



## Calling Out the Right

Erwin Chemerinsky, the founding dean of UC Irvine School of Law, is one of the nation's foremost liberal legal scholars. He is also a renowned appellate attorney who has argued four major cases before the U.S. Supreme Court. His latest book, *The Conservative Assault on the Constitution* (Simon & Schuster), tracks the profound impact that Republican-appointed justices have had on the U.S. Supreme Court since the late 1960s. But the book is more than a detached polemic; it includes Chemerinsky's very personal account of what it was like to fight some of the country's most important legal battles—and lose. In October, Chemerinsky spoke with associate dean Evan Lee of UC Hastings College of the Law.



Erwin Chemerinsky

To watch the full interview, go to [www.callawyer.com](http://www.callawyer.com).

Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, coproduced by *California Lawyer* and UC Hastings College of the Law.

**Q.** Unlike your academic treatises, your new book reads like a political manifesto. It's a call for the nation to take back the Court and take back the Constitution from what you portray as a conservative coup d'état.

Ever since Richard Nixon ran for president in 1968, conservatives have sought to dramatically change constitutional law. The thesis of this book is that in almost every area, they've succeeded. We tend not to realize that, because the cases come down one at a time. And not every case goes in a conservative direction. Some of the targets of the conservatives—*Roe v. Wade*, the school prayer decisions—haven't been overruled. But what I wanted to say to a wider audience is that conservatives have succeeded to a large extent.

Still, I notice you don't use the phrase "vast right-wing conspiracy." Why not?

Conspiracy has the connotation of something illegitimate, if not illegal. I don't believe that these justices have done anything illegal. But I do think that what they've done is very undesirable.

You argue that neither liberals nor conservatives can interpret the Constitution

in a neutral fashion. But what about the "original intent" arguments that Justice Antonin Scalia makes?

Even if we believe that original intent can give us some guidance to what rights are protected, most issues that come up in constitutional law aren't about that. Take the Fourth Amendment. It prohibits unreasonable searches and seizures. What's unreasonable? Is requiring every high school student participating in extracurricular activity to go through drug testing reasonable or unreasonable? Take another example: When the Supreme Court dealt with affirmative action in 2003, it had to face the question of whether or not diversity in the classroom is a compelling government interest. ... Now if there's anyplace where I think I can make a strong argument for original intent, it's that the framers of the Fourteenth Amendment *intended* something like what we today call affirmative action.

Affirmative action in what sense? Race-conscious remedies?

Exactly. And this is one place where Justices Scalia and Thomas pay no attention to original intent. They just want to follow their conservative ideology.

So, to the Reconstruction Congress of 1867 you think color blindness would be a nonstarter?

They adopted numerous programs like the Freedmen's Bureau that were race based. So, there's no indication that they interpreted equal protection as requiring color blindness, and yet that, of course, is how Justices Scalia and Thomas want to interpret it.

I'll give you another example. The Second Amendment says, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Justice Scalia writes an opinion that says the first half of it is prefatory; it's the second half that's operative. And so he reads the Second Amendment as if the first half wasn't there at all. But you can't dismiss half of an amendment by saying it's just prefatory. It's all operative language.

You would argue, then, that conservative judges are standing behind a façade of neutrality to shield the public from what's actually going on?

That's exactly right. *Brown v. Board of Education* in saying that separate can never be equal was making a value

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choice that wasn't commanded by the text of the Constitution. *Roe v. Wade* was making a value choice. When the Supreme Court said this year that corporations have the right to spend as much money as they want to get candidates elected they were making a value choice as well. The difference between liberals and conservatives is that conservatives are trying to pretend they're doing something different. I think it is important to show that the conservative emperor has no clothes.

Some critical legal scholars in the 1970s and '80s made the argument that all law is politics. That's not your claim, is it?

I wouldn't want to be so reductive as to say that all law is politics and all politics is law. I think it is much more complex than that. Both, though, do involve value choices.

In 2003 in *Lawrence v. Texas*, the Supreme Court ruled that a state couldn't criminalize same-sex intercourse between two consenting adults in private. Now of course you agreed with the result, but you were disappointed with the reasoning. You pointed out that the Court never said that the right to engage in homosexual activity was a fundamental right. So given the narrowness of that ruling, do you think Justice Anthony M. Kennedy [who wrote the majority opinion] would vote to uphold California's Proposition 8 if the case were to reach the Supreme Court on its merits? I'm terrible at making predictions because I tend to predict the result that I want. Therefore, I predict that Justice Kennedy would join Justices Ginsburg, Breyer, Sotomayor, and Kagan to declare Prop. 8 unconstitutional.

I know that as a Chicago native you're a huge Cubs fan. Is that because it sort of meshes with your jurisprudence, which favors the underdog?

You can't be a liberal Democrat at this point and *not* be rooting for the underdog. But I think even if I were a conservative Republican I would still be a Cubs fan. 🐻

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