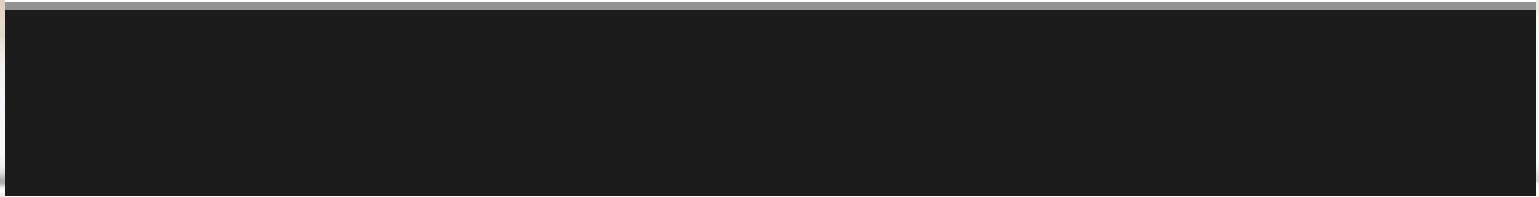
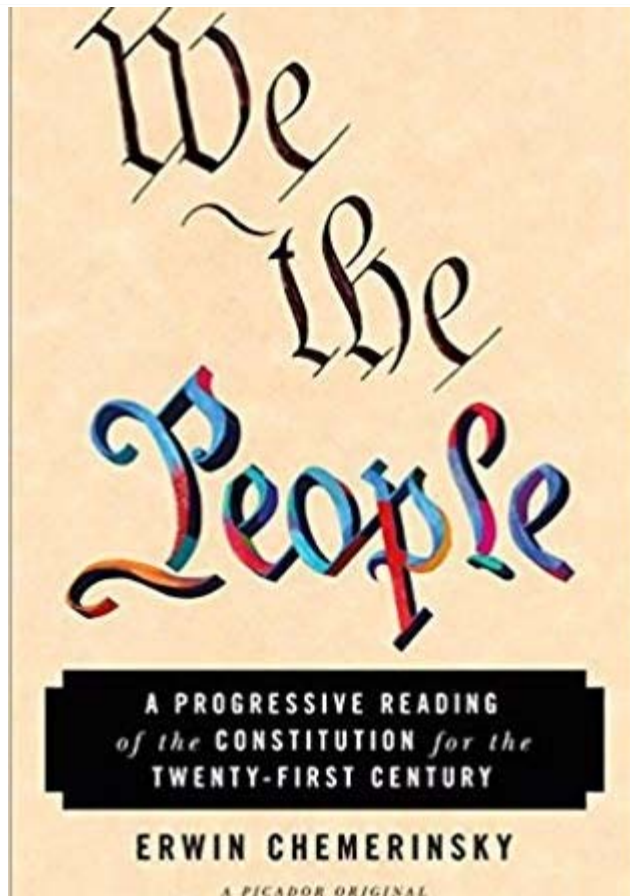


Saturday, February 16, 2019

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NON-FICTION

## What To Do Now That The Court Is Lost

### *A “Progressive” Reading Of The Constitution Doesn’t Provide Many Answers*

November 28, 2018      Michael Giltz

Now that Brett Kavanaugh is officially Justice Kavanaugh, we can expect decades of rulings from the Supreme Court that block a progressive agenda. The rightward tilt of the Court will tempt some to undermine the independence of the judicial branch, or give up on it altogether.

Not so fast, says scholar Erwin Chemerinsky, the dean of UC Berkeley School of Law, honored by National Jurist last year as the most influential person in legal education.

Chemerinsky points out that conservatives faced a similar dilemma for decades themselves. They faced a liberal Court hostile to their agenda. Their response? They built a network for young lawyers, campaigned hard for judicial appointees at every level and developed a new philosophy dubbed “originalism” to cloak the right-wing rulings they longed for with the guise of impartiality.

In *We The People*, Chemerinsky insists liberals must do the same. Resist the desire to debase the authority of the courts, build up a network a la the right-wing Federalist Society, campaign hard for judges at every level, and most of all develop a progressive reading of the Constitution.

Chemerinsky argues that the key to this intellectual task is the overlooked section known as The Preamble, often quoted but rarely taken seriously. He says that the U.S. Constitution—and the U.S. government as a whole—should be a tool to work towards the goals as stated in the Preamble, to actually “*form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity....*”

As Chemerinsky is at pains to make clear, he’s far from the first to believe the Preamble is much more than a throat-clearing bit of fancy talk.

All well and good, but Chemerinsky proves no better at taking down conservative thought than at offering up a new progressive philosophy. He slaps aside the infantile argument of “originalism.” But it’s far from a definitive knock out, either because there’s so little to the argument in the first place or because Chemerinsky just can’t bring himself to take it seriously.

In response to this conservative thought, Chemerinsky offers a progressive reading of the Constitution, how that has played out in the past and what it should mean in the future.

His new philosophy entails...well, pretty much the progressive agenda of today. You cannot ensure the “general welfare” if people are worried about getting sick. How can you “establish justice” if some people are homeless? Or “secure the blessings of liberty” if transgender people aren’t free to live unburdened by the prejudices of others? Indeed, but is any of this new?

Chemerinsky’s book simply falls between the cracks. It doesn’t feel scholarly enough to impress the legal community. And it’s too schoolmarm-ish and dry for the general public.

Ultimately, the message I took away from this passionate if thin book was not the need for any grand new philosophy to refute the paper tiger of “originalism.” It’s the essential need for your side to win the Presidency and win control of the Senate again and again and again. And then put Justices on the Court who share your principles.

**(Picador, November 13, 2018)**

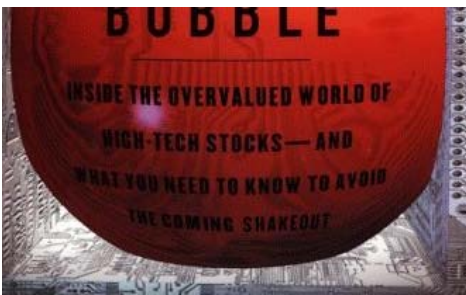
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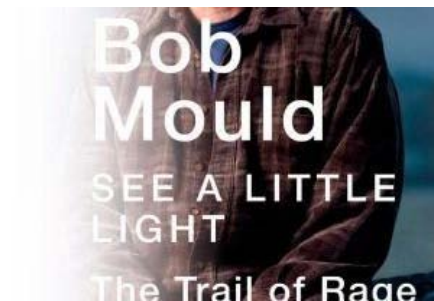
Michael Giltz is a freelance writer based in New York City covering all areas of entertainment, politics, sports and more. He has written extensively for many outlets, such as New York Post, New York Daily News, New York Magazine, The Advocate, Out, Huffington Post, Premiere Magazine, Entertainment Weekly, BookFilter, USA Today and the Los Angeles Times. He's co-host of the long-running podcast Showbiz Sandbox.

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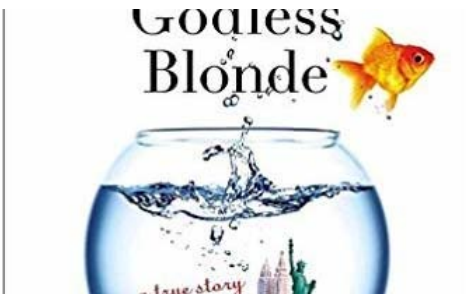
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