A Tribute to Justice Scalia: Why Bad Cases Make Bad Methodology

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The *Vanderbilt Law Review* asked me to write a short memorial tribute to my old boss, Justice Antonin Scalia, and I am fortunate that Dean Chemerinsky's new book provides an apt occasion to do so. To be as blunt as the Justice would have been: he would have hated this book. Not because Dean Chemerinsky is not a gifted writer; he most surely is. But because the entire methodology of the book—a methodology I call "bad-cases" reasoning—was anathema to the Justice. The Justice may not have been right about everything, but he was right about this: bad-cases reasoning is bad methodology. In this Essay, I try to explain why.

When Justice Scalia was asked how it could be that one or another of someone's favorite constitutional rights was not recognized by his originalist approach, he would often say something like the following:

> The Constitution does not guarantee everything that is good and it does not prohibit everything that is bad. It only guarantees or prohibits the specific things it enumerates. If you do not like the list, call your member of Congress.[1]

Yet, Dean Chemerinsky's new book is little more than an indictment of the Supreme Court for not frequently enough recognizing Dean Chemerinsky's favorite constitutional rights. The book proceeds along the following syllogism: bad things have happened; the Supreme Court did not stop them (or even brought them about); therefore, the Supreme Court is a failure.[2] His list of bad things has some old

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1. *See, e.g.*, Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989) (noting that the Constitution "did not pretend to create a perfect society even for its own age (as its toleration of slavery, which a majority of the founding generation recognized as an evil, well enough demonstrates)" let alone "a document intended to create a perfect society for all ages to come").

2. ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 5 (2014) ("Throughout this book, I tell stories of in which the Supreme Court sanctioned terrible injustices."); *Id.* at 118 ("My goal throughout this book is to determine whether the Supreme Court made American society better or worse.").

favorites on it, as well as some of more recent vintage: *Plessy v. Ferguson*,[3] *Dred Scott v. Sandford*,[4] *Korematsu v. United States*,[5] *Buck v. Bell*,[6] *Citizens United v. FEC*,[7] *Shelby County v. Holder*,[8] etc. You get the idea.

Dean Chemerinsky is not alone in this methodology. Indeed, it is a common technique on the left to criticize originalism because it leads to bad results.[9] A popular example uses *Plessy*: *Plessy* is a bad result; originalism leads to *Plessy*; therefore, originalism must be wrong.[10]

This is what I mean by "bad-cases" reasoning. It posits that any interpretation of the Constitution that leads to one or more of the entries on someone's list of "bad" cases cannot be legitimate; legitimate interpretation must line up with "good" results.[11]

The problem with bad-cases reasoning is that it is hopelessly circular. How can we know whether a case was rightly or wrongly decided unless we have a theory of the Constitution against which to judge the case to begin with? In other words, to say that a case was wrongly decided is to assume we already know the right way to interpret the Constitution. Yet, proponents of bad-cases reasoning offer it to us as a way to separate right interpretations from wrong ones.[12] It cannot serve that function if it requires that we know the right interpretations to begin with.

Dean Chemerinsky tries to avoid the circularity problem by contending that "everyone" agrees that the cases on his list were wrongly decided.[13] But this is obviously not true with respect to many of the recent cases on his list like *Citizens United* and *Shelby County*. Indeed, if "everyone" agreed with Dean Chemerinsky, we would not

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3. *Id.* at 38.

4. *Id.* at 27.

5. *Id.* at 59.

6. *Id.* at 17.

7. *Id.* at 249.

8. *Id.* at 260.

9. *See, e.g.*, William P. Marshall, *Progressive Constitutionalism, Originalism, and the Significance of Landmark Decisions in Evaluating Constitutional Theory*, 72 OHIO ST. L.J. 1251 (2011).

10. *See id.* at 1261-64 (discussing *Brown v. Board of Education*).

11. *See generally id.*

12. *See id.*

13. CHEMERINSKY, *supra* note 2, at 6:

> I realize, of course, that there needs to be a rubric for assessing whether the Court is succeeding or failing. One measure is the decisions . . . that are uniformly condemned by subsequent generations of scholars and judges. . . . [T]o make the case against the Supreme Court, I will focus especially on examples . . . where virtually everyone today—liberal and conservative alike—can agree the Court was wrong.

need to worry about the Constitution at all; even with all the imperfections in the democratic process, if "everyone" wants something, the legislature usually delivers it. But even with respect to the older, more notorious cases on his list—*Plessy*, *Dred Scott*, *Korematsu*, *Buck*—the only thing everyone agrees with is that the laws upheld in the notorious cases are *morally* reprehensible.[14] Everyone does *not* agree that these cases were wrongly decided as a matter of *law*.[15] Thus, Dean Chemerinsky can avoid the circularity problem only if we should equate what is unconstitutional with what everyone agrees is morally reprehensible.[16] But the Constitution does not say that. So why would we do it?

Dean Chemerinsky's answer is that we have no choice but to do it on account of legal realism. Legal materials are ambiguous, he says; judges' decisions must therefore be based on their moral views and not on legal materials.[17] Thus, he says, the Supreme Court "could have" interpreted the Constitution to side with him in all of the cases on his list.[18] But even if it is no doubt true that legal materials are often ambiguous[19]—and Justice Scalia, too, was at least something of a legal realist[20]—it does not follow that a judge can reach *any* result he or she wants in *every* case. Most of us believe that legal materials are at least *somewhat* constraining, that it is not politics *all* the way

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14. In fact, everyone agrees only that these laws would be morally reprehensible *today*; the Dean Chemerinskys who lived back then often *supported* these laws. *See* Corinna Barrett Lain, *Rethinking the Supreme Court's "Failures"*, 69 VAND. L. REV. 1019 (2016). How were these Supreme Courts supposed to know that their Dean Chemerinskys would change their minds?

15. *See, e.g.*, Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

16. CHEMERINSKY, *supra* note 2, at 22 (asserting that his students believe the Court ought to change its interpretation of the Constitution whenever required by "basic human decency" and "the most elemental notions of humanity").

17. *Id.* at 10:

> There is thus a sense that it is the "law," not the justices, that is responsible for the Court's decisions. This is nonsense and always has been. The Court is made up of men, and now finally women, who inevitably base their decisions on their own values, views, prejudices;

see also id. at 337–42; 340 ("[T]he decisions throughout this book reflect value choices made by the justices. They should be blamed or praised for their choices."); *id.* at 342 ("Let's admit that this emperor has no clothes. The justices . . . made a value choice to favor slave owners, and the government when it interned the Japanese Americans, and businesses when they have struck down so much regulatory legislation.").

18. *Id.* at 17, 27, 38, 59, 156, 336–37.

19. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675, 688–89 (2009).

20. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (1997) (acknowledging legal realism); Scalia, *supra* note 1, at 864 ("The inevitable tendency of judges to think that the law is what they would like it to be will, I have no doubt, cause most errors in judicial historiography to be made in the direction of projecting upon the age of 1789 current, modern values . . . .").

down.[21] Perhaps Dean Chemerinsky actually believes it is politics all the way down.[22] But not many people subscribe to such extreme legal realism; for the rest of us, to assess fairly whether a judge "could have" decided a case one way or another, we must start, again, with a theory of the Constitution.

The closest Dean Chemerinsky comes to invoking a theory of the Constitution is his complaint that the Supreme Court failed to protect "minorities"[23] in the cases on his list.[24] This makes his list appear to have at least some grounding in the Constitution because one of the rationales for judicial review is indeed to look out for minorities when the political branches will not.[25] But I am afraid this is not enough grounding in the Constitution. Is it Dean Chemerinsky's view that every time a member of a minority group files a constitutional lawsuit, he or she should win it? If not every time, then which times? What if members of other minority groups disagree with the interpretation of the Constitution propounded by the group who filed the lawsuit? Which minority group should prevail? We cannot answer any of these questions without, again, a theory of the Constitution.

Justice Scalia's methods were not perfect; he was the first to concede that they had weaknesses.[26] Circularity, however, was not one of them. I am afraid the same cannot be said for bad-cases reasoning.

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21. *See* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 35–63 (2008).

22. It is not clear to me whether or not he believes this. On the one hand, he says: "I am most definitely not arguing that it is just a matter of justices deciding based on a whim or their personal preferences." CHEMERINSKY, *supra* note 2, at 340. On the other hand, in the very next paragraph, he seems to argue precisely that:

> [T]he fact that many sources are considered helps to explain why the Supreme Court has enormous discretion in deciding cases. . . . The justices cannot hide their decisions behind the text of the Constitution; the decisions described throughout this book reflect value choices made by the justices. They should be blamed or praised for their choices. *Id.*

23. *Id.* at 10 (listing his "criteria" to "evaluate the Court" as "How has it done in protecting the rights of minorities of all types? How has it done in upholding the Constitution in the face of the repressive desires of political majorities?"). Oddly, in at least one of the cases on his hit list—Citizens United—the Supreme Court protected a minority (and the one of the most concern to those who created the Court to begin with): the rich.

24. *See id.*

25. *Id.* at 10 ("[I] believe that the two preeminent purposes of the Court are to protect the rights of minorities who cannot rely on the political process and to uphold the Constitution in the face of any repressive desires of political majorities."); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Brian T. Fitzpatrick, *The Constitutionality of Federal Jurisdiction-Stripping Legislation and the History of State Judicial Selection and Tenure*, 98 VA. L. REV. 839, 846–47 (2012).

26. *See generally* Scalia, *supra* note 1.