ERWIN CHEMERINSKY

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The following address is the 2014 Bruce C. Hafen Distinguished Lecture, delivered at J. Reuben Clark Law School on October 30.

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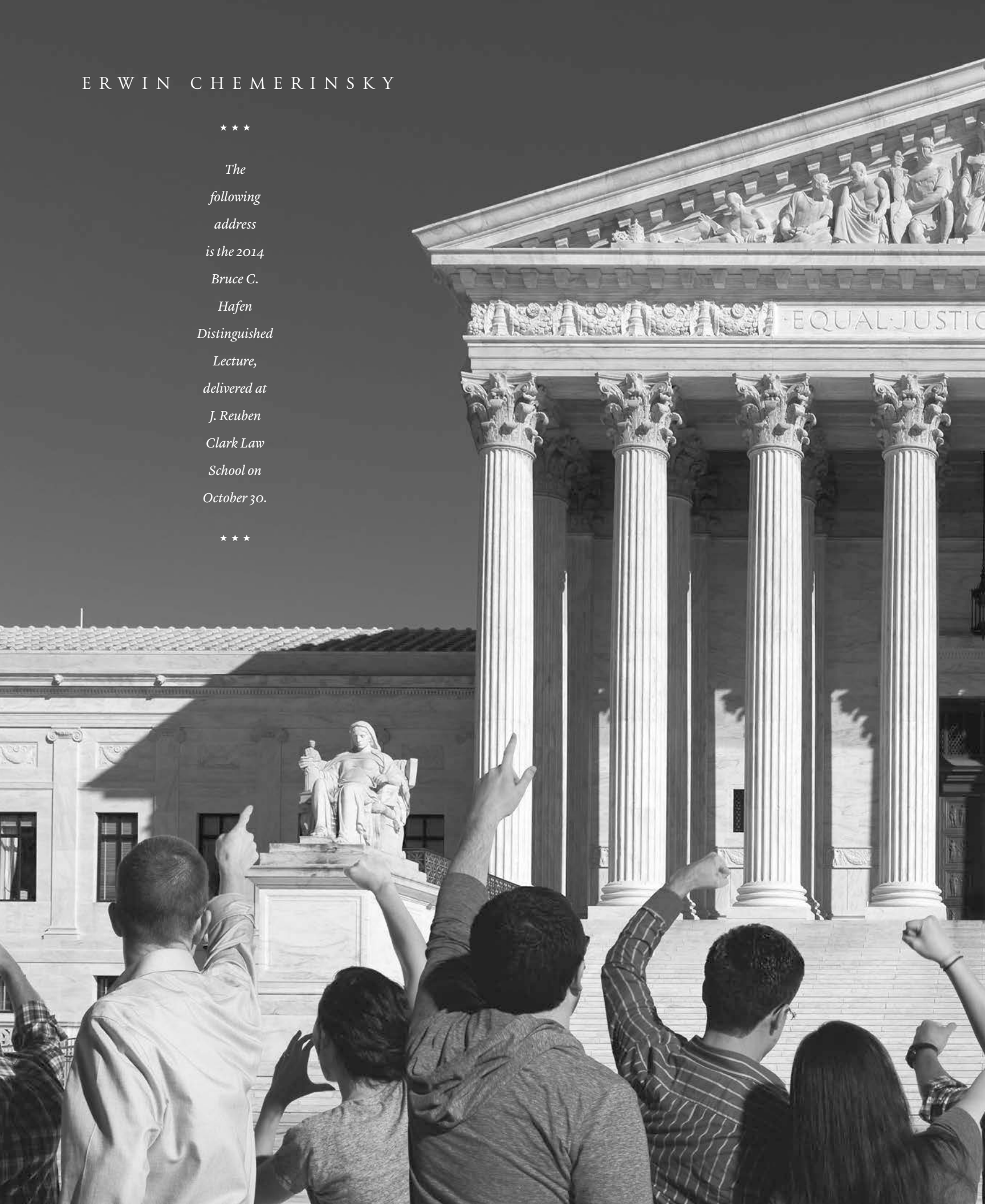



CE·UNDER·LAW·
THE CASE AGAINST THE SUPREME COURT

It is truly a privilege to deliver this lecture today. I should tell you that I feel a special relationship to your law school. When I was part of creating the law school at the University of California, Irvine, the school we most modeled ourselves after and ultimately learned the most from was this law school. So it is really special to be with you today.

Carrie Buck was born in 1906 in Charlottesville, Virginia. She went through the local elementary school and junior high school; she passed every year along with her grade. In all accounts, she was a normal child.

But her father left her mother, and her mother was destitute. Her mother lacked resources to take care of Carrie and Carrie's sister, Doris, so she put her two daughters in foster homes. Carrie stayed with her foster family doing chores and housework. When she was 17, she was raped by her foster father's nephew, and she became pregnant as a result of the rape. Her foster parents were humiliated by her pregnancy and had her institutionalized. She was placed in what was called "a home for the feeble minded." There she gave birth to a daughter.

Soon after, the state of Virginia began proceedings to get Carrie surgically sterilized. Virginia, like states across the country, had adopted eugenic laws. A brief hearing was held. An expert said that he had administered an IQ test to Carrie—this was a very new test—and that her IQ was below normal. (I should note here that many years later, Stephen Jay Gould, then a Harvard professor, went and found Carrie Buck. He administered a contemporary IQ test, and her IQ was in the normal range.) A social worker testified at the hearing that she had looked at Carrie's baby, who was six months old at the time, and "something didn't seem right about the baby girl." The hearing officer ordered that Carrie be surgically sterilized.

The case came to the United States Supreme Court. It should have been an easy case for the Court. The Constitution and the Eighth Amendment of course prohibit cruel and unusual punishment. Wasn't this exactly what was being done to Carrie Buck? After all, she had done nothing wrong. Before this time the Supreme Court had held that the due process clause protected fundamental rights. Isn't the right to procreate one of these fundamental rights? But the Supreme Court, in an 8 to 1 decision, ruled against Carrie Buck. Justice Oliver Wendell Holmes, one of the most renowned Justices to ever serve on the High Court, wrote the decision and used some of the most insensitive and offensive language found in the *United States Reports* when he wrote, "Three generations of imbeciles are enough." As a result of the eugenics laws and this 1927 Supreme Court decision, *Buck v. Bell*, 60,000 American citizens were involuntarily surgically sterilized.

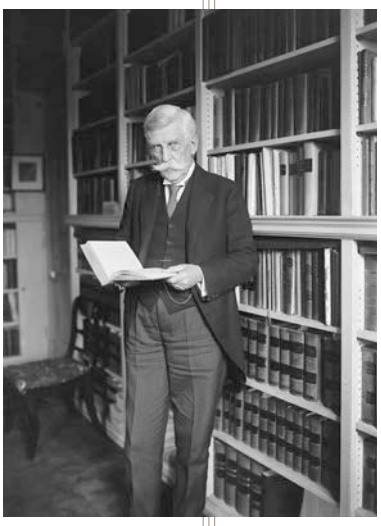
THE SUPREME COURT AND THE CONSTITUTION

I have now been a law professor for 35 years, and I teach *Buck v. Bell* each year. A couple of years ago my students were particularly outraged by the decision, and I found myself making excuses for the Supreme Court. But the more I thought about it, the more I realized that on many occasions I had made excuses for the Supreme Court when teaching particularly outrageous and offensive decisions, like *Dred Scott v. Sandford, Plessy v. Ferguson,* and *Korematsu v. United States.* So I forced myself to think more critically about the Supreme Court.

I realized that the Court has often failed in its most important tasks in its most important times, and I started to write a book about this. The book, titled *The Case Against the Supreme Court,* was published last month.

Now, obviously if I am going to say that the Supreme Court has failed, I need criteria to evaluate its performance. I think we can all agree that the Court exists, above all, to enforce the Constitution, but this requires us to think about why we have a constitution. Whenever I teach constitutional law, to law students or undergraduates, I always ask them on the first day to think about this question, and of course this requires that they reflect on how the Constitution is different from all other laws. The answer is that the Constitution is much more difficult to change. Any statute or ordinance can be changed by the next session of the legislature or in the city council, but to change the Constitution requires two-thirds approval of both houses of Congress and passage by three-quarters of the states.

But then I ask my students, "Why should a nation that sees itself as a democracy, that believes in majority rule, constitute itself in a document that is difficult to change?" After all, none of us voted to approve the Constitution. My guess is that few of us had ancestors in this country in 1787 who approved the Constitution.



Renowned Supreme Court Justice Oliver Wendell Holmes played a hand in the controversial *Buck v. Bell* decision regarding eugenics in 1927.

The answer I then give is that I believe that the Constitution is an attempt by society to restrain itself. The Constitution puts our most precious values—values about the structure of government and values about individual freedom—in a document that is intentionally difficult to change. I believe that this is, in part, to protect minorities, because the majority can usually protect itself through the democratic process. It is minorities who need a Constitution and a judiciary for protection.

I also believe that the Constitution exists to restrain what the government can do in times of crisis. The framers knew of world history: history illustrates that in times of crisis there is a tendency to centralize power and take away freedom. The Constitution, then, is an elaborate edifice to make sure that our short-term passions don't cause us to lose sight of our long-term values. If you'll accept these goals of the Constitution and these purposes for the Supreme Court, then I think I can make the case for you that the Supreme Court has so often failed throughout American history in the most important tests in the most important times.

The first third of the book *The Case Against the Supreme Court* looks at the Supreme Court historically, the second third looks at the Roberts Court, and the final third asks what we should do about this problem.

THE SUPREME COURT AND ISSUES OF RACE

I believe that any analysis of the Supreme Court and its historic performance has to begin with the area of race. I believe that historically, and even now, the Supreme Court has a dismal record with regard to race. From 1787 to 1865, a period of 78 years, the Supreme Court aggressively enforced the institution of slavery and protected the rights of slave owners. In your constitutional law class you might have read *Prigg v. Pennsylvania.* Pennsylvania adopted a law that prohibited the use of force or violence in removing a slave who had escaped there from a slave state. The Fugitive Slave Clause in Article 4 of the Constitution said that a slave who had escaped to a free state would have to be returned. Pennsylvania didn't prevent that from happening; it just prevented force or violence from being used. Doesn't every state have an interest in preventing force and violence? But the Supreme Court declared that Pennsylvania law unconstitutional.

Justice Joseph Story wrote the opinion of the Court. Justice Story is also one of the most celebrated Justices to ever serve on the Supreme Court and the youngest to ever be appointed to the Court. At Harvard Law School there is a dorm named after him. In Iowa there is a statue of him. Yet, shouldn't his reputation be tarnished by this decision that so aggressively protected the rights of slave owners?

I am sure that in your law classes on the Constitution you have talked about *Dred Scott v. Sandford,* which held that slaves are not citizens, even if they are born in the United States, but are simply property of their owners. The Court declared unconstitutional the Missouri Compromise, which helped precipitate the Civil War. Then, from 1896 to 1954, a period of 58 years, the Supreme Court aggressively enforced the doctrine of "separate but equal." The Court's decision in *Plessy v. Ferguson,* and those that followed it, upheld Jim Crow laws that segregated literally every aspect of Southern life.

As I mention these examples to you, maybe your reaction is, "That was then; it is different now." So let me give you examples from now. Let me talk about a Supreme Court case from a year ago June. On June 25, 2013, the Supreme Court declared unconstitutional key provisions of the Voting Rights Act of 1965. The decision, *Shelby County, Alabama v. Holder,* was the first time since the 19th century that the Supreme Court has declared unconstitutional

a federal civil rights law dealing with race. I think that the Voting Rights Act of 1965 is one of the most important federal laws adopted in my lifetime. Congress knew that litigation to enforce this prohibition would be expensive and difficult. Congress was also aware of how especially Southern states were continually changing their election systems to disenfranchise minority voters.

Do you remember the old game Whac-a-Mole—knock the mole down in one place and it pops up in another? That's what Congress thought was going on, especially in the Southern states. A law would be adopted to disenfranchise minority voters; it would be struck down, only to be replaced by another that was just as bad. So Congress added Section 5 to the Voting Rights Act. It says that jurisdictions with a prior history of race discrimination in voting must get preclearance from the attorney general to change their election systems. Section 4B of the Act determines which jurisdictions need to get preclearance. Under the current version, this includes nine states, almost all the South, and local governments that are scattered across the country.

Joseph Story, a celebrated Justice of the Supreme Court, wrote the opinion of the Court for the racial decision made in *Prigg v. Pennsylvania* in 1842.

These provisions were scheduled to expire in 1982. Congress held extensive hearings and then voted to extend these provisions another 25 years. President Ronald Reagan signed them into law. The provisions were scheduled to expire in 2007. In 2006 Congress held 20 hearings and compiled legislative history 16,000 pages long documenting continuing race discrimination in voting in the covered jurisdictions. The Senate voted 98 to nothing to extend these provisions another 25 years. Can you imagine the Senate today voting anything 98 to nothing? There were only 33 "no" votes in the House. President George W. Bush signed the provisions into law.

Shelby County, Alabama, is south of Selma, Alabama. It is in a jurisdiction with a long history of race discrimination in voting. It brought a challenge to this law. On Tuesday, June 25, 2013, the Supreme Court, in a 5 to 4 decision, declared unconstitutional Section 4B of the Voting Rights Act. Remember that this is the provision that determines which jurisdictions need to get preclearance. Once this provision is invalidated, no jurisdictions need to get preclearance. Chief Justice John Roberts wrote the opinion for the Court. He said, "Race discrimination in voting is largely a thing of the past." He also said, "The formula in Section 4B was based on outdated statistics," and, "This violates the principle of equal state sovereignty, that Congress must treat all states alike."

But where in the Constitution does it say that? Now, I'm not an originalist. I don't believe that the meaning of the Constitution is limited by what its framers intended. But if there is anything about which I am confident when talking about original intent, it is that the Congress that ratified the 14th and 15th Amendments didn't believe that Congress had to treat all states the same. That Congress is, after all, the Congress that passed the Reconstruction Act and created military rule over the South.

Immediately after this 2013 decision, states such as Texas and North Carolina put into effect discriminatory voting laws that denied preclearance.

But the story doesn't stop there. Let me talk about an event as recent as a week ago Saturday, October 18, 2014. At 5:30 a.m. the Supreme Court allowed to go into effect the Texas law that had been found by a district court to likely keep 600,000 African Americans and Latinos in Texas from voting in the coming election on Tuesday, November 4. A federal district court judge in Texas had held a nine-day trial. She issued a 143-page opinion finding the Texas photo ID law the most restrictive in the country, keeping, as I said, about 600,000 people from voting. She found that the purpose and the effect of this statute was to disenfranchise minority voters. A three-judge panel had come to the same conclusion in 2011 and had kept preclearance from being granted, only for the verdict to be made irrelevant after the *Shelby County* decision.

Now as you may know from your classes, a preliminary injunction from the district court can be overturned only if it is found to be an abuse of discretion. It is hard to imagine how this could be an abuse of discretion. Four federal judges have come to the same conclusion.

DEAN ERWIN CHEMERINSKY

Introduction by James R. Rasband, dean of BYU Law School

I am pleased to welcome Erwin Chemerinsky, the Raymond Pryke Professor of First Amendment Law and founding dean of the University of California, Irvine School of Law. The Hafen Lecture is the preeminent public lecture given at the Law School each year, and Dean Chemerinsky fits well within the group of distinguished speakers we have had the last several years: Michael McConnell; Dean Anthony Kronman; Professor Deborah Rhode; Dean John Garvey, now president of the Catholic University of America; and Sarah Barringer Gordon. Dean Chemerinsky really adds luster to this extraordinary list. This lecture is designed to honor Bruce C. Hafen, a member of our founding faculty, former dean of the Law School, former president of Rick's College (now BYU–Idaho), former provost at Brigham Young University, and an emeritus General Authority of our sponsoring church. Hafen was an internationally recognized scholar of family and educational law with particular interest in the legal rights of children and the legal status of marriage.

Dean Chemerinsky is what all law school deans would like to be when they grow up. In addition to serving as dean at UC Irvine School of Law, he teaches a full load of classes, lectures to undergraduates, publishes books, and continues to pour out a steady stream of influential articles, op-eds, and magazine pieces.

His extraordinary energy is only outshone by his generosity of spirit. Students and colleagues all attest to his good heart, his kindness, and his infectious energy. I have felt the same on the occasions when we have been together. He has the capacity to make you feel as though he is honored to spend time with you, when the real privilege flows in the other direction.

Dean Chemerinsky was born on the south side of Chicago and earned his bachelor's degree at Northwestern University. He received his law degree from Harvard. Prior to accepting the deanship at UC Irvine he taught at the Duke, University of Southern California, and DePaul law schools, with some visiting stints at UCLA School of Law. His areas of expertise are constitutional law, federal practice, civil rights, and civil liberties, but the truth is that he is a renaissance legal scholar who engages with a full range of law and policy. His energy simply cannot be contained to a narrow set of issues. He frequently argues cases in front of the nation's highest courts, including the United States Supreme Court. In the best tradition of the law, Dean Chemerinsky has also given himself to public service and has done a wide range of pro bono work. He serves on such a wide array of commissions, task forces, and boards that I won't even try to recite them all; he simply gives of himself over and over to building the communities of which he is a part.

Earlier this year the *National Jurist* wrote that Dean Chemerinsky was *the* most influential person in legal education in the United States. That is high praise, but it is deserved. Despite his national reputation, what is clear is that to his students there is never any doubt that they are at the center of his passion. Three years ago the *National Jurist* put him on the list of 23 law professors to take before you die. Now you are going to be able to remove hearing from Dean Chemerinsky off your bucket list, even if you don't receive a full semester's worth of instruction. It is such an honor to have him here.

The first of those federal judges held a nine-day trial. She wrote a 143-page opinion. But on Saturday morning, October 18, the Supreme Court, in what seems to be a 6 to 3 ruling, allowed the Texas law to go into effect. The Justice of the majority issued no opinion—not a word of explanation. Justice Ruth Bader Ginsburg wrote a blistering dissent.

THE SUPREME COURT IN TIMES OF CRISIS

I want to give a second example of the Supreme Court's failings throughout American history—how it has enforced the Constitution in times of crisis. If you will buy my premise that a preeminent role of the Constitution is to protect rights in times of crisis, again I think the Supreme Court has dismally failed.

Let me give a few specific examples. During World War I, in 1917 and 1918, Congress adopted statutes that made it a federal crime to criticize the draft for the war efforts. The first major case concerning freedom of speech to be decided by the Supreme Court rose from one of these statutes. If you have studied First Amendment law, you are familiar with it; it is a case called *Schenck v. United States*.

It involved a man who circulated a leaflet that argued that the military draft was unconstitutional as a form of involuntary servitude. There wasn't a shred of evidence that his leaflet had the slightest adverse effect on military recruitment or the war effort. But just

for circulating that leaflet, not doing anything else, he was convicted and sentenced to 10 years in prison. The Supreme Court, in an opinion again by Justice Oliver Wendell Holmes, affirmed the conviction in a sentence. If you remember this case at all, this is when the Supreme Court said that the government can punish speech if there's "a clear and present danger" of harm. This is also when the Court said that there's no right to falsely shout "fire" into a crowded theater. But if anything is the antithesis of a clear and present danger—a falsely shouted "fire" into a crowded theater—isn't it Schenck's harmless leaflet?

Another case decided that same year involved the socialist leader Eugene Debs. He gave a speech to a group of college students in which he said, "You are fit for something better than slavery and cannon fodder. There's more I'd like to say but I can't for fear of imprisonment." For that speech he was convicted and sentenced to 10 years in prison. Again the Supreme Court upheld his conviction in one sentence. Debs ran for president while in prison; he died soon after his pardon.

We can also talk about World War II, when 110,000 Japanese Americans, aliens and citizens—70,000 of whom were United States citizens—were uprooted from their homes and placed in what President Franklin Roosevelt called concentration camps. Race alone determined who would be free and who would be put behind barbed wire. Many of these families were literally housed in horse stalls. The case, *Korematsu v. United States,* came to the Supreme Court in 1944. Whenever you take constitutional law, you will read this case. I think the decision should have been easy for the Supreme Court. This was race discrimination, pure and simple. In England procedures were devised to screen those of German ancestry to see if they were a threat to national security. Nothing like that was done in the United States. Race was used to determine who would be free and who would be in prison. The Supreme Court, in a 6 to 3 decision, upheld the evacuation of Japanese Americans. Justice Hugo Black wrote the opinion of the Court. He said, "War is about hardship, and these are just the hardships that Japanese Americans will have to bear."

During World War II, Justice Hugo Black of the Supreme Court was part of the *Korematsu v. United States* decision, which supported the placement of approximately 110,000 Japanese Americans in concentration camps.

Or we can talk about the McCarthy era. It was truly the age of suspicion. Merely to be suspected of being a communist was often enough for a person to lose a job or even liberty. The leading Supreme Court case during this time was *Dennis v. United States.* You actually have to read the dissenting opinion to figure out what these individuals were convicted of. There was a group of individuals who wanted to teach the works of Marx, Engel, and Lenin. For this they were convicted of the crime of conspiracy to advocate the overthrow of the United States government. They weren't convicted of plotting the overthrow the government; they weren't even convicted of advocating the overthrow of the government. Their crime was conspiracy to advocate the overthrow of the government. Nonetheless, the Supreme Court approved their conviction. Chief Justice Fred Vinson wrote the opinion for the Court. He said, "When the evil is as grave as the overthrow of the United States government, there doesn't have to be any proof that the speech increases the likelihood of it happening."

Again, I know of the temptation to say, "Well, those cases were a long time ago. We're more enlightened now." So let me give an example from now. We could start by talking about those who have been detained and continue to be detained as part of the War on Terror. In fact, let me ask each of you to engage in a thought experiment: How many people has the United States government detained, or how many does it continue to detain as part of the War on Terror? I am confident that none of you knows the answers to those questions because the government has not told us the answers. Several years ago I debated with Michael Chertoff, head of the Department of Homeland Security, in front of a group of federal judges. When I asked him these questions, he said, "I can't tell you; it's classified." We still don't know.

But we do know that approximately 169 individuals remain in Guantánamo Bay, Cuba, and some of them have been there since the spring of 2002. I have represented one detainee, Salin Garebi, since the summer of 2002. To this day he has never had a trial or a meaningful factual hearing. He has been in custody now for 12 and a half years—longer than any war in

American history—and yet the Supreme Court has not provided any relief to Salin Garebi or to the others in Guantánamo.

I can think of one more example of how the Court has made poor decisions in times of crisis, again drawing from the War on Terror: it is a Supreme Court decision in 2010 called *Holder v. Humanitarian Law Project*. Some Americans wanted to help some Kurdish individuals; specifically, they wanted to help teach them about how to use the United Nations in international law for peaceful resolution of disputes. Other Americans wanted to help a Sri Lankan group of foreigners apply for international humanitarian assistance. It is important that you know that all the parties to the litigation agreed that this is what the Americans wanted to do. No one said that these Americans were trying to teach the foreigners how to engage in terrorist acts or were giving them money that could be used for terrorist acts. The question that arose was that for doing just what I have described and nothing more, could they be convicted of the crime of giving material assistance to a foreign terrorist organization? The Supreme Court, in a 6 to 3 decision, said that this speech and this speech alone was enough material assistance to terrorist organizations. Chief Justice John Roberts wrote for the Court; Justice Stephen Breyer's dissent lamented that there wasn't any evidence whatsoever that this speech would pose any threat or increase the likelihood of terrorist activity.

In the second part of the book, I talk about the Roberts Court and about how the Roberts Court is the most pro-business court since the 1930s, consistently favoring the rights of corporations over those of employees or consumers. I also talk about how the Roberts Court consistently favors government power over individual rights, and I talk about things that we study in civil rights classes, such as how the Supreme Court has dramatically expanded governmental immunity.

FIXING THE SUPREME COURT

So I have to ask the question: What should we do about it?

There are some law professors, even very prominent ones, who argue that the solution should be to eliminate Constitutional judicial review. Harvard law professor Mark Tushnet wrote a book titled *Taking the Constitution Away from the Courts,* in which he says we should eliminate Constitutional judicial review. Former Stanford Law School dean Larry Kramer wrote a book that comes to a similar conclusion and argues for what he calls "popular Constitutionalism," which leaves the Constitution to the people to enforce. Pulitzer Prize–winning author and Williams College political science professor James MacGregor Burns wrote a book just a few years ago in which he also argues for the elimination of judicial review. These three authors each make the point that other countries have democracy and individual freedom without judicial review. In England no court has ever had the power to declare unconstitutional an act of Parliament. In the Netherlands there is a written constitution, but it specifically provides that no court can declare a law unconstitutional for violating it.

Yet I reject this approach. I believe that *Marbury v. Madison* was right in saying that the written limits of the Constitution are meaningful only if they can be enforced, and enforcement requires the judiciary. I have spent almost 40 years representing people on death row, criminal defendants, a Guantánamo detainee, a homeless man. I know that for my clients it is likely to be the courts or nothing. When was the last time that a legislature passed a law to expand the rights of criminal defendants? For me the solution is not to eliminate the judiciary; I believe it is essential to achieve the goals that I described for the Constitution in the Supreme Court, but I believe we should think about how can we reform the Supreme Court to make such failures as I have described less likely in the future. Consequently, in the last chapter of the book, before the conclusion, I offer a set of ideas for reforming the Court.

I begin by saying that I think we should have the Court clearly declare, and we as a society proclaim, that we see the role of the Court as enforcing the Constitution, especially to protect minorities and to enforce the Constitution in times of crisis. Never has the Supreme Court expressly declared that to be its purpose. I believe that just doing so might help a great deal in the future.

I also argue that we should change the way Supreme Court Justices are selected and confirmed. I argue for merit selection of Supreme Court Justices. I believe that a president could create a merit selection committee that can be bipartisan in its membership, and the president can have more from his or her political party but require that there be a two-thirds recommendation. For example, he could say, "Recommend to me two or three people who you think are the best to be on the Supreme Court, and I promise to either pick from them or ask you for more names." There are states that have that kind of merit selection system. Alaska is one of them. This has led—even with a conservative governor like Sarah Palin—to picking a liberal for the Alaska Supreme Court, Morgan Christen, who President Obama then put on the Ninth Circuit.

President Jimmy Carter had merit selection for federal district courts and federal courts of appeal. He never got to pick a Supreme Court Justice. I think by any measure his selections were among the very best judges picked by any president—and certainly the most diverse judges to that point to be picked by any president.

I think we need to change the confirmation process to make it meaningful. I think that Democrats and Republicans together should agree to a set of questions that every nominee for the Supreme Court should have to answer, including questions about their views concerning matters that will come before the Court. There are only two possibilities in which we cannot do this. One would be if we think that those who are being nominated don't have any views on disputed legal issues. When Clarence Thomas and David Souter went before the Senate judiciary committee, they each said they had no views on *Roe v. Wade*. Patricia Ireland, then president of the National Organization for Women, said, "There are only two adults in the United States who don't have views on *Roe v. Wade*, and now they're both going to be on the United States Supreme Court." The other possibility for not asking for their views is that if we know their views, they are no longer impartial. But that can't be right. We know how Antonin Scalia and Ruth Bader Ginsburg are going to vote when the question comes before them as to whether *Roe v. Wade* should be overruled. No one says that requires them to be disqualified.

I also favor term limits for Supreme Court Justices—18-year nonrenewable terms. Thankfully, life expectancy is so much greater today than it was when the Constitution was written in 1787. Clarence Thomas was confirmed to the Supreme Court in 1991, when he was 43 years old. If he remains on the Court until he is 90, the age when John Paul Stevens stepped down, he will have been a Justice for 47 years. Both John Roberts and Elena Kagan were 50 when they were confirmed to the Court. If they remain until they are 90, they will have been there for 40 years. That is just too much power to be exercised by a single individual for too long a period of time. Additionally, 18-year nonrenewable terms mean that every president will get a vacancy to fill every two years. Too much depends now on the accident of history when vacancies occur. Richard Nixon had four vacancies to fill in his first two years as president. Jimmy Carter had none to fill in his four years as president.

Further, I argue for changing the way the Court communicates with the American people. To pick a single example, I believe there should be cameras in the Supreme Court for every argument and every proceeding so that we can see that branch of government at work. I believe that the ethical rules that apply to lower federal court judges should apply to Supreme Court Justices. No longer should it be left to each Justice to decide for himself or herself whether they should be recused in a case.

I don't pretend that these reforms singularly or cumulatively will magically change the Supreme Court, but I believe they can make a difference. Justice Louis Brandeis, in his dissent in *Olmstead v. United States,* said, "The greatest threat to liberty will come from people who claim to be acting for beneficial purposes." He also said, "People born to freedom know to resist the tyranny of despots," and, "The insidious threat to liberty will come from well-meaning people with zeal, with little understanding of what the Constitution is about."

I believe that throughout American history, all of our Justices have been well-meaning people of zeal, but I believe that all too often they have failed us. cm

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