CRITICAL RACE JUDGMENTS

By re-writing U.S. Supreme Court opinions that implicate critical dimensions of racial justice, Critical Race Judgments demonstrates that it’s possible to be judge and a critical race theorist. Specific issues covered in these cases include the death penalty, employment, voting, policing, education, the environment, justice, housing, immigration, sexual orientation, segregation, and mass incarceration. While some rewritten cases – Plessy v. Ferguson (which constitutionalized Jim Crow) and Korematsu v. United States (which constitutionalized internment) – originally focused on race, many of the rewritten opinions – Lawrence v. Texas (which constitutionalized sodomy laws) and Roe v. Wade (which constitutionalized a woman’s right to choose) – are used to incorporate racial justice principles in novel and important ways. This work is essential for everyone who needs to understand why critical race theory must be deployed in constitutional law to uphold and advance racial justice principles that are foundational to U.S. democracy.

Bennett Capers is a Professor of Law at Fordham Law School, where he is also the Director of the Center on Race, Law, and Justice. He is the author of The Prosecutor’s Turn (Metropolitan Books). His commentary and op-eds have appeared in the New York Times, Washington Post, and other journals.

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R. A. Lenhardt is a Professor of Law at Georgetown Law School, where she specializes in matters pertaining to race, family, and citizenship. She has published widely, and is currently working on a book project entitled Race, Law, and Family in an American City: The Untold Story of Moore v. City of East Cleveland. In addition to her position at the Law School, Professor Lenhardt has been selected as one of four co-founders of the Racial Justice Institute being launched by Georgetown University.

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Critical Race Judgments

RE-WRITTEN U.S. COURT OPINIONS ON RACE
AND THE LAW

Edited by

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Is it possible to be both a judge and a feminist?” So opens Feminist Judgments, a collection of key decisions in English law rewritten by feminist legal scholars. It is a provocative question, and one that prompted us, a group of Critical Race Theorists, to open this book, Critical Race Judgments, with a similar question: “Is it possible to be both a judge and a Critical Race Theorist?” On one view, the answer is a resounding “no.” To put the point the way two critics of the genre once put it, Critical Race Theory is “beyond all reason.” Accordingly, that body of work can be neither translated into nor substantively shape the articulation and the development of legal doctrine in the United States. On another view, and the one that informs this project, the answer is unequivocally “yes.” The very project of Critical Race Theory is to highlight, contest, reimagine, and rearticulate “the vexed bond between law and racial power.” – ECIP introduction. | Includes bibliographical references and index.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data


title: Critical race judgments : rewritten US court opinions on race and the law / edited by Bennett Capers, Fordham Law School; Devon Carbado, UCLA School of Law; Robin A. Lenhardt, Georgetown Law School; Angela Onwuachi-Willig, Boston University School of Law.


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identifiers: lccn 2021036384 (print) | lccn 2021036385 (ebook) | isbn 9781107164529 (hardback) | isbn 9781316616451 (paperback) | isbn 9781316691090 (ebook)


classification: lcc kf4755 .c748 2022 (print) | lcc kf4755 (ebook) | dec 342.7308/73–dc23

LC record available at https://lccn.loc.gov/2021036384.

LC ebook record available at https://lccn.loc.gov/2021036385.

isbn 978-1-107-16452-9 Hardback
isbn 978-1-316-61645-1 Paperback

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Contents

About the Contributors  ix
Advisory Committee  xxi
Foreword  xxiii

Introduction  1

Brown v. Board of Education  25
Derrick Bell

Part I Membership and Inclusion  39

Arizona v. United States  41
Kevin Johnson

Chae Chan Ping v. United States  74
Rose Cuison-Villazor

Plessy v. Ferguson  85
Trina Jones

Korematsu v. United States  104
Robert Chang

The Slaughterhouse Cases  118
Francisco Valdes

Terry v. Ohio  150
Paul Butler
vi Contents

Rogers v. American Airlines
Wendy Greene 159

PART II PARTICIPATION AND ACCESS 183

Shaw v. Reno
Guy-Uriel Charles and Luis Fuentes-Rohwer 185

Rice v. Cayetano
Addie Rolnick 198

Milliken v. Bradley
Michelle Adams 217

Gong Lum v. Rice
Reginald Oh 235

Regents of the University of California v. Bakke
Luke Charles Harris 246

Parents Involved v. Seattle School District No. 1
Charles Lawrence 268

Meritor Savings Bank FSB v. Vinson
Angela Onwuachi-Willig 286

PART III PROPERTY AND SPACE 303

Dred Scott v. Sandford
Cheryl I. Harris 305

Virginia v. Black
Mari Matsuda 324

Palmer v. Thompson
Elise C. Boddie 337

Angela Onwuachi-Willig and David Simson 347

Washington v. Davis
Kimberlé Williams Crenshaw 377

Katz v. United States
Bennett Capers 403
Contents

Illinois v. Wardlow
L. Song Richardson 420

PART IV INTIMATE CHOICE AND AUTONOMY 437

Loving v. Virginia
Peggy Cooper Davis 439

Adoptive Couple v. Baby Girl
Matthew Fletcher and Kathryn E. Fort 452

Reno v. Flores
Jennifer Chacón 472

Lawrence v. Texas
Russell Robinson 485

Moore v. City of East Cleveland
R. A. Lenhardt 492

Buck v. Bell
Dorothy Roberts 514

Roe v. Wade
Melissa Murray 523

PART V JUSTICE 535

United States v. Cruikshank
Pratheepan Gulasekaram 537

McCleskey v. Kemp
Mario Barnes 557

Whren v. United States
Devon W. Carbado and Jonathan Feingold 582

Richardson v. Ramirez
Janai Nelson 602

Bean v. Southwestern Waste Management Corp.
Sheila Foster 617

Barlow v. Collins
Angela P. Harris 625
Muller v. Oregon
Khiara M. Bridges
651

Williams v. Walker-Thomas Furniture Co.
Emily Houh
663

San Antonio Independent School District v. Rodriguez
Rachel F. Moran
675
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About the Contributors

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xvi

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Dorothy Roberts is the George A. Weiss University Professor of Law & Sociology at the University of Pennsylvania, with joint appointments in the Departments of Africana Studies and Sociology and the Law School, where she is the inaugural Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights. She is also the founding director of the Penn Program on Race, Science, and Society. She author of Killing the Black Body: Race, Reproduction, and the Meaning of Liberty; Shattered Bonds: The Color of Child Welfare; Fatal Invention: How Science, Politics, and Big Business Re-create Race in the Twenty-First Century; and Torn Apart: How the Child Welfare System Destroys Black Families —And How Abolition Can Build a Safer World. Recent recognitions of her work include 2019 Honorary Doctor of Laws Degree, Rutgers University, Newark; 2017 election to the National Academy of Medicine; and 2016 Society of Family Planning Lifetime Achievement Award.

Russell K. Robinson is the Walter Perry Johnson Professor of Law & Faculty Director, Center on Race, Sexuality & Culture, University of California, Berkeley School of Law. Robinson graduated with honors from Harvard Law School, after receiving his BA summa cum laude from Hampton University. Robinson’s scholarly and teaching interests include antidiscrimination law, race and sexuality, law and psychology, constitutional law, and media and entertainment law. His publications include: “‘Playing It Safe’ with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality,” 112 Northwestern Law Rev. 1565 (2018); “Unequal Protection,” 67 Stan. L. Rev. (2015); and “Masculinity as Prison: Sexual Identity, Race, and Incarceration,” 99 Calif. L. Rev. 1309 (2011).

Addie C. Rolnick is the San Manuel Professor of Law at the University of Nevada, Las Vegas, William S. Boyd School of Law. She is the Faculty Director of the Indian Nations Gaming & Governance Program and the Associate Director of the Program on Race, Gender & Policing. Her work examines equality-based attacks on indigenous rights, including how advocates have used the Rice case to dismantle indigenous rights in the U.S. territories. Prior to joining UNLV, she was the inaugural Critical Race Studies Law Fellow at UCLA School of Law. Before that, she represented tribal governments as a lawyer and lobbyist in Washington, DC. She earned her JD and MA in American Indian Studies from UCLA and her BA from Oberlin College.

David Simson is an Acting Assistant Professor of Lawyering at NYU Law School. His research and writing focus on constitutional law, Critical Race Theory, employment discrimination, and law and social psychology. He has published in several journals,
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Francisco Valdes is Professor of Law and Dean’s Distinguished Scholar at University of Miami School of Law. His work focuses on constitutional law and theory, Latina/o legal studies, critical outsider jurisprudence and Queer scholarship. Since 1995, Dr. Valdes has contributed regularly to LatCrit symposia and publications to help elucidate LatCrit approaches to knowledge-production, critical theory, and academic activism. During this time, Dr. Valdes’ work on constitutional theory, critical race studies and queer scholarship also has been published in numerous law reviews, other academic journals and various book anthologies, including both specialty and mainstream venues. In 2002, Dr. Valdes edited (with Angela Harris and Jerome Culp) the collection of essays, Crossroads, Histories and Directions: A New Critical Race Theory. Dr. Valdes served as founding co-chair of LatCrit, Inc., and in 2002, received the Clyde Ferguson Award of the AALS Minority Groups Section. In 2004, he also received the Extraordinary Service Award from the National Conference of the Regional People of Color Scholarship Conferences.
Advisory Committee

CRITICAL RACE JUDGMENTS: RE-WRITTEN U.S. COURT OPINIONS ON RACE AND THE LAW

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Foreword

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Robert F. Kennedy is often quoted as saying, “Some men see things as they are, and say why. I dream of things that never were, and say why not.” This wonderful volume of essays does exactly that: it imagines things that never were and tells us how different and better our country could have been. If only we had justices who used the lens of Critical Race Theory, constitutional law and many areas of statutory law would have been vastly different and we would live in a more just and equal society.

In some instances, the essays are about how terribly misguided decisions – such as Plessy v. Ferguson,1 Korematsu v. United States,2 and McCleskey v. Kemp3 – could have been written to come to totally different conclusions. In some instances, the essays are about how judicial opinions that came to a progressive result – such as Loving v. Virginia,4 Roe v. Wade,5 and Lawrence v. Texas,6 – could have been improved. The sum of this work is to provide a very different vision for American law.

But what these essays don’t answer because it was not their assignment is Bobby Kennedy’s question of why not. Why has our Supreme Court been such a failure when it comes to issues of race throughout American history? One thing that unites the essays in this book is their documenting that the Supreme Court overall has had a dismal record – and that is a very generous characterization – with regard to race and equality throughout American history. From 1787, when the Constitution was ratified, until 1865, when the Thirteenth Amendment was adopted, not a single Supreme Court decision protected the rights of slaves or chipped away at the

1. 163 U.S. 537 (1896) (upholding “separate but equal”).
5. 410 U.S. 113 (1973) (upholding a woman’s constitutional right to abortion).
institution of slavery. The Court, in decisions such as *Prigg v. Pennsylvania* and *Dred Scott v. Sanford*, aggressively protected the rights of slave owners.

From 1866 until 1954, a period of 58 years, the Court articulated and implemented the doctrine of “separate but equal” that sanctioned apartheid in much of the United States. And it was not for many years after that until state-mandated segregation ended. Nor has the Court’s performance in recent years been admirable. The Court dramatically limited the scope of equal protection in cases like *Washington v. Davis* in its requirement for proof of discriminatory intent to establish race discrimination. And in *Shelby County v. Holder*, the Court for the first time in over a century and a half declared unconstitutional a civil rights statute, invalidating crucial provisions of the Voting Rights Act of 1965.

The essays in this book require consideration of why the Supreme Court has done so poorly on issues of race. A large part of the answer certainly must be racism. A central teaching of Critical Race Theory is how racism is deeply embedded in American society and its legal and social structures. The essays in this book show how a different America could have been constructed. Critical Race Theory also teaches us of the importance of implicit biases and these too have infected Supreme Court decisions throughout American history.

This collection of essays demands that we reflect on the many Supreme Court cases that are discussed and understand why the Constitution and the Court have failed so dismally in combating racism. One must hope that this understanding, and that these essays, can provide a basis for a much better path for the future.

First, as we look back at the cases discussed in this book, we must be cognizant, at least at times, that the essays are the beneficiaries of hindsight. That is in no way to excuse the failings of the Court, but it is to say that there are times when hindsight makes evident things that might not have been recognized at the time of the decision. Derrick Bell’s dissent to *Brown v. Board of Education*, which begins this book, is a powerful example of that.

Professor Bell and I had many occasions to discuss *Brown*. On the occasion of the fiftieth anniversary of *Brown v. Board of Education*, Professor Bell and I were opposing counsel in a moot court on *Brown* at American University Law School. Professor Bell’s position was not that the Court should have upheld laws requiring segregation, but rather that the quest to desegregate schools was futile and therefore

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7. 41 U.S. (16 Pet.) 539 (1842) (declaring unconstitutional a state law that prohibited removing an escaped slave by force or violence).
8. 60 U.S. (19 How.) 393 (1857) (holding that slaves are property and not citizens, and declaring the Missouri Compromise unconstitutional as a taking of property from slaveowners).
Foreword

misguided. Our moot court actually continued a discussion we began when I was a student in his course on Race, Racism, and American law in the Spring of 1978, and a conversation that we had for the rest of his life about what the Court should have done in Brown and with regard to public schools.

Professor Bell’s view that desegregation of schools was an impossible quest certainly and tragically has been shown to be correct. But I don’t think the Court could have known this futility in 1954. The Court could not have known the extent of the massive resistance, the degree of white flight to suburban and private schools, and the Supreme Court’s own abandonment of desegregation in decisions like Milliken v. Bradley and Parents Involved in Community Schools v. Seattle School District No. 1.

Essays like Professor Bell’s, and others in this book, force us to think about if we knew then what we know now, what would we do differently. Professor Khiara Bridges offers a different and far better opinion for Muller v. Oregon, where the Supreme Court upheld a maximum hour law for women employees. At the time, Muller was hailed as a progressive victory in an era of a Court that was invalidating laws to protect employees, but in hindsight its approach focusing on the inherent frailty of women and the need to protect their reproductive capacity is profoundly sexist and offensive. Professor Melissa Murray offers an approach to Roe v. Wade that would have provided a far stronger foundation for abortion rights and that benefits from the knowledge of what has occurred over the last half century.

Second, and closely related, we must understand the decisions in the context of the pressures of their times. To be clear, looking at cases in this way provides an understanding, never an excuse for bad decisions. A number of years ago, I participated in a moot court that Harvard Professor Charles Ogletree held on whether Dred Scott was inevitable. One of the judges on the panel, Sixth Circuit Judge Damon Keith, in his comments after the argument, forcefully answered this question: the Court’s decision was wrong and inexcusable at its time and we should have expected more and better from the justices. In fact, the dissents in many of the cases show that the better view was known at the time and unfortunately rejected. Professor Robert Chang’s essay on Korematsu v. United States echoes some of the points made in the dissenting opinions of Justices Robert Jackson and Frank Murphy, who clearly saw the terrible error of the Court’s ruling.

Professor Paul Butler’s essay offers a very different and far better approach to the Court’s decision in Terry v. Ohio, which upheld the ability of the police to stop and frisk individuals if there is “reasonable suspicion.” Terry is a wrong decision that

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15 208 U.S. 412 (1908).
17 323 U.S. 214 (1944) (Jackson, J., dissenting; Murphy, J., dissenting).
18 392 U.S. 1 (1968).
contributed greatly to racialized policing in the United States. But what is often overlooked is that Terry v. Ohio was an 8–1 decision handed down by the Supreme Court in 1968 when there was the most liberal group of justices of any time in American history. The majority opinion in Terry was written by Chief Justice Earl Warren and was joined by liberal luminaries such as William Brennan and Thurgood Marshall; only Justice William Douglas dissented.

Understanding the case requires reflecting on how such a liberal Court could render such a bad decision empowering the police. The racial consequences of the Court’s holding in Terry clearly were foreseeable. The NAACP Legal Defense Fund in its “friend of the court” brief in Terry v. Ohio addressed the racial consequences of allowing police stops and frisks: “The evidence is weighty and uncontradicted that stop and frisk power is employed by the police most frequently against the inhabitants of our inner cities, racial minorities and the underprivileged.”

Terry v. Ohio was decided in 1968. It was an extraordinarily tense time in the United States and the social unrest, and the underlying social concern about crime and social order, likely affected the justices. This was the year that Martin Luther King, Jr. and Bobby Kennedy were assassinated. There was great concern about crime and violence in the United States in the late 1960s. Shortly before the Court decided Terry, President Lyndon Johnson had created a President’s Commission on Law Enforcement and Administration of Justice, chaired by Attorney General Nicholas Katzenbach. This was a reaction to the perception that crime was out of control. 1968 was the year that Richard Nixon ran for President, largely on a platform of what he called “law and order” and explicitly against the Warren Court and its decisions. 1968 was a year in the midst of racial violence in the United States. In 1965, there was a riot in Los Angeles in the Watts area. In the summer of 1967, just before the Supreme Court’s oral arguments in Terry and its companion cases, riots occurred in Newark, in Detroit, and in other cities. More riots followed, including after the assassination of Dr. Martin Luther King, Jr., on April 4, 1968. It was in this context that the Supreme Court considered and decided Terry v. Ohio.

The Court also may have been reacting to the great criticism of its earlier decisions, expanding rights of criminal defendants, such as Mapp v. Ohio and Miranda v. Arizona. The justices were repeatedly attacked for handcuffing the police and being soft on criminals. Likely they just weren’t willing to take another step to significantly limit law enforcement in light of this. Again, this is not to excuse the decision, but to understand how it came about.

10 Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae at 3, Terry, 392 U.S. 1 (No. 67), 1967 WL 113672, at *3.
11 Devon Carbado powerfully makes this point in Devon W. Carbado, From Stop and Frisk to Shoot to Kill: Terry v. Ohio’s Pathway to Police Violence, 64 UCLA L. Rev. 1508, 1528 (2017).
12 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states).
Understanding decisions in the context of their times also provides a basis for thinking about *Brown v. Board of Education* and again Professor Bell’s essay about it. As Professor Bell rightly pointed out, nowhere in *Brown* does the Court explain why “separate but equal” is inherently inimical to the Fourteenth Amendment’s promise of equal protection of the law. I share his sense that this should have been an essential part of the Court’s decision. Instead, the Court in *Brown* focused narrowly on why segregation of schools violates equal protection. Chief Justice Warren surely wrote the opinion this way to get a unanimous opinion. William Douglas wrote in his autobiography that had *Brown* been decided the year before, in 1953 when it was first argued, it would have been 5–4 to affirm *Plessy v. Ferguson* and the doctrine of separate but equal.\(^\text{24}\) The Court in 1954 could not have gotten unanimity to the opinion Professor Bell rightly said was essential. Would it have been better for the Court to have issued such an opinion even if it was not unanimous? Would it have been better to forego unanimity the following year so as to prescribe immediate remedies for segregation rather than its amorphous command to desegregate with “all deliberate speed”? Justice John Paul Stevens later said that he felt the Court gave up too much for the sake of unanimity in *Brown*.\(^\text{25}\) Yet, I also understand why Chief Justice Warren felt that unanimity was essential for a decision of this magnitude. It is a difficult and unanswerable question, but it requires looking at the Court in the context of the pressures, including internal ones among the justices, that it faced.

Third, the decisions discussed in this book must be understood as a reflection of the justices and their values and life experiences. One of the central teachings of Critical Race Theory is that there is no such thing as “objective” law. Supreme Court decisions are entirely a product of who is on the Court and what they believe. Although Supreme Court nominees are fond of uttering platitudes at their confirmation hearings like, “Justices are just umpires calling balls and strikes” and “Justices just apply the law, they don’t make it,” we all know that they are utter nonsense. Why did Republican Senators block the confirmation of Chief Judge Merrick Garland and rush through the confirmation of Judge Amy Coney Barrett? It is because they, like everyone, know that the identity of the justices and their ideology and values make all of the difference in Supreme Court decisions.

In all of American history, there have been only three individuals of color to serve on the Supreme Court, two Black justices and one Latina justice. There have been just five women on the Supreme Court. Overall, the justices have come from very privileged backgrounds and all obviously were very successful before their nomination to the Supreme Court. Some justices – like James Clark McReynolds – were openly racist and anti-Semitic. Many were stunningly insensitive to the racial dimensions of their decisions. For example, Fourth Amendment decisions like


Whren v. United States\textsuperscript{26} (discussed by Devon Carbado and Jonathan Feingold) and Illinois v. Wardlow\textsuperscript{27} (discussed by Song Richardson) essentially give the police the ability to stop any person at any time, which inevitably is done in a racialized manner. But the Court’s opinions are seemingly oblivious to this reality. The requirement for proof of discriminatory intent in cases like Washington v. Davis (discussed by Kimberlé Williams Crenshaw) and McCleskey v. Kemp (discussed by Mario Barnes) reflects a Court’s majority that shows little understanding of the problems of implicit bias or of proving discriminatory intent.

Focusing on the identity of the justices as the reason for the decisions is important in reminding us how different it could have been and how easily it might have been that many of the opinions could have been written like the ones presented in this book. There is a temptation to regard history as having been inevitable rather than contingent on circumstances and events. What if Bobby Kennedy had not been assassinated in June 1968 and he, rather than Richard Nixon, appointed four justices between 1969 and 1971? Or what if Hubert Humphrey had won that election? Many of the cases discussed in this book would have come out differently. In the area of public schools, San Antonio Board of Education v. Rodriguez,\textsuperscript{28} discussed by Professor Rachel Moran in her essay, and Milliken v. Bradley,\textsuperscript{29} discussed by Professor Michelle Adams, surely would have been decided differently. Both were 5–4 rulings, with the majority comprised of Potter Stewart joined by the four Nixon appointees – Warren Burger, Harry Blackmun, Lewis Powell, and William Rehnquist. These decisions, which did a great deal to institutionalize separate and unequal schools, instead would have had the Court taking major steps towards ensuring equal educational opportunity. The Court would have held that disparities in school funding violate equal protection and that courts may impose inter-district remedies for school segregation.

Or what if Al Gore had been elected President in 2000 rather than George W. Bush? If there had not been the “butterfly ballot” in Florida, it would have happened. He likely then would have been President in 2005 and would have replaced William Rehnquist and Sandra Day O’Connor. How different constitutional law would be with liberal or even relatively moderate justices rather than John Roberts and Samuel Alito. And what if Hillary Clinton rather than Donald Trump had been elected in 2016 and she had been able to replace Antonin Scalia, Anthony Kennedy, and Ruth Bader Ginsburg?

Between 1960 and 2020, there have been thirty-two years with Republican Presidents and twenty-eight years with Democratic Presidents. In 2024, it will be

\textsuperscript{26} 517 U.S. 806 (1996) (motivation of police officer is irrelevant if there is reasonable suspicion or probable cause).

\textsuperscript{27} 528 U.S. 119 (2000) (reasonable suspicion existed when a person walked the other way from a police officer).

\textsuperscript{28} 411 U.S. 1 (1973) (holding disparities in school funding do not violate equal protection).

\textsuperscript{29} 418 U.S. 717 (1974) (holding that courts generally cannot impose inter-district remedies for school segregation).
exactly even in this regard. But since 1960, Republican Presidents have put fifteen justices on the Court and Democratic Presidents only eight. A great deal of that is the accident of history as to when vacancies on the Supreme Court have occurred, as well as Republican machinations in blocking Garland and rushing through Barrett. In other words, the decisions discussed in this book were not an historical inevitability. They were entirely a product of who was on the Court when they were decided.

In conclusion, as I reflect on this wonderful book, it made me think about why we should care so much about the Supreme Court. I have spent my career teaching its decisions, writing about them, and occasionally arguing there, and find that increasingly I am asking myself that question. The Court has failed so miserably on issues of race, and much else. The composition of the current Court – and what it is likely to be for many years to come – is a cause for despair. Amy Coney Barrett was 48 years old when she was confirmed as a justice in 2020. If she remains on the Court until she is 87, the age at which Justice Ruth Bader Ginsburg died, Barrett will be a justice until the year 2059.

The essays in this book and the cases they discuss show why we spend so much time focused on the Supreme Court. Its decisions affect all of us, often in the most important and intimate aspects of our lives. Its decisions profoundly shape our society, for ill in cases like Dred Scott and Plessy, and for good, in cases like Brown and Roe and Lawrence. This book challenges us to imagine what our world would have been like with a different group of justices, ones far more conscious of racism and ones that benefited from the wisdom of Critical Race Theory. It would have been – and it could have and should have been – such a better world.

30 See Erwin Chemerinsky, The Case Against the Supreme Court (2014).