sup>

That's exactly the problem.

Chemerinsky is (on the one hand) looking to you for "social change" and (on the other) insisting that constitutionalism is like Ulysses tying himself to the mast. He can't have it both ways, really. In truth, the anti-discrimination decisions that Chemerinsky rightfully admires—like *Brown v. Board of Education*, or the push for gender equality under law—likely reflect the *evolution* of the Constitution, not its original meaning.<sup>9</sup> And that's the rub. Either you are holding fast, fulfilling one of Chemerinsky's assigned purposes for judicial review, or you are modifying the original intent to help Chemerinsky's downtrodden, fulfilling the other. He's got you in quite a whipsaw there.

In fact, we can now see clearly why Chemerinsky is so very disappointed. His heroic image of you is pure Warren Court

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7. CHEMERINSKY, *supra* note 2, at 10.

8. *Id.* at 5.

9. *Id.* at 122 (admiring *Brown*).

liberalism, and sharply at odds with his own description of the Siren Resistant Court. Possessing a set of desires that are impossible to satisfy, no wonder he's dejected.

It's too bad, because the truth about you is right in front of Chemerinsky's eyes—but for some reason he can't quite blink away the film that obscures it. Talking about your failure to enforce desegregation until Congress enacted the Civil Rights Act in 1964, and the problem of white flight, he says, "It is possible that this reflects the inherent limits of what the judiciary can do."<sup>10</sup> Speaking of *Carrie Buck*, and *Fred Korematsu*, and *Dred Scott*, he observes that "part of the answer is that the justices live in society and thus are likely to reflect its attitudes and values at any point in time."<sup>11</sup> Bingo! Chemerinsky writes these sorts of arguments off as just making more excuses for you, and he's tired of making excuses. But they may be reality, not excuses.

People who ask too much from you are bound to be disappointed. Chemerinsky makes the case that *Buck v. Bell* was wrong by pointing to how you recanted in *Skinner v. Oklahoma*. But *Buck v. Bell* was handed down in 1827, the heyday of the eugenics movement. *Skinner* was decided in 1942, when Naziism had crushed any enthusiasm for programming human genetics.<sup>12</sup> For better or for worse, you are the product of your times. Between that and the fact that aside from one brief Warren Court moment—which itself had its explanation—you basically are a (small "c") conservative institution; it is no wonder a dyed-in-the-wool liberal like Chemerinsky is not happy.

Even when you do good (in Chemerinsky's terms), he always looks to rob you of any real credit. He concedes that lots of your cases are unanimous, but then he has to qualify that by pointing out that "not all cases are of equal significance in the law or in society." Of course, you've decided some cases of momentous significance in ways he finds correct, like your decision upholding the Affordable Care Act. Yet, again though, less credit than due: "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>13</sup> You just can't win for losing with Chemerinsky.

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10. *Id.* at 156.

11. *Id.* at 293.

12. PAUL A. LOMBARDO, THREE GENERATIONS, NO IMBECILES: EUGENICS, THE SUPREME COURT, AND *BUCK V. BELL* 226 (2008).

13. CHEMERINSKY, *supra* note 2, at 233.

So there you have it. A leaky “case” against you, by a guy who’s bound to dislike you anyway.

## II. THE CASE FOR ERWIN CHEMERINSKY

But here’s the thing. Whatever else you want to say about Erwin Chemerinsky, he’s sincere. Chemerinsky is nothing if not sincere. As anyone who knows him will tell you so. And Chemerinsky is in pain. He informs us: “This book was far harder to write than I could have imagined.”<sup>14</sup>

The question is *why* Chemerinsky is in pain? You’d think this would be the easiest thing in the world for him, going after a Court he sees as overly conservative. Like shooting fish in a barrel.

The reason is because deep in his heart—despite his beefs with the outcomes of cases—Chemerinsky has always been an Acolyte. He’s one of your faithful. He *is* the faithful. If anyone is the voice of the Supreme Court, it is—ironically enough—Erwin Chemerinsky. No one—but *no one*—can explain better or more clearly what you folks are saying. When it comes to Supreme Court opinions, many people see him as the Oracle at Delphi. There’s a reason he is in huge demand as a speaker, that his treatises on federal jurisdiction and constitutional law are crazy best sellers, and that he is one of the most cited legal scholars of all time (right up there with Cass Sunstein, Richard Epstein, and Richard Posner).<sup>15</sup>

So, the risk is that if you’re losing Chemerinsky, you’re losing everyone else that matters. As it turns out, what we might call the “Chemerinsky phenomenon” is hardly limited to Chemerinsky himself.

Indeed, it’s really hard to find a time in history when so many on contending sides of the issues could come together in agreement that your institution poses a real problem. The only remotely similar time that comes to mind is when you resolved the *Legal Tender Cases* back in 1870-71. You decided that paper money was not legal tender, the President then filled two vacant seats on your bench, you flipped the other way, and the country—supporters of the second decision and all—volubly expressed its disapproval.<sup>16</sup>

But what’s happening now is different. It isn’t about one decision. It’s deeper. And the right is every bit as unhappy as the left.

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14. *Id.* at 343.

15. Miranda Rosati, *Most-Cited Authors—2013 Edition*, HEINONLINE HELP & SUPPORT (Nov. 19, 2013), <https://help.heinonline.org/2013/11/most-cited-authors-2013-edition/> [<https://perma.cc/BCE8-MQKP>].

16. See FRIEDMAN, *supra* note 1 at 135.

## III. THE CONSERVATIVE CASE AGAINST THE SUPREME COURT

From the conservative perspective, the halcyon days of the present Chief Justice's tenure undoubtedly came around January 2010, with your decision in *Citizens United*.<sup>17</sup> A conservative majority was firmly in control and moving the law in the correct direction.

Or so it seemed.

The trouble began with The Case of the Century, the epic battle that culminated in your first decision in *NFIB v. Sebelius*.<sup>18</sup> Conservatives were understandably distraught when they lost what looked like a sure thing. Then came Jan Crawford Greenburg's eye-popping revelation of the Chief doing an about face far into the game.<sup>19</sup>

Some, like leading conservative legal thinker Randy Barnett, who'd basically cooked up the whole challenge, tried to put a brave face on it.<sup>20</sup> Although Obamacare had to fight another day, the Commerce Clause challenge had been sustained.<sup>21</sup>

Most on the right, though, were not having any of it. Authors in the *Cato Review* pummeled the decision, pointing out that your ruling allowing Congress basically to tax inactivity "can achieve exactly the same result" as was possible under the Commerce Power.<sup>22</sup> (Not only does that seem right, it may be worse. The likelihood of Congress making us eat broccoli and buy Oldsmobiles always seemed pretty remote; on the other hand, one can see the ready appeal of a revenue hungry legislature looking for things to tax and finding that doing nothing qualifies.) *Cato* said that besides "a blue pencil" it took "Olympian intellectual gymnastics" and a "conveniently blind eye" to your own precedents to make the taxing argument work.<sup>23</sup>

These criticisms from the right—that you were rewriting congressional statutes for self-perceived institutional reasons, replacing legal reasoning with evident manipulation, general disgust—surfaced in spades two years later when (among other

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17. 558 U.S. 310 (2010).

18. 132 S. Ct. 2566 (2012).

19. Jan Crawford, *Roberts Switched Views to Uphold Health Care Law*, CBS NEWS (July 2, 2012, 9:43 PM), <http://www.cbsnews.com/news/roberts-switched-views-to-uphold-health-care-law/> [https://perma.cc/4V3Z-5XD9].

20. Randy Barnett, *Health Care Ruling: A Strange Constitutional Win*, WASH. EXAMINER (June 28, 2012, 12:00 AM), <http://www.washingtonexaminer.com/health-care-ruling-a-strange-constitutional-win/article/2500883> [https://perma.cc/ZK3Z-GXPU].

21. *Id.*

22. David B. Rivkin, Jr. et al., *NFIB v. Sebelius and the Triumph of Fig-Leaf Federalism*, 2011–12 CATO SUP. CT. REV. 31, 55 (2012).

23. *Id.* at 46, 60.



things) you upheld Obamacare again in *King v. Burwell*, then *just one day later* in *Obergefell* made same-sex marriage the law of the land.

Polls showed strong support for what you did in *Obergefell*, but among evangelicals and some on the far right, this was heresy. Ryan Anderson, writing in the *National Review*, said “[f]ive unelected judges do not have the power to change the truth about marriage or the truth about the Constitution.”<sup>24</sup> And from Robert George, in *First Things* (in a symposium devoted to anguish about the decision), a *cri de coeur*: “[l]awless” is what he called it, comparing it to *Dred Scott*, and invoking Lincoln: “To accept it,” would be for the American people “to resign their government into the hands of that eminent tribunal.”<sup>25</sup>

Even those on the right who agreed with the outcome in *Obergefell* still were aghast at the words that tumbled out of Justice Kennedy’s pen. Over at the *Volokh Conspiracy*, Ilya Somin said “Unfortunately, much of Justice Anthony Kennedy’s majority opinion is based on dubious and sometimes incoherent logic.”<sup>26</sup> “[T]he law and the Constitution had little to do with it,” editorialized the *National Review*: Rather, this was about “love”—“and the law can’t fight love.”<sup>27</sup> The most scathing criticism though came from within your own ranks: engaging in typical sharp-tongued rhetoric, your recently-lost colleague Nino Scalia wrote that “If I ever joined [such] an opinion . . . I would hide my head in a bag.”<sup>28</sup>

It was the one-two punch of *Obergefell* coming a day after *King* that really lost the right. Once again the Chief was taken to task for rewriting a congressional act. “Words don’t mean anything. Laws don’t mean anything,” wrote *Breitbart*’s Ben Shapiro.<sup>29</sup> What really got the

24. Ryan T. Anderson, *Judicial Activism from the Court on Marriage: Here’s How to Respond*, NAT’L REV. (June 26, 2015, 5:00 PM), <http://www.nationalreview.com/article/420397/judicial-activism-court-marriage-heres-how-respond-ryan-t-anderson> [https://perma.cc/2H55-DSS6].

25. Robert P. George, *After Obergefell: A First Things Symposium*, FIRST THINGS (June 27, 2015), <http://www.firstthings.com/web-exclusives/2015/06/after-obergefell-a-first-things-symposium> [https://perma.cc/24MV-FSBG].

26. Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, VOLOKH CONSPIRACY (June 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/> [http://perma.cc/2BD8-KJPM].

27. David French, *The Supreme Court Ratifies a New Civic Religion That Is Incompatible with Christianity*, NAT’L REV. (June 26, 2015), <http://www.nationalreview.com/article/420376/marriage-christians-religion-love> [https://perma.cc/8N2C-S9TC].

28. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2630 n.22 (2015) (Scalia, J., dissenting).

29. Alexandra Boguhn et al., “Words Don’t Mean Anything”: Conservative Media React to Supreme Court’s Health Care Decision, MEDIA MATTERS (June 25, 2015), <http://mediamatters.org/research/2015/06/25/the-end-of-america-as-we-know-it-conservative-m/204135> [https://perma.cc/K6ZM-KWZ5].

attention, though, was the line in the Chief's dissent in *Obergefell*, "But this Court is not a legislature."<sup>30</sup> Many felt they'd seen the Court be just that in *King*. Andrew McCarthy at the *National Review* was direct: "It takes a Clintonium quantum of cheek to pull that off one day and, on the next, to inveigh against the very thought of it."<sup>31</sup>

By this time "Judicial Activism" was becoming such a common phrase out of the right's mouth that you'd have thought we were reading about the Warren Court. That was the Fox Network's party line, with Karl Rove (yes, Karl Rove) leading the charge.<sup>32</sup> Robert George's accusation of lawlessness was another increasingly popular way of summing up your work.<sup>33</sup> And that was the nice stuff. Media Research Center VP Dan Gainor said the Chief had been "an awful pick" for the Supreme Court, and then called him a name I can't even repeat here.<sup>34</sup>

#### IV. WHAT THE PEOPLE THINK

I know *exactly* what some of you are thinking. That this is exactly what happens with a truly independent court. Your very merit rests in the fact that you are bipartisan disappointers, that you follow the law where it leads and let the chips fall where they may.

That would be a nice story if it were true. But it is decidedly *not* what people are thinking as they watch you decide cases. Or at least that is what the polls say.

For decades now the judiciary has had the highest approval rating among the three branches of government.<sup>35</sup> True, that may not always be saying much, especially compared with longstanding discontent about Congress. Still, the judiciary's public trust rating has

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30. *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

31. Andrew C. McCarthy, *Let's Drop the Charade: The Supreme Court Is a Political Branch, Not a Judicial One*, NAT'L REV. (June 27, 2015), <http://www.nationalreview.com/article/420417/supreme-court-john-roberts-marriage-health-care-constitution> [<https://perma.cc/LMU3-VXVE>].

32. Boguhn, *supra* note 29.

33. George, *supra* note 25.

34. Emma Margolin, *Obamacare Decision Turns Roberts from Conservative Dream to Nightmare*, MSNBC (June 25, 2015), <http://www.msnbc.com/msnbc/obamacare-decision-turns-john-roberts-conservative-dream-nightmare> [<https://perma.cc/4KZN-ETKS>].

35. Jeffrey M. Jones, *Trust in U.S. Judicial Branch Sinks to New Low of 53%*, GALLUP (Sept. 18, 2015), <http://www.gallup.com/poll/185528/trust-judicial-branch-sinks-new-low.aspx> [<https://perma.cc/EB3Z-QQWE>] ("Americans have consistently had more trust in the judiciary than in the other two government branches . . .").

tumbled from a whopping 80% in 1999 to 52% today.<sup>36</sup> And, for what it is worth, most of that fall has happened since 2009.<sup>37</sup>

It's hard to believe you aren't playing a big role in those tumbling numbers. You are the most public face of the judiciary, after all. As recently as 2010 your approval rating way exceeded disapproval (it was a 61-28 spread in one poll).<sup>38</sup> It had been that way since 2001, but for a bump around 2005 (likely because of your decision in *Kelo*).<sup>39</sup> But since 2010, your approval's been dropping and disapproval's been rising, such that in the last two years the lines have been crisscrossing below 50%.<sup>40</sup> Indeed, in any number of polls your approval rating seems to have lost at least ten points over the last fifteen years.<sup>41</sup>

Of late, a lot of this tumble understandably is being driven by Republicans, but unlike other periods in polling history it does not look like the slack is being picked up by the other side. Someone's always disappointed by your decisions, and the numbers bounce around—but typically they quickly bounce back after high profile decisions. After *Bush v. Gore*, for example, you lost Democrats' support for a short bit, but Republicans compensated.<sup>42</sup> Then it all smoothed out. Not so now: you, a court that has leaned conservative and Republican-appointed a long time, seem to be on a slow descent among your own, and the Democrats are not rushing in to fill the void.

What really ought to catch your attention, though, is that this drop in support seems to reflect a loss of faith that you are up to anything other than simple ideological politics. The title of Andrew McCarthy's piece in the *National Review* says it all: "Let's Drop the Charade: The Supreme Court is a Political Branch, not a Judicial One."<sup>43</sup> *Breitbart* likened the first ACA decision akin to *Bush v. Gore*: "[l]iberals have long believed the Court is merely a political

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36. Jeffrey M. Jones, *Republicans' Approval of Supreme Court Sinks to 18%*, GALLUP (July 16, 2015), <http://www.gallup.com/poll/184160/republicans-approval-supreme-court-sinks.aspx> [<https://perma.cc/8JY8-CMGW>].

37. See Jones, *supra* note 35.

38. *Supreme Court*, GALLUP, <http://www.gallup.com/poll/4732/supreme-court.aspx> (last visited May 10, 2016) [<https://perma.cc/U7HX-Y6KU>].

39. See *id.* (noting a dip in approval around 2005); *Kelo v. City of New London*, 545 U.S. 479 (2005).

40. *Id.*

41. *Id.*

42. Jones, *supra* note 35.

43. McCarthy, *supra* note 31.

institution. For conservatives [now] it will be difficult not to see the Court as a political institution whose rules and culture are hostile.”<sup>44</sup>

Polling indicates people are seeing you more as opinionated ideologues than judges. The data does not go back far, but when people are asked whether your decisions are based solely on law, or include your personal and political views, whopping margins say the latter.<sup>45</sup> One *New York Times* poll had it that as high as seventy percent or more who think something other than law is happening.<sup>46</sup>

That’s the same thing some pretty tony Republicans and conservatives have been saying. Fred Thompson, the former Senator (and lawyer, and movie actor), now deceased, pointed a finger of rectitude. Maybe (he speculated) you had one or another political motive for your ACA decision. But still:

The problem is that none of these considerations are an appropriate basis for deciding a lawsuit. Cases are still supposed to be decided upon the law and the facts before the court. This may seem a mundane point in a discussion involving institutional and national salvation, but it’s true nevertheless. An umpire does not concern himself with the outcome of the game as he is calling balls and strikes.<sup>47</sup>

In invoking the umpire, Thompson was recalling the Chief Justice’s analogy during his confirmation hearings: “umpires don’t make the rules, they apply them.”<sup>48</sup> The left had called foul to that claim long before, but all of a sudden everyone seemed to think the umpire was playing for some team—even if they could not say exactly which one.

Does any of this matter? As I said at the outset, it’s rare that any of these chickens come home to roost. It’s been a long time—decades—since any other branch of government managed to take more than a trivial swipe at you.

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44. Joel B. Pollak, *Wrong, Wrong, Wrong: The Supreme Court’s Worst Decision Since Kelo*, BREITBART (June 28, 2012), <http://www.breitbart.com/big-government/2012/06/28/wrong-wrong-wrong-the-supreme-court-worst-decision-since-kelo/> [<https://perma.cc/U9BD-PLPP>].

45. *Supreme Court/Judiciary*, POLLINGREPORT.COM, <http://www.pollingreport.com/court.htm> (last visited May 10, 2016) [<https://perma.cc/J5AS-ZV5B>].

46. *Id.* A Democracy Corps poll put it closer to 60%. Stan Greenberg et al., *Broad Bi-Partisan Consensus Supports Reforms to Supreme Court*, DEMOCRACY CORPS (May 7, 2014), [http://www.democracycorps.com/attachments/article/979/DCorps%20SCOTUS%20Memo%20FIN](http://www.democracycorps.com/attachments/article/979/DCorps%20SCOTUS%20Memo%20FINAL%20050614.pdf)

AL%20050614.pdf [<https://perma.cc/P43T-YJEX>].

47. Fred Thompson, *The Roberts Opinion: Pessimistic Liberals and Optimistic Conservatives Both Get It Wrong*, NATIONAL REVIEW (July 3, 2012 4:00 AM), <http://www.nationalreview.com/article/304641/roberts-opinion-fred-thompson> [<https://perma.cc/3QP5-VPK8>].

48. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005).

Still, there are troubling noises abroad in the land—which brings us to what may be the far more potent aspect of Chemerinsky's critique

#### V. TIME FOR CHANGE?

After agonizing over all this for some time, Chemerinsky decided that no matter how frustrated he was with your handiwork, he remained in favor of judicial review. He thought through the matter carefully, flirted with the extreme position advocated by some others, and ultimately came to the view that radical change was not appropriate. Judicial review should stay, he concluded, if for no other reason than that it is exercised by all the courts in the land: even when things seem a mess at the top, it is important to have lower court judges that can cry constitutional foul when the other branches go awry.<sup>49</sup>

Instead, Chemerinsky concluded, what was needed was some important change in the way you do business. He's got a long list, and it is pretty indicative of how off the rails he thinks the train is. To name a few items on it, he wants you to allow cameras in the courtroom, change your opinion-writing and opinion-releasing practices, bolster your ethics and recusal rules, change the selection and confirmation process for new justices, and even eliminate life tenure.<sup>50</sup> That's quite the agenda.

What you need to understand is that in all of this Chemerinsky has wide, wide support from across the ideological spectrum. Sure, some of this is obscure insider baseball, but a lot gets broader traction. Democracy Corps conducted a national poll on much of this, and—as the authors put it—there was “overwhelming” approval for all the “reform” issues they raised.<sup>51</sup> Roughly seventy percent of the country wants live broadcasts, by camera, internet, or audio, of your proceedings.<sup>52</sup> There's lots of concern about ethics and finances, and strong support for increasing reporting requirements and to make you follow the same ethical code other federal judges must.

But it goes well beyond this. Just under three-quarters of the country think it's time to get rid of life tenure altogether and replace it with eighteen year fixed terms.<sup>53</sup> Calls to do so are coming from across

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49. See CHEMERINSKY, *supra* note 2, at 267–93.

50. CHEMERINSKY, *supra* note 2, at 310 (term limits), 313 (cameras), 317 (opinion practices), 323 (ethics and recusal).

51. Greenberg, *supra* note 46.

52. *Id.*

53. *Id.*

the spectrum of public intellectuals. Those in favor on the left include Chemerinsky, Akhil Amar, and Henry Monaghan.<sup>54</sup> On the right you find leading lights: Steve Calabresi (founder of the Federalist Society), politicians like Rick Perry and Michael Huckabee, and conservative thinkers like John McGinnis and Sai Prakash.<sup>55</sup> Even Justice Breyer has said this might make sense.<sup>56</sup> Calabresi, an originalist if ever there was one, argues scathingly (along with coauthor Jim Lindgren) that “Although life tenure for the Supreme Court may have made sense in the eighteenth-century world of the Framers, it is particularly inappropriate now, given the enormous power that Supreme Court Justices have come to wield.”<sup>57</sup> Strong words.

Moreover, the movement to limit life tenure looks positively quotidian compared to what Senator Ted Cruz has to say. This serious contender for the head of the Republican ticket in 2016 thinks you should stand for retention elections.<sup>58</sup> He’s every bit as unhappy as Chemerinsky: “The Court’s brazen action undermines its very legitimacy,” he wrote, and so he wants to hold you accountable.<sup>59</sup> Indeed, in tone Cruz sounds remarkably like Chemerinsky:

As a constitutional conservative, I do not make this proposal lightly. I began my career as a law clerk to Chief Justice William Rehnquist—one of our nation’s greatest chief justices—and I have spent a decade litigating before the Supreme Court. I revere that institution, and have no doubt that Rehnquist would be heartbroken at what has befallen our highest court. But, sadly the Court’s hubris and thirst for power have reached unprecedented levels. And that calls for meaningful action, lest Congress be guilty of acquiescing to this assault on the rule of law.<sup>60</sup>

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54. CHEMERINSKY, *supra* note 2, at 310; Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211 (1988); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23.

55. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 775 (2006); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541–43 (1999); Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 570–73 (1999); Seema Mehta, *Huckabee Calls for Term Limits on U.S. Supreme Court Justices*, L.A. TIMES (March 18, 2015), <http://www.latimes.com/nation/politics/politicsnow/la-pn-huckabee-term-limits-supreme-court-20150328-story.html> [<https://perma.cc/3PRY-DC26>].

56. Stephanie Ward, *Justice Breyer Says He Could Support Certain SCOTUS Term Limits*, A.B.A. J. (Jan. 8, 2016 1:15 PM), [http://www.abajournal.com/news/article/justice\\_breyer\\_says\\_he\\_could\\_support\\_certain\\_scotus\\_term\\_limits](http://www.abajournal.com/news/article/justice_breyer_says_he_could_support_certain_scotus_term_limits) [<https://perma.cc/4ULC-YH6E>].

57. Calabresi & Lindgren, *supra* note 55, at 772.

58. Ted Cruz, *Constitutional Remedies to a Lawless Supreme Court*, NAT’L REV. (June 26, 2015), <http://www.nationalreview.com/article/420409/ted-cruz-supreme-court-constitutional-amendment> [<https://perma.cc/AV6E-XQ28>].

59. *Id.*

60. *Id.*

Effecting this kind of fundamental change would not be easy, of course, and thus is unlikely to happen. There are proposals to impose term limits by statute, the leading contender—advanced both by Calabresi and Paul Carrington—being a regular system of staggered appointments every two years and eighteen-year limits.<sup>61</sup> But Calabresi himself acknowledges these probably run into constitutional trouble.<sup>62</sup> A constitutional amendment is never an easy thing to accomplish.

Still, I do need to offer up a caution. What the Constitution requires—and what it does not—has a nasty way of changing depending on how urgent an issue seems to the country at any moment.

It's more than that though. What you need to understand is that the frequent criticisms about how you do business reflect a growing negative image problem you have. Any number of critics seem to think you are ethically challenged, insufficiently transparent, sometimes lazy, maybe even a bit sloppy. That's *not* me talking; it is what people are saying. Notable people with good reputations.

The problem, as I see it, is that all too often you come off as generally disrespectful of the demos. It's one thing to be independent in that sort of aloof way that suggests you hold yourself outside of politics. It is another to look as though you are better than the rest of us. The last decades have seen authority taken down a peg in this country, and you've managed to come out of that okay. You aren't helping the case, though, by turning a deaf ear to what is being said about you, by being largely unresponsive to what are entirely reasonable demands. Many of your critics these days are well meaning people trying to save you from yourselves, something you seem to miss entirely.

To hear people tell it, all too often it looks as though you are using your institutional independence to grant yourself favors, while at the same time acting in ways that actually undercut the notion that you are truly independent of political life.

Let's start with ethics. You—if anyone—have to be entirely above reproach. And you've not been, whether it was your late colleague Justice Scalia duck hunting with Dick Cheney or Justice Breyer voting in a case in which his wife held stock in one of the parties.<sup>63</sup> My own sense is that most of this is not very significant, or

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61. Calabresi & Lindgren, *supra* note 55.

62. *Id.* at 855.

63. Steve Twomey, *Scalia Angrily Defends His Duck Hunt With Cheney*, N.Y. TIMES (Mar. 18, 2004), <http://www.nytimes.com/2004/03/18/politics/scalia-angrily-defends-his-duck-hunt-with->

is the result of completely honest errors. But sloppiness won't cut it here, and neither will a tin ear. As Charlie Geyh said in an ABA report on state judges voting in cases involving campaign donors: "It is not enough that judges *be* impartial; the public must *perceive* them to be so."<sup>64</sup> You've said the same yourself when pointing the finger at others. (*See, e.g., Caperton.*)<sup>65</sup>

Similarly, you don't practice what you ethically preach. You aren't bound by a judicial ethics code. The Chief says you "consult" it, but as many point out there's a big difference between being bound by something and checking it out when you feel like it.<sup>66</sup> Similarly, your recusal practices trouble many.<sup>67</sup> The rules are opaque. And you make the decisions on your own without any sort of review, leading some to point to the maxim that people should not be judges in their own case. You respond that you need a full bench so business gets done; ergo you must sit if you possibly can. But that argument just doesn't hold water for those who perceive the appearance of impropriety.

Speaking of appearances of impropriety, you really should take the question of your public "appearances" much more seriously. Years ago, when I was young and naïve, I asked a federal district court judge to speak at a Tennessee Civil Liberties Union event. His discomfort was palpable and surprised me at the time. I get it now. Although this seems not to occur to you, I seriously question whether you should be headliners at Federalist Society and American Constitution Society events, where the red-meat crowds gather to debate constitutional issues and the legal-constitutional direction of the country. The job you hold demands circumspection. During confirmation hearings you claim you can't discuss matters that could come before you, but then some of you regularly hit the stump to express views *ex cathedra*

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cheney.html [https://perma.cc/J4ZY-MZKG]; Sam Hananel, *Supreme Court Justice Took Part in Case Despite Wife's Stock Ownership*, PBS NEWSHOUR (Oct. 16, 2015), <http://www.pbs.org/newshour/making-sense/conflict-interest-supreme-court-justices-stocks/> [http://perma.cc/AL7U-GRRH].

64. FEDERAL JUDICIAL CENTER, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 1 (2d ed. 2010).

65. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009).

66. Editorial, *Judicial Ethics and the Supreme Court*, N.Y. TIMES (Jan. 5, 2012), [http://www.nytimes.com/2012/01/06/opinion/judicial-ethics-and-the-supreme-court.html?\\_r=0](http://www.nytimes.com/2012/01/06/opinion/judicial-ethics-and-the-supreme-court.html?_r=0) [https://perma.cc/SQ8J-V4UV].

67. *See, e.g.,* Gabe Roth, *At the Supreme Court, Conflicts of Interest Are Just a Day at the Office*, L.A. TIMES (Nov. 30, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-roth-supreme-court-transparency-20141201-story.html> [https://perma.cc/Y2E5-JN4S]; Ed Whelan, *Injudicious Ginsburg*, NAT'L REV. (Feb. 19, 2015), <http://www.nationalreview.com/article/414026/injudicious-ginsburg> [https://perma.cc/4KXQ-6GD9]; ALLIANCE FOR JUSTICE, A SUPREME COURT JUSTICE'S RECUSAL DECISIONS SHOULD BE TRANSPARENT AND REVIEWABLE 3 (2011), <http://www.afj.org/wp-content/uploads/2013/11/recusal-afj-memo.pdf> [https://perma.cc/PZV6-945S].



about all sorts of things that are best left unsaid—by you at least. And it is well beyond unacceptable that you should ever appear at closed door gatherings of the faithful and their fundraisers in either party. If you want to be famous out in the public eye, you should consider different employment. You are not rock stars; you are judges.

Next, consider the contrast between all this public engagement as individuals and your seriously distressing lack of institutional transparency. Most officials post their financial disclosures on the web. You require snail mail applications, impose fees for copying, and then insist that the disclosures get picked up or mailed hard copy. Even if some interest groups go to the trouble and post it for the rest of us, what matters is that with practices like these you seem clueless at best and arrogant at worst. At the end of 2014, the Chief announced you were going to enter the modern world by making filings available electronically.<sup>68</sup> He did it in a report that spent a lot of time talking about how slow you were to get rid of pneumatic tubes, saying, “The courts will always be prudent whenever it comes to embracing the ‘next big thing.’” The “next big thing” to which he was referring is, of course, computers. He was trying to be humorous perhaps, but once again it looked simply out of touch. And the Chief didn’t help matters by embargoing his annual report until the evening of New Year’s Eve, a typical ploy to avoid media attention.

I know you want to ignore it, but the public drumbeat for transparency is only going to get louder. You are kidding yourself if you think you can play the ostrich and it will go away. Today there are calls from Court insiders for you to reveal how you vote on certiorari petitions, and for more disclosure of what Will Baude calls the “shadow docket” (the “orders list” to the rest of us).<sup>69</sup> Insisting on these sorts of things would have been real rarities not long ago, but now the clamor only grows. My advice is to give serious thought to where to draw your lines, and draw some reasonable ones, lest you slowly get forced into going places you don’t want to—and perhaps should not. (I, for one, am quite ambivalent on the cert vote issue; I’m not certain what is gained by more transparency here, and much might be lost.)

Item A on any agenda for catching up with the twenty-first century has to be cameras in the courtroom. This implicates nothing about your inward deliberative role; it is about what you do and *must*

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68. Adam Liptak, *Supreme Court, in Big Leap, Plans to Put Filings Online*, N.Y. TIMES (Dec. 31, 2014), <http://www.nytimes.com/2015/01/01/us/politics/supreme-court-plans-to-provide-briefs-and-filings-electronically.html> [<https://perma.cc/E7WY-AMML>].

69. William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J.L. & LIBERTY 1, 1 (2015).

do in the public eye. Many people believe it simply unacceptable that in order to see you do your job in this day and age, people have to come to Washington, D.C. only to stand in long lines for short glimpses. Huge majorities of your fellow citizens are of this view. As Representative Jerry Nadler asks, "How is it that we can keep up with the Kardashians, but we cannot keep up with the Supreme Court?"<sup>70</sup>

Your arguments against cameras are thin gruel at best. Most if not all of you supported cameras when asked at confirmation. What justifies the about-face; what secret have you learned in your holy of holies? The Chief says, "It's not our job to educate the public." But people are not looking for you to educate them: you work for them, and they want to see you perform your public functions. You express concern about lawyers acting out in front of cameras, but much too much is at stake for them to do this; what really discomfits you is that *you* may be seen grandstanding. You worry some of you will end up in clips on late night television. But whose fault is that? The Chief admits he can barely control the bench.<sup>71</sup> And yet, honestly, when all is said and done, I'd wager you that putting cameras in your courtroom would only enhance your public standing. For all your foibles, oral arguments are extremely impressive and awe-inspiring. Why this incredible lack of faith in yourselves?

To return to a prior point, what's hard for many to take is the juxtaposition between forbidding cameras as you perform the people's work, while at the same time demonstrating that you are happy to go globe-trotting and appear in the media when it suits your personal purposes. It's hard to miss the irony of Steven Breyer appearing on *The Late Night Show* with Stephen Colbert to hawk "The Court and the World," and hearing him—during that appearance—try to explain to the millions of viewers why they can't watch him at oral argument.<sup>72</sup> People don't understand what is up, and it is too much to expect them to do so.

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70. Steven Nelson, *Congressmen Rally to Open Supreme Court to Cameras*, U.S. NEWS & WORLD REP. (Oct. 8, 2015), <http://www.usnews.com/news/articles/2015/10/08/congressmen-rally-to-pry-open-supreme-court-to-cameras> [<http://perma.cc/A2JC-GUYV>].

71. See, e.g., Dahlia Lithwick, *The Women Take Over*, SLATE (Mar. 2, 2016), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2016/03/in\\_oral\\_arguments\\_for\\_the\\_texas\\_abortion\\_case\\_the\\_three\\_female\\_justices.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2016/03/in_oral_arguments_for_the_texas_abortion_case_the_three_female_justices.html) (describing oral argument in *Whole Woman's Health v. Hellerstedt*, where "Roberts los[t] almost complete control over the court's indignant woman, who are just not inclined to play nice anymore").

72. Jacob Gershman, *Justice Breyer, on 'Late Show,' Defends Ban on Cameras in the Supreme Court*, WALL ST. J. LAW BLOG (Sept. 15, 2015, 10:37 AM), <http://blogs.wsj.com/law/2015/09/15/justice-breyer-on-late-show-defends-ban-on-cameras-in-the-supreme-court/> [<https://perma.cc/X5EC-EU7N>].

I'd like to touch on one final form of transparency, which is the quality of your written product. Here, as with cameras, I join the chorus of complaints. Adam Liptak wrote a story a little while back about the growing length of your opinions.<sup>73</sup> *Brown v. Board of Education* was 4,000 words; *Parents Involved* was 47,000.<sup>74</sup> *Citizens United* was roughly “the length of *The Great Gatsby*,”<sup>75</sup> and frankly has required as much explaining as the green light at the end of Daisy's pier. The median in the 1950s was 2,000 words; now it is well over 8,000.<sup>76</sup> Richard Posner—who does have standing to talk about opinion writing because he deserves reading—called your recent end of term fare “unnecessarily long, misleadingly long, and tedious.”<sup>77</sup>

Length, in short, hardly brings clarity.

It doesn't take a rocket scientist to see why a spiraling increase in the length of opinions is happening. Word processing technology has made it possible to drench us in a flood of language. Your law clerks are doing most of the work. They are former law review editors, which gives you a sense of what they think effective prose looks like.

And yet, the increase in length hardly seems justifiable given how few cases you dispose of these days on the merits. It is like the old adage, if I had more time I'd have written you a shorter letter. You have worlds of time. Your caseload is at an all-time low. How hard is it to write opinions on eighty cases in one year in a relatively concise way? When asked advice on legal writing, you—as National Public Radio summed it up—say, “Skip the Legalese and Keep it Short.”<sup>78</sup> You would do well to practice what you preach.

What you have to understand about these varied concerns about transparency is that people think you are hiding things. Not the crazies, I remind you. Respectable voices, writing in noted media outlets. Posner called the length of your opinions “padding” that you add so that people think the law is deciding things, rather than you: “Great justices and judges, most famously Oliver Wendell Holmes,

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73. Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), [http://www.nytimes.com/2010/11/18/us/18rulings.html?\\_r=0](http://www.nytimes.com/2010/11/18/us/18rulings.html?_r=0) [<https://perma.cc/W548-Z8W9>].

74. *Id.*

75. *Id.*

76. *Id.*

77. Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 21, 2013), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/supreme\\_court\\_the\\_biggest\\_flaw\\_in\\_the\\_opinions\\_this\\_term.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_the_biggest_flaw_in_the_opinions_this_term.html) [<https://perma.cc/ABH7-JL4B>].

78. Nina Totenberg, *Skip the Legalese and Keep It Short, Justices Say*, NPR (June 13, 2011), <http://www.npr.org/2011/06/13/137036622/skip-the-legalese-and-keep-it-short-justices-say> [<https://perma.cc/NQ73-S4M5>].

have been frank in their opinions. . . .”<sup>79</sup> He co-authored an empirical paper that suggests (even controlling for argument date and other case attributes) you intentionally dump your big cases at the end of the term.<sup>80</sup> The authors speculate you do it to “diffuse media coverage and other commentary regarding any particular case,” as well as out of a desire to get out of Dodge so people don’t make things uncomfortable for you at cocktail parties.<sup>81</sup> Andrew Cohen over at *The Atlantic* suggested the same, saying you are “manipulating the timing of the release” of your “most divisive rulings” in order to “minimize the political and legal and cultural fallout from any single ruling.”<sup>82</sup> That’s the same sort of observations people are making about disclosure and recusal rules.

Here’s the thing. You are the branch of government that runs on reason, not expediency. Or so we are told. And yet, from the disappointing and obscurant quality of your opinions, to your many orders without explanation, to what seems like pure capriciousness and arbitrariness in the various ways you do business, reason hardly seems the order of the day. The public is made to feel like the puppy by the table, waiting for every crumb of your beneficence. That hardly seems the way to keep the public on your side.

I have a suggestion. A serious one. Appoint an Advisory Committee. A top flight, entirely admirable establishment committee (but be sure to include some youth on it). Get them to look into some of these questions for you. And follow some of their advice. My guess is that they will be conservative in what they offer up, that they will suggest some healthy change and provide cover for a lot of the status quo. I think that, plus some small reasoned movement, would go a long way toward quieting the storm. (I’d be glad to get you a list of possible names, if you would like.)

## VI. BACK TO THE (MERITS) FUTURE

In the popular movie series, Dr. Emmett Brown builds a time machine. Sending Marty McFly into time, he says “Your future is whatever you make it, so make it a good one.” That’s good advice. You are the keepers of the Supreme Flame. You temporarily inhabit one of

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79. Posner, *supra* note 77.

80. Lee Epstein et al., *The Best for Last: The Timing of U.S. Supreme Court Decisions*, 64 DUKE L.J. 991, 992 (2015).

81. *Id.* at 1022.

82. Andrew Cohen, *We All Lose When the Supreme Court Procrastinates*, ATLANTIC (June 21, 2013), <http://www.theatlantic.com/national/archive/2013/06/we-all-lose-when-the-supreme-court-procrastinates/277066/> [https://perma.cc/UK8Q-5A2S].

the more remarkable institutions of governance in all of history. Every day when you come to work, you should be thinking about that, and about what your enduring values are and should be.

Which brings me back to decisions on the merits, just briefly, to make an important point. Perhaps *the* most important point.

Two of the cases that come in for some of Chemerinsky's strongest criticism were decided 9-0 and written by judges on the left side of the bench. They are *Hui v. Castenada*<sup>83</sup> and *Kamp v. Goldstein*.<sup>84</sup> You'll recall *Castenada*: that's the case in which Public Health Service officials through their "indifference" (a generous word under the circumstances) basically tortured and then killed a prisoner in their custody by ignoring what was pretty plainly penile cancer.<sup>85</sup> None of you ever wants to go through what he did. *Goldstein* was one of that flurry of cases in which people are imprisoned for long periods of time—or sentenced to death—because prosecutors fail to turn over evidence the defense should plainly have.<sup>86</sup> You don't want that either. None of us want any of that. But the simple matter is you are responsible for much of it, in an indirect but essential way.

There's this Internet meme you may have seen: "You had one job." It's used to capture situations where the butt of the meme has failed notably in the most basic of responsibilities. Like when the crayons have the wrong color label on them, or the Spiderman backpack plainly has a Barbie image on back, or the knife display at the dry goods store has a big "Back To School" sign over it. Hilarious gaffes.

The same might be said of you, unfortunately. But when it happens in your shop it's not so funny. It's tragic.

Back in the day, before you came to see yourselves as the most famous lawsayers in all the world, saddled with the awesome responsibility of (as Justice Breyer put it to Stephen Colbert) deciding momentous constitutional questions for three hundred and fifteen million people, you were just a court.<sup>87</sup> An old-fashioned court that existed to remedy the violations of people's rights. It's like you put it when John Marshall saw fit to lecture Thomas Jefferson in *Marbury v. Madison*: when one has a legal right and it is violated, the law affords a remedy.<sup>88</sup>

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83. 559 U.S. 799 (2010).

84. 555 U.S. 335 (2009).

85. 559 U.S. at 803.

86. 555 U.S. at 339.

87. Gershman, *supra* note 72.

88. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Chemerinsky elaborates on the problem in one entirely apt chapter devoted to “Abuses of Government Power.” The target in that chapter is your immunities doctrines.<sup>89</sup> You’ve by-and-large let off the hook for money damages the states, prosecutors, and judges. Officials commit outrageous acts and they escape liability under the supposedly “qualified” immunity you grant them. And local governments and departments also are in the clear unless one meets exceptionally high burdens of showing something is a municipal “policy.”

It was not always this way. Emphatically not. You used to take remedies for rights violations seriously, like your opinion in *Little v. Barremme*. Although you’ve alluded to history and text in fashioning these wide-ranging doctrines, it’s all unpersuasive camouflage for what ultimately has become an all-things-considered policy balancing analysis. That’s apparent in the opinions. But here’s the thing. Not only do you lack any claim to expertise in resolving that balance; it is a betrayal of your one traditional role.

Take *Castenada*. There, you conclude that no matter what the PHS officials did or did not do, a congressional statute affords them immunity.<sup>90</sup> You end with a rhetorical flourish: “[W]e are mindful of our judicial role.”<sup>91</sup> But are you? You’re talking about following the text of a statute; *Castenada* was a *constitutional* case. If the Constitution affords him a remedy, then under your own *Bivens* doctrine, Congress has little to say about it absent (at best) clear proof that there is some equally effective one in its place. This is the very point Chief Justice William Rehnquist made in *Webster v. Doe*.<sup>92</sup>

Then *Goldstein*. There, you proclaim (quoting prior precedent that is equally problematic): “The ‘public trust of the prosecutor’s office would suffer’ were the prosecutor” to have to consider personal liability in making decisions.”<sup>93</sup> The “prosecutor’s office *would* suffer”? Prosecutors have done such a shoddy job of adhering to their basic ethical obligations that there are as many Innocence Projects as there are states. And no wonder, given that you’ve failed in your most basic of jobs: to scrutinize criminal cases to ensure the most fundamental of rights were protected.

Don’t take my word for it. Or Erwin Chemerinsky’s. In a variety of forums, Alex Kozinski has laid into the failings of absolute immunity for prosecutors, pointing to what he calls an “epidemic of

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89. CHEMERINSKY, *supra* note 2, at ch. 6.

90. *Hui v. Castaneda*, 559 U.S. 799, 806 (2010).

91. *Id.* at 812.

92. *Webster v. Doe*, 486 U.S. 592, 603–04 (1988).

93. *Van de Kamp v. Goldstein*, 555 U.S. 335, 341–42 (2009).

*Brady* violations abroad in the land.”<sup>94</sup> He asks, “[w]hat kind of signal does [your according absolute immunity] send to young prosecutors who are out to make a name for themselves?”<sup>95</sup> And then he answers his own question, and it is difficult to argue with his conclusion, “that they can be as reckless and self-serving as they want, and if they get caught, nothing bad will happen to them.”<sup>96</sup>

To be clear, it is not just people accused of crimes and imprisoned who are suffering (innocent though they may be) from your failure to take seriously the job of remedying rights violations. Your antipathy at engaging in the remedial function is on display in lots of other arenas, including the property rights at stake in your *Williamson County* line of cases.<sup>97</sup>

If I may, you seem to be focusing lately too much on being Supreme and not enough on being Court. The cognoscenti would giggle whenever Earl Warren asked what simple justice compelled.<sup>98</sup> Those in the know understand it is much more complicated than that. It is all about texts and intentions and three-prong tests and a balancing of interests. Right? But here is the thing to remember: Most of the public sees it the way Earl did. They may have diametrically different views of what justice itself demands, there is no doubt about that. But when all is said and done, what they look to are the results in your cases, and what makes sense in a common sense way. By that metric, *Castenada* and *Goldstein* were way off the mark.

This job of yours is all about remedying rights violations. That’s why you were granted independence: so you could call it as it is when government officials step on people’s legally-protected toes. No one is telling you *how* to call it in any given case. The suggestion, rather, is that you actually call some of them as balls and strikes, instead of simply deferring to the players themselves every time something really troubling crosses your plate.

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I’ve gone on a lot longer than I’d intended. I figured I’d do the usual academic thing with Chemerinsky’s book and that would be the end of it. I respect the man deeply, and call him a dear friend, but

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94. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. viii (2015).

95. *Id.* at xl.

96. *Id.*

97. *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

98. See generally LUCAS A. POWE JR., *THE SUPREME COURT AND THE AMERICAN ELITE*, 1789-2008 (2009).

even he would hardly claim that he sits precisely at the midpoint of public opinion.

Then I got to thinking. And looking at the evidence. And realized how many folks are unhappy with you.

Like I said. You are as solid as Mount Rushmore. I don't see any earthquake on the horizon—though earthquakes have this way of coming when you least expect them, which is why the general rule is: build carefully. But the better analogy in this case may be one of slow erosion. Lately, more and more folks seem to be booing the umpire. And given some of his behavior, one can at least understand why. Many people are unhappy, and many for the same reasons as Erwin Chemerinsky. You should pay a little attention. You should care.