

# ARTICLE

## ABANDON HOPE OF OBJECTIVE CONSTITUTIONAL INTERPRETATION ALL YE WHO ENTER HERE:

### CHEMERINSKY'S EXPANSIVE NEW VIEW OF CONSTITUTIONAL INTERPRETATION

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Erwin Chemerinsky's new book *We the People: A Progressive Reading of the Constitution for the Twenty-First Century*<sup>1</sup> proposes a new and expansive method for constitutional interpretation. Chemerinsky posits that there are five values in the Preamble that should guide interpretation of the Constitution: democratic governance, effective governance, justice, liberty, and equality.<sup>2</sup> He then uses this inherently vague standard to justify a variety of his personal policy preferences, now constitutionally required under the new standard he created. This standard seems to have no bounds, even allowing Chemerinsky to label the Electoral College, which is expressly established in the Constitution, as "clear[ly] unconstitutional[]." <sup>3</sup> Fans of Chemerinsky's past work, which draws on his extensive knowledge of constitutional law to make highly thought-out and persuasive arguments, will be highly disappointed by this book.

Chemerinsky's proposal to interpret the Constitution based on themes he has selected from the Preamble, such as "effective

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1. ERWIN CHEMERINSKY, *WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY* (2018).

2. *Id.* at 57–59.

3. *Id.* at 88 ("It is especially important for the Court to act because the political process will never deal with the clear unconstitutionality of the Electoral College.").

governance,” would no doubt serve to increase the already prevalent disagreement as to what is constitutionally acceptable or required.<sup>4</sup> But this hyper-subjectification of the Constitution seems to be one of Chemerinsky’s main goals. And unlike Chemerinsky’s new method of constitutional interpretation, this is not a hidden meaning that needs to be teased out from the text; he is rather upfront about this.<sup>5</sup>

Chemerinsky says that progressives should focus “on the desired meaning of the Constitution and its contents.”<sup>6</sup> In other words, first determine the end result you want from the Constitution, the “desired meaning,” and then work backwards to substantiate this end goal.<sup>7</sup> It is also telling that in this quote Chemerinsky is not saying that this practice is for everyone. Rather, it is something that “progressives”<sup>8</sup> should do. Presumably, this is necessary because conservatives’ “desired meaning” of what “effective governance” means would lead to vastly different (and undesirable to Chemerinsky) constitutional standards.<sup>9</sup> If Chemerinsky’s new standard for Constitutional interpretation was adopted, however, it is unclear what principle could be utilized to block conservatives from using the same standard.

In attempting to justify his new standard, Chemerinsky states that “we are not living in the world of 1787 and should not pretend that the choices for that time can guide ours today.”<sup>10</sup> This begs the question, if we are not to be guided in any way by the choices made in 1787, then what purpose does the Constitution serve at all? Furthermore, if decisions from the framing of the Constitution are irrelevant today, then why did Chemerinsky base his new standard for our twenty-first century country primarily around the Preamble? This logic of chronological superiority would be better suited for a book that argued for a complete rewriting of the Constitution.

Chemerinsky claims that any attempt to ascertain the original intent of the framers is not “likely to be helpful” because “[s]o many people were involved in drafting and ratifying the

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4. *Id.* at 64.

5. We must develop and defend an alternative progressive vision for the Constitution: that is my goal in this book.” *Id.* at xvi.

6. *Id.* at 18.

7. This troubling appeal to personal desires is prevalent throughout the book. Additionally, Chemerinsky constantly presents his personal desires interchangeably with the alleged desires of everyone. One such example is his assertion that “all of [the New Deal] laws were highly desirable.” *Id.* at 115.

8. *Id.* at 18.

9. *Id.* at 18, 64.

10. *Id.* at 24.

Constitution . . . .”<sup>11</sup> This is of course correct—that finding out what the Constitution means is sometimes a difficult task—but the alternative of disregarding what was intended for the document that judges are sworn to uphold seems to be a significantly worse alternative.

It is unlikely that Chemerinsky would appreciate the practice of judges ignoring the intent of the writers of the document they are interpreting if he was on the other side of the equation. For example, in the 1990s Chemerinsky served on a commission to rewrite the Los Angeles City Charter.<sup>12</sup> If the courts today needed to interpret a provision of that charter, Chemerinsky would likely not want the courts to disregard the words he wrote on the grounds that it is easier to simply create a new meaning based on the judges’ personal preference. Furthermore, Chemerinsky would likely not be satisfied with the explanation that this new way of looking at the document he wrote was “grander, and more inclusive,”<sup>13</sup> a phrase Chemerinsky uses to describe the superiority of his new method of constitutional interpretation.

Chemerinsky acknowledges that under current constitutional interpretation, the Preamble “plays no role in constitutional arguments and analysis”<sup>14</sup> and is “relegated to sheer irrelevance by the courts.”<sup>15</sup> Even Chemerinsky’s own constitutional law textbook never discusses the Preamble.<sup>16</sup> Nevertheless, Chemerinsky’s retort is that if you want to know what the underlying values of the Constitution are, “the place to start is at the very beginning.”<sup>17</sup> He also points to three early Supreme Court cases that make reference to the Preamble.<sup>18</sup>

Using the Preamble as the basis for constitutional interpretation is also problematic because, as Chemerinsky admits, “there is no historical record of the drafting process of the

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11. *Id.* at 37.

12. TEDx, *The Living Constitution: Erwin Chemerinsky at TEDxUCIrvine*, YOUTUBE (May 3, 2012), <https://www.youtube.com/watch?v=TfDu-R2mMq4> at 4:55; See Meg Sullivan, Legal Scholar’s Role in Charter Reform Wins Praise, USC NEWS (Sep. 20, 1999) <https://news.usc.edu/8482/Legal-Scholar-s-Role-in-Charter-Reform-Wins-Praise/>.

13. CHEMERINSKY, *supra* note 1, at 25.

14. *Id.* at 55.

15. *Id.* (quoting Brian Leiter, Carole E. Handler, & Milton Handler, *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation*, 12 *Cardozo L. Rev.* 117 (1990)).

16. *Id.* at 56 (citing ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW*, 5<sup>th</sup> ed. (New York: Wolters Kluwer, 2016)).

17. *Id.* at 53.

18. *Id.* at 56. Those three cases are *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Martin v. Hunter’s Lessee*, 14 U.S. 304 (1816); and *McCulloch v. Maryland*, 17 U.S. 316 (1819). *Id.*

Preamble or the reasons for the changes made by the Committee of Style.”<sup>19</sup> Perhaps this is what makes the Preamble so attractive to Chemerinsky as a basis for Constitutional interpretation. Namely, the less is known about it, the more it is subject to interpretation.

In many places in the book, Chemerinsky comes across more as a politician using hyperbolic rhetoric to drum up support from the masses than a constitutional law professor presenting well-reasoned arguments to a knowledgeable audience. For example, he claims to have “no doubt whatsoever” that the current conservative Court will “eliminate all constitutional protection for abortion rights . . . .”<sup>20</sup> He even claims that the Constitution as ratified in 1791 “gave women no rights.”<sup>21</sup>

Other sections read more like a high school research paper, focusing only on personal preferences without any attempt at constitutional analysis. For example, in discussing *United States v. Lopez*,<sup>22</sup> Chemerinsky states that “[g]uns near schools are inherently a bad thing. It is hard to identify what is gained by declaring this law unconstitutional.”<sup>23</sup> Of course, at issue in *Lopez* was not the desirability of the legislation but rather whether it exceeded Congress’s power under the Commerce Clause.<sup>24</sup> The extent of Chemerinsky’s analysis is essentially that he has determined that one of the five themes of the Preamble is effective governance; he also determined that this law promotes effective governance, and therefore it is Constitutional. Under this theory, perhaps the courts could even impose the law in question in *Lopez* without Congressional action. After all, Chemerinsky has deemed this law constitutional because it is necessary for “effective governance.”<sup>25</sup> Therefore, not having the law would be denying people a constitutional guarantee and therefore be unconstitutional.

Possibly the boldest position in the book is when Chemerinsky takes something expressly stated in the Constitution and deems it unconstitutional based on his new

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19. *Id.* at 61.

20. *Id.* at 12.

21. *Id.* at 59, (“This is not surprising for a Constitution that explicitly protected the institution of slavery and gave women no rights.”); *Id.* at 74 (“As I have explained, the Constitution protected the rights of slave owners and accorded women no rights; it was really about protecting the rights of white male property owners.”) In 1791 the Constitution granted women many rights, including free speech, freedom of religion, the right against self-incrimination and double jeopardy, etc.

22. *United States v. Lopez*, 514 U.S. 549 (1995).

23. CHEMERINSKY, *supra* note 1, at 118.

24. *Lopez*, 514 U.S. at 552.

25. CHEMERINSKY, *supra* note 1, at 123).

five-values-of-the-Preamble standard. He states that the Electoral College should be struck down by the Supreme Court because of its “clear unconstitutionality.”<sup>26</sup> With Chemerinsky openly admitting that his new method of interpretation allows for the striking down of explicit provisions in the Constitution, it is hard to see any limit at all. Under this view what would stop the Supreme Court from holding that free speech is unconstitutional on the grounds that it impedes “effective governance”?<sup>27</sup>

Chemerinsky alleges that it is only coincidence that removing the Electoral College would favor Democratic candidates over Republican ones.<sup>28</sup> “It does not matter whether it is a Republican or Democrat who benefits,”<sup>29</sup> he claims. However, before Donald Trump won the 2016 election due to the Electoral College, Chemerinsky admitted that eliminating the Electoral College “would require a constitutional amendment . . . .”<sup>30</sup> Conveniently, the book did not seem to provide any examples of policies supported by this new method of interpretation that Chemerinsky was not already a supporter of.

Chemerinsky also argues that there is a “constitutional right to minimum entitlements.”<sup>31</sup> He acknowledges that this seems “far-fetched”<sup>32</sup> given our current understanding of constitutional law. Regardless, he states his position that “. . . the Constitution, as reflected in its Preamble, had a larger and grander vision of ensuring the general welfare of all Americans.”<sup>33</sup> The mechanics behind how an over-200-year-old document can suddenly acquire a different vision are never addressed. In support of this new constitutional right to minimum entitlements, Chemerinsky points out that “[m]any countries in the world have constitutions

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26. *Id.* at 88.

27. *Id.* at 64.

28. The replacement of the Electoral College with a popular vote would favor Democratic presidential candidates because the Electoral College gives disproportional voting power to smaller states, which are more likely to be conservative. *See* Jose A. Del Real & Julie Turkewitz, *Should the Electoral College Be Eliminated? 15 States Are Trying to Make It Obsolete*, NY TIMES (May 22, 2019), <https://www.nytimes.com/2019/05/22/us/electoral-college.html?searchResultPosition=1>; *but see* Nate Cohn, *The Electoral College's Real Problem: It's Biased Toward the Big Battlegrounds*, NY TIMES (March 22, 2019), <https://www.nytimes.com/2019/03/22/upshot/electoral-college-votes-states.html?searchResultPosition=5>.

29. CHEMERINSKY, *supra* note 1, at 90.

30. Erwin Chemerinsky, *Reforming the Electoral College*, ORANGE COUNTY REG. (Sept. 15, 2016), <https://www.ocregister.com/2016/09/15/reforming-the-electoral-college/>.

31. CHEMERINSKY, *supra* note 1, at 221.

32. *Id.*

33. *Id.* at 225.

that create such a right,”<sup>34</sup> while neglecting to mention that ours does not.

It becomes clear early on in the book that Chemerinsky’s five-values-of-the-Preamble standard is really no standard at all. Rather, it is simply a ruse to use the courts to enact progressive policies and combat conservative policies (or, as Chemerinsky defines them, “regressive policies”).<sup>35</sup> This new method of interpretation is not without benefits, however. The difficulty of constitutional law classes would be greatly reduced if the current standard, with all its complexities, is replaced with this new standard. To determine what is constitutional, students would simply need to memorize the policies that Chemerinsky likes. While Chemerinsky’s approach may make for an interesting progressive thought experiment, as a book purportedly portraying a serious scheme of constitutional interpretation, it falls gravely short.

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34. *Id.* at 221 (citation omitted).

35. *Id.* at xvii.