

## Active Liberty: Interpreting Our Democratic Constitution

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As politicians, advocacy groups, and think tanks converge on the nation's capital to debate U.S. Supreme Court nominee Judge John G. Roberts Jr.'s views on hot-button issues like abortion, gay rights, and the environment, the question of judicial temperament may get lost in the fireworks.

Is he a restrained judge who will defer to the other branches of government? Or will he be an activist like members of the Warren court? And what about his views on interpreting murky language--an area ripe for judicial discretion--whether it comes from hastily written statutes or broadly worded Constitutional provisions? As Senators and the media prod and probe Judge Roberts to determine which camp he belongs to, U.S. Supreme Court Associate Justice Stephen G. Breyer has thrown his hat into the debate with a new book, "Active Liberty: Interpreting our Democratic Constitution."

The book, a reprint of lectures Justice Breyer delivered at Harvard, is intellectually rigorous--and often deeply situated in theory--but reads in a fluid prose unencumbered by treacherous footnotes, string cites, and academic jargon that often dampen the flow of so many law review articles.

His main point is this: When interpreting statutory and constitutional texts, the courts should place great weight on what Justice Breyer calls "the liberty of the ancients" or active, participatory democracy in government. He gives a passing glance to "modern liberty"--freedom from government encroachment--but his focus remains on the significance of pro-democratic forces in the Constitution as a guide for judicial decision making.

The Constitution though, did not embrace democracy in its purest forms. The populace did not directly elect Senators; the Electoral College still selects the President; and there was of course slavery and the ignominious three-fifths clause. Due to their distrust of democracy, the founding fathers decided to abridge it.

The book does not advocate an ideological school of jurisprudence. Instead, Justice Breyer sees active liberty as one tool among many judges use in interpreting language. "The matter is primarily one of approach, perspective, and emphasis...[which] even if they are not theories, play a great role in the law."

And throughout the book, Justice Breyer sticks closely to the issue of interpreting hazy language while carefully shunning overarching theories of political philosophy: "Liberal" and "conservative" do not show their faces in his monologue. It becomes clear by the end of book though that Justice Breyer's deliberation turns into a work of advocacy against his largest intellectual antagonist on the Court, Justice Antonin Scalia, the champion of the "literalist" or "originalist" camp. The originalists look to language--at times searching contemporaneous lexicons for guidance--and tradition to guide

their interpretations. They shun analysis of the consequences of their decisions; instead, relying on the founders'--or legislators'--divine words for guidance.

"This view," Justice Breyer writes, referring to the Scalia school "while logically consistent with emphasizing the Constitution's democratic objectives, is not hospitable to the kinds of arguments I have advanced." The justice shoots a torrent of canons at his opponents, turning their usual arguments of objectivity against them. Isn't it better for a judge to focus on a legislator's intent rather than amorphous words to arrive at a decision, Justice Breyer asks?

His answer is a resounding Yes.

The originalist approach, Justice Breyer writes, "can produce a decision that is not only subjective, but that is also unclear, lacking transparency about the factors that the judge considers truly significant." An opinion looking to intent and legislative purpose will make the judge's reasoning transparent, Justice Breyer argues.

Justice Breyer applies his methodology to various topics of the day, from federalism, which has seen states gain in power in the past decade, to affirmative action, to free speech and less scintillating areas like administrative law.

His chapter on statutory construction should show up on every litigator's bookshelf, providing how-to advice like a do-it-yourself guidebook to judicial reasoning.

It also gives Justice Breyer the opportunity to compare his approach to that of the originalists side-by-side in real-life cases. In each of his three examples, Justice Breyer concludes that the Court's majority-- in applying a textualist or originalist approach---arrived at a conclusion counter to the legislature's will.

Justice Breyer melds his push for participatory democracy with his purpose-driven interpretative approach. "[A]n interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose." Justice Scalia's textualism, the argument continues, therefore "tends to undercut that constitutional objective."

Justice Scalia and his supporters of course argue that their approach, which eschews the murky exploration of legislative intent beyond the very words used by lawmakers, also seeks to promote the Constitution's objectives. This is where reasonable minds differ. "Active Liberty" is Justice Breyer's contribution to that ongoing debate.