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The Case against the Supreme Court

By Erwin Chemerinsky

Reviewed By Donna Bader
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When I first picked up *The Case against the Supreme Court* by Erwin Chemerinsky, I wondered why a prominent law school dean at UC Irvine School of Law, and a noted scholar on constitutional law, would write such a book *against* the Supreme Court. Aren't law professors supposed to be *in favor* of the third arm of the government, the sacred United States Supreme Court?

Plaintiffs' attorneys are well aware of the steady erosion of individual rights due to the Court's unfavorable decisions. An individual's ability to pursue class actions, civil rights lawsuits and employment cases has been hampered by a Court that consistently decides important cases by a 5-4 split. The protections given to governments and big business has risen to such a level that corporations have gained rights once given only to individuals. Could our Founding Fathers envision such a result?

Chemerinsky presents a compelling case against the Supreme Court. Instead of evidence, he has selected the Court's own decisions to show how the Court all too often has sided with big business and the government. The one bright spot, the Warren Court, was a short blip on the radar from 1954 through 1969, and it wasn't until 1962 that there was a liberal majority. During which time the Court reached some historic pro-consumer decisions. Those days are gone. Now the Roberts' Court is ruled by a rather young Chief Justice John Roberts, fifty-nine years of age, who may serve for decades on the Court. Its pro-business course could continue for years.

> "A constitution is society's attempt to tie its own hands, to limit its ability to fall prey to weaknesses that might harm or undermine cherished values. History teaches that the passions of the moment can cause people to sacrifice even the most basic principles of liberty and justice. The Constitution is society's attempt to protect itself from itself. The Constitution enumerates basic values – regular elections, separation of powers, individual rights, equality – and makes change or departure very difficult."
>
> **— Erwin Chemerinsky**

Buck v. Bell

Chemerinsky starts off with a bang in his Introduction, presenting the case of Carrie Buck, born in 1906, who was raised by her foster parents until she was 17. Carrie became pregnant after she was raped by her foster parents' nephew. She was then committed to the Virginia State Colony for Epileptics and Feeble-minded. (Even the name gives me shivers.) Carrie's daughter Vivian was taken from her and adopted by the foster parents.

The State then sought to have her surgically sterilized, relying on a new eugenics law that authorized the sterilization of those of low intelligence. Virginia was not unusual; thirty states had such laws that allowed for the involuntary sterilization of criminals, those of low intelligence, and those with so-called hereditary defects, including alcoholism and drug addiction in some states and even blindness and deafness in others.

Carrie's attorney challenged the constitutionality of Virginia's law before the United States Supreme Court. In an 8-1 decision in *Buck v. Bell* (1927) 274 U.S.200, the Supreme Court ruled against Carrie. The esteemed Justice Oliver Wendell Holmes wrote the majority opinion, concluding Buck was "a feeble-minded white woman." The Court upheld the Virginia law:

> It is better for all the world, if instead for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

In the end, the Supreme Court sided with the government. Chemerinsky was outraged and thought perhaps such cases were unusual. He decided to examine whether the Supreme Court has been a success or a failure. His conclusion is that it has frequently failed on important cases, siding with big business and the government, rather than protecting individual rights. He writes, "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 to protect people's rights."

The Constitution

One cannot consider the Supreme Court without looking at our U.S. Constitution. Chemerinsky notes how hard it is to change this time-honored document by amendment. He believes there is a reason for this difficulty, which he describes as "a defining characteristic." He opines the drafters wanted to create a set of rights that would be difficult to change, thus preventing tyranny by the majority and protecting minority rights.

In analyzing the Court's decisions, Chemerinsky was well aware of his reputation as a liberal. He wanted to

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avoid any criticism that he was being selective in his choices for analysis. He tells us that he has carefully chosen cases that both liberals and conservatives would take issue with. (I'm not so sure about this.)

Historic cases

The book is written in three parts. Chemerinsky first examines historic cases, such as those dealing with the rights of slave owners in the *Dred Scott* decision, enforced segregation under the "separate, but equal" theory in *Plessy v. Ferguson* (1896) 163 U.S. 537, and even the right to confiscate and imprison Japanese-Americans in *Korematsu v. United States* (1944) 323 U.S. 2114.

In the second part, Chemerinsky then examines our present Court, which is the most pro-business Court since the 1930s. He concludes the Court has done more harm than good in its decisions dealing with arbitration, class-action lawsuits, and employment discrimination. All of this has made it difficult, if not impossible, for individuals to pursue lawsuits for damages.

The public hasn't lost sight of what has happened. All three branches of government are viewed with distrust by our citizens, who have concluded Wall Street really runs our country. Congress' approval rating has sunk to a low of 15 percent. Probably not one day goes by where you don't hear complaints about the inertia of the legislature and its inability to reach any consensus on important issues facing the populace. The presidency has been occupied for over six years by a man who once asked us to dream of change, but who now finds it difficult to get anything done. His approval rate is approximately 46 percent. The Supreme Court, hidden away in the background, only surfaces when important cases are brought to it, but the citizens are often unaware of the Court's checkered past, and view it as a reflection of the political ideology of the justices. Its approval rate is 44 percent compared to 62 percent in mid-2000.

As Justice Stevens pointed out in his dissent in *Bush v. Gore* (2000) 53 U.S. 98, a case where the Supreme Court effectively decided the Presidential election, "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the law."

Citizens United

Nowhere is that loss of confidence more evident than in *Citizens United v. Federal Election Commission*. Since 2010, corporations are now free to spend millions, even billions, on elections, where the ordinary citizen's budget cannot hope to match these expenditures. Campaign spending is at an astronomical level and the winner of an election can easily be predicted based on the amount of campaign contributions. Chemerinsky concludes, "By any measure, *Citizens United* was stunning in its judicial activism." Many people are familiar with *Citizens United* and its impact on elections.

In the third part, Chemerinsky discusses what can be done to reform the Court. He focuses on restricting the Court's power to declare laws unconstitutional. He makes a compelling case to keep judicial review, limiting the Court to simply interpret and apply the Constitution. While some critics have agreed judicial review is incompatible with democracy – the majority rule, after all – Chemerinsky believes the Constitution was tailored to avoid changes in the law at the majority's whim and at the cost of individual rights. One can only imagine what would happen if majority rule, which is changeable by nature, was not reined in by individual constitutional rights.

Writing about published opinions and cases can be difficult. An opinion is often written in complex legalese. Very few laypeople would ever think to pick up a legal opinion. (Many attorneys suffer from the same affliction.) But these cases are about real people and real conflicts. Chemerinsky has written about cases in a way that is accessible to readers and even presents the more interesting human side of legal cases.

Chemerinsky argues the justices insert their personal values into their decision-making process, reflecting the attitudes and values of society. At the same time, he notes the justices are "elites and reflect the values of elites in society." Their opinions change with the composition of the Court, just as the Congress and executive branches change. Judicial appointments are made based on political ideology. Decisions and laws are made by those in power to make and enforce laws. All branches of government are operated by imperfect human beings who act in accordance with their own interests. The pendulum will swing back and forth depending on who holds the power.

Despite the case he has made against the Supreme Court, Chemerinsky still believes the Supreme Court is the most important institution in ensuring liberty and justice for all. But how many times have we heard a client exclaim, after losing because of a perceived injustice, that they are willing "to go all the way to the Supreme court?" Such a statement implied a long journey, at the end of which they would eventually find justice. That may not be the case at all.


Bader

Donna Bader, a certified appellate specialist, has practiced for over 35 years in Orange County. She and trial attorney Jon Mitchell Jackson were recipients of a 2013 CLAY Award for litigation by California Lawyer *magazine. Bader is the author of* An Appeal to Reason: 204 Strategic Tools to Help You Win Your Appeal at Trial, *which was written to help trial attorneys protect their cases before they reach the appellate stage. She was the first editor of* Plaintiff *magazine and is a past editor of* Advocate *magazine.*

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