

# Democratizing The Constitution

By PETER BERKOWITZ

STEPHEN BREYER. *Active Liberty: Interpreting Our Democratic Constitution*. ALFRED A. KNOPF. 161 PAGES. \$21.00.

THE STRUGGLE OVER the Supreme Court is a high-stakes contest, though how the sides differ and what they share frequently gets lost in the shuffle. By and large, conservatives are convinced that fidelity to the Constitution, in particular to its original meaning, requires the Court to scale back the powers acquired by the federal government during the last half of the twentieth century. Progressives, meanwhile, are generally convinced that fidelity to the Constitution, particularly to the values or larger purposes they find implicit in its more general promises of liberty and equality, demands a Court that expands rights and adapts laws to meet the changing needs of a dynamic political society, much in the manner of the Warren Court. And both sides tend to equate their interpretations of fidelity to the Constitution with judicial restraint.

At the same time, both sides base their convictions about the proper role of the Court on competing claims about democracy. Conservatives believe that too often over the last 50 years, but especially in the case of abortion, the Court has short-circuited democratic politics by arrogating to itself authority not provided for in the Constitution. Progressives contend that, given vast differences of power in society and developing conceptions of freedom and equality among citizens, the Court must on occasion intervene aggressively, particularly, as in the case of abortion, to give expression in new circumstances to the Constitution's enduring ideals.

And both sides are in emphatic agreement that who will sit on the Court in the coming years will decisively influence the meaning of fidelity to the Constitution and of democratic self-government that gets inscribed in the supreme law of the land for a generation or more. Unfortunately, public debate about the Court and the Constitution, particularly as showcased at Senate Judiciary Committee hearings, is all too commonly as agitated and discordant as the stakes are high. Whether this reflects a decline from a golden era of reasoned public discourse about constitutional law is open to debate. But one can confidently identify a variety of factors that have contributed to the current morass.

THE 1950S MARKED the beginning of a new era in Supreme Court jurisprudence. *Brown v. Board of Education*, which represents a high point in the nation's quest for racial justice, also gave rise to a new conception of the Court's role in the nation's political life. In the 1930s and the 1940s, the Court withdrew into the background to make room for New Deal regulation of the economy and creation of the welfare state. However, emboldened by its unanimous decision in 1954 striking down segregation in public schools, the Court in the 1960s and 1970s thrust itself into the center of

national politics, promulgating progressive outcomes in controversies concerning contraception and abortion, criminal defendants' rights, and affirmative action. In the 1980s, led by President Ronald Reagan, conservatives declared a counterrevolution. They sought to limit the Court's reach by appointing to it and to lower federal courts men and women who would insist that Congress not make laws that went beyond what the constitutional text and structure reasonably permitted. Moreover, they chose people who believed that the Court should not announce new rights but rather should stick to interpreting the rights explicitly laid out in the Constitution. This, conservatives argued, would better respect the distribution of power in our federal democratic system, giving states more room to regulate social and economic life.

In 1987, alarmed by Reagan's success in moving the judiciary to the right, progressive special-interest groups and legal academics changed the rules of the confirmation game. They rose up and mounted a vehement and unprecedentedly political campaign to encourage or intimidate the Democratic-led Senate to reject the nomination of Robert Bork, an indisputably top-notch legal mind, on the grounds that his judicial philosophy was outside the mainstream. This was followed by the battle in 1991 over President George H. W. Bush's nomination of Clarence Thomas. In front of a riveted nation, Thomas's former colleague, Anita Hill, accused him of discussing sex in the workplace, and Thomas responded by accusing the Senate Judiciary Committee of undertaking a "high-tech lynching." Each side came out of the confirmation process — in which Thomas was elevated to the high Court by an unprecedentedly narrow 52–48 margin — determined never to be taken for a ride again by the other.

It's true that in 1993 and 1994 President Bill Clinton's nominations of Ruth Bader Ginsburg and Stephen Breyer sailed through the Democratic-controlled Senate with overwhelming bipartisan support. However, when the Republicans gained control of the Senate Judiciary Committee in 1994, they brought the war over the judiciary to the lower federal courts, employing a variety of tactics to delay and, in some cases, deny hearings for a substantial number of Clinton appointees. Under President George W. Bush, Senate Democrats have taken the tactics of obstruction to a new level. Outraged by *Bush v. Gore* and determined to do what lay in their power to prevent Bush from reshaping the federal judiciary as a result of it, Democrats became the first party in the United States Senate to use the explosive device of the filibuster to prevent a vote on judicial nominees who would otherwise have been confirmed by a Senate majority.

To compound the problem, as the legal academy and the Senate Judiciary Committee were growing ever more politicized, the Supreme Court was churning out opinions of increasing size and complexity. In big cases, opinions running well over 100 pages and fractured into multiple concurrences and dissents, and sometimes further fractured into concurrences-in-part and dissents-in-part, became common. Consequently, the work product of the branch of government that is by design the least democratic has become still more remote and inaccessible to even well-informed non-experts.

In this troubled context, the publication of Justice Stephen Breyer's brief book on interpreting the Constitution — presented originally in 2001 as the James Madison Lecture at New York University School of Law and subsequently as the Tanner Lectures

on Human Values at Harvard University in November 2004 — is a breath of fresh air. To be sure, Breyer’s extended essay, which attempts to strike a better balance between liberty and democracy under the Constitution, provides no panacea. Nor is it likely, as progressives such as University of Chicago law professor Cass Sunstein and *New York Times* columnist Nicholas Kristoff have suggested, to supply a new blueprint for left-leaning constitutional jurisprudence. Breyer is too reliant on an erroneous historical claim about the Constitution, too sanguine that a pragmatic concern with the consequences of legal rules in hard cases produces progressive outcomes, and too selective in his choice of issues. Nevertheless, his calm tone, straightforward language, wise understanding of the judicial craft, and respectful engagement with rival views could not be more timely. The book will help sustain those who continue to believe that, despite its political dimensions, constitutional law differs from politics and that the art of legal reasoning enables Supreme Court justices to resolve cases and controversies that arise under the Constitution in a manner that honors the Constitution’s liberal and democratic character.

**B**REYER, A FORMER Harvard Law School professor, proceeds from the claim that the Constitution embodies two principles of liberty. Both, he notes, will be familiar to readers of Isaiah Berlin’s “Two Concepts of Liberty” and the nineteenth-century French political thinker Benjamin Constant’s “The Liberty of the Ancients Compared with the Moderns.” The first — which is what most people understand by freedom, and which Berlin calls “negative liberty” and Constant “the liberty of the moderns” — is “freedom from government coercion.” Breyer follows Constant and calls it modern liberty. The second — which Berlin calls “positive liberty” and Constant “the liberty of the ancients” — is “freedom to participate in the government itself.” Breyer calls it “active liberty” and wants to champion it because, in his judgment, Americans have lost sight of its constitutional importance.

It is striking that Breyer implicitly disparages modern liberty as essentially secondary and passive, as this is contrary to the very authorities he invokes. Berlin wrote in England in the 1950s, at the height of the Cold War and with many of his university colleagues tempted by Marxism. Constant’s essay was published in 1819, with the memory of the excesses of the French Revolution still fresh. Both warned against denigrating the apparently more modest scope of negative or modern liberty, and cautioned against overlooking the oppressive possibilities latent in positive or ancient liberty. Modern liberty, Berlin and Constant emphasized, gave free and equal citizens the opportunity to develop their peculiar talents and pursue a variety of ends, including, if they wished, throwing themselves into the hurly-burly of political life. A concentration on positive or ancient liberty in the modern world, they feared, would empower elites to disrespect democratic decision making and, in the name of the people, force citizens to be free.

Nevertheless, Breyer believes that he has the Constitution on his side. Indeed, to restore active liberty to its proper status, he argues, one must appreciate how the aspiration to promote citizens’ participation in political life “resonates throughout the Constitution.” And appreciation of the Constitution’s “democratic objective,” he maintains, should impel courts to “take greater

account of the Constitution’s democratic nature when they interpret constitutional and statutory text.”

This doesn’t mean that justices are free to invalidate or uphold Congress’s duly enacted laws and state action wherever they believe the result would encourage citizens to take a livelier interest in law and public policy. Breyer stresses that a justice must always begin with the plain meaning of constitutional or statutory language and from there move to a historical consideration of “what the language likely meant to those who wrote it.” In determining constitutional meaning, one must also “look to tradition indicating how the relevant language was, and is, used in the law.” In addition, justices must examine the legal precedents that have over the years given meaning to the legal language, understand the purposes or values that the language embodies, and think through the consequences of alternative interpretations. In some cases, though, after justices have given due consideration to constitutional language, history, tradition, precedent, purpose, and consequence, ambiguities or gaps will remain.

What the Constitution’s democratic objective does mean, according to Breyer, is that in hard cases, where the law’s incompleteness or contradictions permit a variety of reasonable resolutions, justices should prefer the interpretation that favors active liberty. In making this bold claim, Breyer insists that one should not overplay the difference between his view of how to interpret the Constitution and that of his colleagues. He places himself within the “broad outlines” of a pragmatic tradition in which he includes Oliver Wendell Holmes, Louis Brandeis, Harlan Fiske Stone, Felix Frankfurter, and Learned Hand. This tradition, he maintains, encourages judges to fill in the Constitution’s open-ended provisions in light of its purposes or fundamental aspirations.

**I**N FACT, BREYER’S judicial philosophy lies at the intersection of several intellectual tendencies. Were he to expand this list of pragmatists beyond Supreme Court justices, Breyer might have added Judge Richard Posner, who has done more than any other single thinker in the last decade to make consideration of consequences by judges respectable. Were Breyer to locate his approach within the larger legal academy, he would have to mention John Hart Ely, whose seminal 1980 book, *Democracy and Distrust*, elaborated the idea of “representation reinforcing review” — a form of judicial review that authorizes the Supreme Court to determine the constitutionality of a law on the basis of how well it promotes equal participation, particularly among groups of citizens who are underrepresented in the political process. And were Breyer to identify his intellectual allies in moral and political philosophy, he would mention a wide swath of contemporary legal and political theorists, including John Rawls and his followers, Ronald Dworkin and his followers, and the proponents of deliberative democracy, most of whom search for moral and legal authority to reject majority will in the name of the majority’s reason.

Notwithstanding the debatable theory that stands behind his judging, the differences among justices, Breyer asserts, “are often a matter of degree, a matter of perspective, or emphasis, rather than a radical disagreement about the general nature of the Constitution or its basic objectives.” And so, often enough, they are. “Our Court,” he points out, “which normally steps in where other judges disagree, decides roughly 40 percent of its cases unanimously. Most of the rest involve only one or two dissenting

votes. In only about 20 percent of our caseload do we divide five–four.” However, since ambiguities and gaps in the law tend to be discovered in connection to the most politically divisive cases and controversies, a justice’s view about the tie-breaking factor may loom larger than the substantial overlap in rival judicial philosophies.

Accordingly, Breyer contends that historical study can demonstrate that the Constitution is “centrally focused on active liberty.” As evidence, he observes that America was born in a rejection of imperial power and stresses that “much post-revolutionary (pre-constitutional) American political thought was characterized by suspicion of government, hostility to the Executive Branch, and confidence in democracy as the best check upon government’s oppressive tendencies.” That’s useful background knowledge, to be sure, but what of the Constitution itself? And what of the thought of those who wrote it and sought to persuade the American people to ratify it?

The Constitution certainly supposes the sovereignty of the people and recognizes that legitimate government is based on the consent of the governed. But to observe the Constitution’s democratic roots is one thing. To establish that its prime objective is to promote a politically engaged citizenry is quite another. And here Breyer fails to meet the challenge he sets for himself. Indeed, he does nothing to cast into doubt that the Constitution’s paramount goal is to achieve modern liberty, limiting government in a variety of ways to secure the people’s individual rights.

Breyer recognizes that *The Federalist*, the most authoritative exposition of the political theory that underlies the Constitution, views democratic majorities as a dangerous source of political oppression. And he is well aware that the Constitution draws upon a new or modern “science of politics” to design political institutions — schemes of representation, separation of powers, checks and balances, federalism — all of which distance the people from the direct exercise of power. Yet, he argues, “the Framers did not abandon their basically democratic outlook.” To prove it, he analyzes familiar provisions of the Constitution that impose constraints on majority will, showing that they do not sever the connection between government power and the will of the people. But he treats the conclusion that the Constitution never ceases to respect the democratic origins of political power as if it vindicated the grander claim that active liberty — or promoting the good of energetic citizen participation in politics — is a preeminent purpose of the Constitution. Breyer overreaches: Without a persuasive basis in the text, history, and structure of the Constitution, his according of privileged constitutional status to active liberty is judicial willfulness masquerading as judicial deference.

Nevertheless, satisfied that he has established active liberty’s historical and constitutional bona fides, Breyer sets out to show how increased appreciation of it “can help guide judges both as actors in the deliberative process and as substantive interpreters of relevant constitutional and statutory provisions.” His first example concerns the application of the First Amendment to government regulation of speech. The crux of the problem is that the First Amendment is absolute — “Congress shall make no law . . . abridging the freedom of speech” — yet because it sometimes clashes with other fundamental rights, including the right of the people to protect themselves from threats to the nation’s security, Congress must sometimes make laws abridging it.

**B**REYER INVOKES THE Constitution's larger purposes in promoting democratic government to explain why the Court should grant greater protection to speech connected to politics and policymaking while allowing Congress more room to regulate commercial speech. So one might think he would have been reluctant to uphold the constitutionality of the McCain-Feingold reform, whose manifest purpose is to restrict the ability of wealthy Americans to support their candidates. Yet Breyer focuses on alternative consequences. To prevent big-money contributors from discouraging smaller donors from getting their voices heard in the public square, to promote "participatory self-government," and "to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process," the Constitution, he concludes, permits Congress to limit the speech of some to enhance the speech of others.

Breyer also wishes to resist any mechanical application of the standard constitutional presumption that commercial speech is less protected than political speech. Contrary to his court, Breyer would have struck down a California law that exposed Nike to legal liability for falsely denying in its advertising that it was engaged in disreputable business practices. Such a law, Breyer reasons, curbs Nike's speech concerning fair labor practices, a political matter of substantial public interest. At the same time, and also contrary to his court, Breyer would have upheld a Congressional prohibition on pharmacists' advertising that they provide specially prepared "compound drugs." Far from involving political speech, he reasons, such advertising fell under government's traditional authority to regulate public health and safety. To evaluate Breyer's judgment, however, one must move beyond his suggestive remarks. One would have to investigate the consequences for business and consumers of striking down the free speech exception to the democratically enacted California law. One would have to examine, as well, the consequences for patients of denying pharmacists the freedom of speech to alert the public to their goods and services. Further investigation, however, would soon converge with the fact-intensive inquiry typical of the legislative branch and would culminate in judgments about the balance of public goods typical of legislators.

And so Breyer proceeds in his short survey, invoking the Constitution's larger purpose and weighing the consequences of competing interpretations of constitutional and statutory language to demonstrate how justices should think about a variety of issues that come before them. In contrast to the Court's recent federalism decisions, which have limited the federal government's power to regulate social and economic affairs, he favors a "cooperative federalism" that would foster greater collaboration between federal and state government. In regard to the right of privacy, Breyer generally favors narrow holdings because new technologies — which create puzzles about privacy's boundaries — are developing rapidly, and the "democratic 'conversation' about privacy is ongoing" and should not be closed down by the Court. He believes the Court was correct in *Grutter v. Bolinger* (2003) to uphold the University of Michigan's affirmative action program because preferences for minorities are "necessary to maintain a well-functioning participatory democracy." Racial preferences in the educational setting do this, according to Breyer, by enlarging students'

experience with a racially diverse society. Concerning the correct approach to statutory interpretation, he argues that in difficult cases the “purpose based approach” requires justices to analyze the matter from the point of view of a “reasonable member of Congress” and to ask how he or she “*would have wanted* a court to interpret the statute in light of present circumstances in the particular case” (italics in the original). In administrative law, Breyer would have the Court reconcile democratic accountability and modern society’s need for technical experts and managers by relaxing the standard rule that courts should defer to an administrative agency’s interpretation of an ambiguous statute provided the interpretation is reasonable. Instead, in cases where administrative agencies are deciding “questions of major importance,” courts should review their rulings aggressively, asking how “the reasonable member of Congress” would have wanted the question to be decided.

In a concluding chapter, “A Serious Objection,” Breyer neatly summarizes the dominant conservative alternative to his participation-reinforcing approach, attempting to show, on strictly jurisprudential grounds, why his approach should be preferred. Although he refrains from mentioning names in the text, he indicates in the chapter’s first footnote that the leading spokesman for that serious objection is his colleague Justice Antonin Scalia. The serious objection goes by the name of “textualism,” though, when referring to the Constitution only and not also to statutes, it is sometimes called “originalism.” Scalia presented a concise version of it in 1996 in his own Tanner Lectures, “Common Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and the Laws,” which was also later published as a short book. Indeed, Breyer’s brief on behalf of active liberty can be seen as an answer to Scalia, the only justice who is a leader of a major school of contemporary jurisprudence.

Breyer reiterates at the end of his book that what distinguishes the textualist is not a radical disagreement about the Constitution but a matter of degree or emphasis. The textualist does not refuse to consider purposes and consequences. Rather, as Scalia writes (and as Breyer quotes Scalia as writing), textualism means “preferring the language and structure of the law whenever possible over its legislative history and imputed values.” But Breyer notes what many critics miss, namely that textualists embrace this view of judging in part on the grounds that it serves democratic ends: “They fear that, once judges become accustomed to justifying legal conclusion through appeal to real-world consequences, they will too often act subjectively and undemocratically, substituting an elite’s view of good policy for sound law.”

**T**O THIS SERIOUS objection to consequence-driven jurisprudence, Breyer offers several arguments. First, textualism cannot be vindicated on originalist grounds because the Framers did not develop an originalist theory of interpreting the Constitution. Contrary to his aim, which is to place reasoning about consequences off-limits, the textualist vindicates his approach on the consequentialist ground that it is the best means for restraining judges from substituting their views about good laws for those of legislators. Second, *contra* the textualist claim, Breyer doubts that consequentialism promotes

subjectivity in judging. The consequentialist does not immediately leap to an examination of the law's purposes and consequences; he does so only in hard cases when text, history, and precedent prove inconclusive. Third, Breyer reminds us that textualism itself cannot close the door to judicial subjectivity. Textualists can strain interpretations of text and history and, in choosing to respect or overturn a particular precedent, have no choice but to turn to a consideration of consequences. Fourth, when it comes to boundary line cases, the textualist's commitment to strict construction and the rigid elaboration of clear rules can produce ridiculous or harmful outcomes.

Breyer's objections are serious, but they do not leave Scalia, or the textualist, without replies of his own. The textualist would affirm that his approach is rooted in reflections on the nature of the judicial role in a liberal democracy and not strict deduction from the Constitution while wondering wherein lies the contradiction. The textualist is not committed to rejecting all reasoning based on consequences — that is certainly the province of the people's elected representatives — but wishes to curb such reasoning in judicial decision-making. His legal theory derives from his political theory. In conceiving of textualism as a means to the end of judicial restraint and democratic government, the textualist argues that good consequences flow to democracies when judges refrain from putting the consequences of their decisions ahead of the imperatives of the laws as written. Moreover, there is no reason for a textualist to deny that textualism cannot provide a fail-safe guarantee against subjectivity. Judges, even textualist judges, are human and therefore tempted to interpret difficult legal language or precedents with which they disagree in ways that advance their conception of the just and the good. The textualist would insist, however, that his approach reduces the temptation. Nor is there reason to doubt that rigidly applied textualism will lead to absurd results. It's true that many textualists embrace the idea of strict construction, but it is reasonable, following Scalia, to reject the distinction between strict constructionists and loose constructionists, instead looking always for the reasonable construction.

The textualist's most devastating reply, however, might come in response to Breyer's assurances that the consequentialist approach does not particularly invite judges to willfully impose their interpretation of good policy on the Constitution and laws. For the argument of Justice Breyer's book provides dramatic illustration of a fair-minded, thoughtful consequentialist who, alert in theory to the dangers of subjective interpretation and willful imposition, nevertheless, at absolutely critical junctures, falls prey to them.

First, as I have suggested, Breyer exaggerates the constitutional significance of "active liberty." "The primarily democratic nature of the Constitution's governmental structure has not always seemed obvious," he gently notes. That's because it's not true, at least in Breyer's sense that the Constitution elevates active liberty above modern liberty. In Philadelphia, in the summer of 1787, James Wilson did make a spirited case for a Constitution more devoted to direct democracy. But Wilson lost. It's fair to say that an informed and politically engaged citizenry is a constitutional value among others. Yet the very evidence Breyer adduces to establish that the Constitution gives primacy to the promotion of active liberty reveals the Constitution's determination to limit democracy in the name



of liberty through a variety of institutional mechanisms and through the provision of enumerated individual rights. In insisting on the primacy of active liberty, Breyer demonstrates not fidelity to the Constitution, but rather a determination to rewrite the Constitution's priorities.

Second, Breyer wrongly suggests that more attention to consequences in constitutional adjudication will generally yield more progressive results. However, as Justice Thomas's dissent in *Grutter* shows, conservatives regard it as constitutionally significant that classifications based on race can have pernicious consequences, including the promulgation of racial stereotypes and the injury to student beneficiaries of racial preferences that comes from placing them in academic environments for which they are underprepared. Focus on consequences only leads to progressive Supreme Court rulings if you find in — or import into — the Constitution larger purposes that are progressive.

Third, Breyer suppresses the national controversy over *Roe v. Wade*, a crucial test case for his theory. Hard cases may make bad law, but the very aim of Breyer's theory is to provide guidance in hard cases. Astonishingly, neither "abortion" nor "*Roe v. Wade*" appears in his book's index. Nor does he mention *Stenberg v. Carhart* — a 2001 decision in which Breyer joined a 5–4 majority striking down a Nebraska ban on one specific partial-birth abortion procedure. In that case, the Court held that the Nebraska law did not provide an exception for the health of the mother, in effect overruling the finding of the Nebraska legislature that no woman eligible for an abortion would be denied one as a result of the ban (because alternative procedures were available). Contrary to the tendencies of his theory, when it comes to abortion, Breyer seems to prefer judicial decisions that protect women's modern liberty, which remove controversial issues from democratic discourse, and which substitute the Court's judgments about medical care for those of state legislatures. This suggests that when necessary, instead of choosing the consequence that serves what he regards as the Constitution's leading purpose, Breyer will determine the Constitution's leading purpose on the basis of the consequence that he prefers to vindicate.

Such deficiencies of argument are disconcerting. More disconcerting still is that they somehow survived the test runs that Breyer gave his ideas in lectures delivered to the distinguished legal academics at New York University School of Law and Harvard Law School. Still, while his blind spots are common among progressive intellectuals, Breyer's virtues can serve as a salutary model for all. These include a devotion to the judicial craft, a willingness to engage seriously the serious alternative to his approach, and an understanding that the challenge, not only for judges in a liberal democracy but for citizens as well, is to balance and reconcile competing interests and goods. Particularly in its quest for balance and reconciliation, Breyer's book makes a timely contribution to the increasingly endangered genre central to liberal democracy in America known as civilized discourse.

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