

## **FROM WARREN TO ROBERTS, A CHANGING COURT**

**By Richard E. Kellner**

Erwin Chemerinsky's "*The Conservative Assault on the Constitution*" (Simon & Shuster) is a first-hand account of the U.S. Supreme Court's doctrinal shift from the liberal Warren Court to the conservative Roberts Court of today. In analytical detail presented through the array of cases that he personally argued before the Supreme Court, Chemerinsky dispels the myth that the court's dramatic philosophical shift has been the result of "strict constructionists" prevailing over "judicial activists."

Many of the stories are truly heart-wrenching. Chemerinsky begins his book with Leandro Andrade, who is presently serving a life sentence with no possibility of parole for 50 years under California's "three strikes" law - for the crime of stealing \$153 worth of videotapes from Kmart. Chemerinsky believed that he could convince the Supreme Court that Andrade's sentence violated the Constitution because, years earlier, the Court ruled that a life sentence with no possibility for parole for the crime of passing a bad check worth hundreds of dollars violated the Eighth Amendment proscription against "cruel and unusual punishment." Justice Sandra Day O'Connor in a 5-4 opinion, joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy and Clarence Thomas, ruled that Andrade's life sentence did not violate the Eighth Amendment because 50 years in the future, when he reached the age of 87, he had the possibility of being paroled. To Chemerinsky, such avoidance of precedent constitutes the essence of judicial activism.

Chemerinsky is particularly distressed by the "vanishing rights of criminal defendants." He quotes *Herrera v. Collins*, in which Rehnquist wrote for the conservative majority, "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas in the underlying state criminal proceeding." As Chemerinsky observes, "the chief justice said that convicting and even executing an innocent person does not violate the Constitution."

In *Board of Education of Oklahoma City v. Dowell*, Chemerinsky laments over the gradual erosion of *Brown v. Board of Education* and the Warren Court's efforts to address the insidious effects of racism in our schools. Again, in a 5-4 opinion, the conservative justices of the Rehnquist Court ruled that once a desegregation decree has been implemented in "good faith" and the "vestiges of past discrimination have been eliminated to the extent possible," the order should be ended even if this would mean the rapid resegregation of the public schools. Chemerinsky is similarly disturbed by a string of rulings that perpetuated the imprisonment of foreign nationals at Guantanamo for years without the protections afforded under the Geneva Convention and the U.S. Constitution. To Chemerinsky, these restrictions of personal liberties are consistent with other rulings by the Court. Chemerinsky brilliantly chronicles how the Rehnquist and Roberts Courts have expanded the "good faith" exception to unlawful searches and seizures under the Fourth Amendment, imposed obstacles to civil lawsuits in wrongful arrests cases, and effectively eroded the societal safeguards that prohibit police from engaging in unlawful conduct.

Chemerinsky points to the ascendance of these conservative courts beginning with the Nixon administration. Nixon openly criticized the Warren Court and campaigned to appoint "law and order" judges. Thereafter, the Reagan and Bush I and II presidencies adopted the same political mantra, and continued to appoint judges who adhered to a conservative philosophy. In detail, Chemerinsky provides a compelling argument that while the conservative justices claim to be strict constructionists who adhere to the "original meaning" of the Constitution, their rulings are functionally identical to the ideologically-driven judicial activism of their liberal counterparts. Thus, opinions such as *Roe v. Wade* are rapidly being marginalized by restrictive opinions, subject to being overruled if a conservative president is elected who then appoints a justice who will provide the 5-4 majority in favor of overruling of the case.

To Chemerinsky, the height of the hypocrisy of "judicial restraint" that the conservative justices' claim to adhere to was revealed in *Bush v. Gore*. For the first time in our nation's history, the Supreme Court took affirmative steps to determine a presidential election. First, the Court granted an order staying the recount of the election pending its review on the ground that Florida's continuing recount could affect the integrity of the election. Thereafter, the Court ruled that the recount had to be stopped and refused to remand the matter to the Florida Supreme Court to set standards under which the recount could be fairly conducted, because the court speculated that Florida wanted the recount to be completed by Dec. 12. Chemerinsky observes that this represented prototypical judicial activism, since the Court usurped the Florida Supreme Court's ability to determine on its own when the vote had to be completed under Florida law.

The ultimate result of *Bush v. Gore* was not only the election of a Republican president, but also the continuation of what Chemerinsky believes to be a conservative assault on the Constitution. Indeed, if Gore had been elected president, he would have replaced two conservative justices with liberal justices, thereby creating an extremely liberal court with a 6-3 majority.

In the end, Chemerinsky observes that the difference between liberal and conservative justices "is not in their willingness to overrule precedent" or "to make momentous decisions affecting society." Their divergence is purely predicated upon the results they wish to achieve. Thus, conservative justices "rail against judicial activism and profess judicial restraint even though they are every bit willing to be activists as liberals."

Chemerinsky's "*The Conservative Assault on the Constitution*" provides a fascinating view of the Supreme Court through the eyes of a legal scholar and highly respected practitioner who regularly appears before the Court. Regardless of one's judicial philosophy, the book is a must read.