

# The New Criterion

## Books

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### Enforcing a

by [Robert Bork](#)

On Stephen Breyer's *Active Liberty*.

It ought to be a major intellectual event in constitutional law when a Justice of the Supreme Court comes forward publicly to explain his theory of judging. Explanation is needed, for by now nobody familiar with the work of the Court believes it confines its rulings to the principles of the historic Constitution. There have always been instances when the Court voted its sympathies rather than anything resembling the Constitution, but over the last half century the divergence between the document and the decisions has sharply increased. Indeed, the criticism that the Court routinely departs from the Constitution's principles, as they were understood by the men who made them law, is not taken seriously by a majority of the justices or most law school professors.

Members of the public are not so blasé, however, though they believe inconsistent things: both that the Court should stick to the actual Constitution and that any social policy they like must be in the Constitution. Still, the belief that a judge's job is to interpret rather than legislate retains considerable resonance. That may be why the justices have never undertaken to advance a rationale for their behavior. To declare openly what they are doing would be to throw gasoline on the smoldering debate about the legitimacy of the Court's activism. The most the justices have said, when questioned, for example, about the propriety of using the Due Process Clause to strike down the substance of legislation—a flagrant misuse of a clause dealing only with procedure—is that the Court has always behaved in that way. The justices must think that they have established an easement across the Constitution just as trespassers acquire a right-of-way across land by years of unremedied intrusions.

While the justices have not felt compelled to justify activism or non-interpretivism (the term used depends on your attitude toward the practice), there has for decades now issued a torrent of justifications from professors of constitutional law. One of the most (perhaps the only) entertaining features of this extensive literature is that each of the professors undertakes (and succeeds) to prove all the other non-interpretativists' theories inadequate while attempting (and failing) to prove his own compelling. This confused *melée* does not, however, suggest to any of these legal philosophers that their enterprise is doomed. Perhaps that unedifying spectacle is why members of the Court have not attempted their own justifications.

Now one of them has. Unfortunately, Justice Stephen Breyer's new book, *Active Liberty: Interpreting Our Democratic Constitution*, does not qualify as a major intellectual event.<sup>[1]</sup> Quite the contrary. He has succeeded only in further muddying already muddied waters. The book, it must be said in the interests of candor, is not even up to the intellectual standards, such as they are, of the debates among the professors. Its failing, and it is fatal, is that it purports to be a theory of

interpretation while being a transparent justification for activism. Apparently meant to soothe, it succeeds only in irritating further. The book's slapdash quality cannot be attributed to haste. Breyer's thoughts were refined in lectures at Harvard and New York University Law School. He thanks over a dozen professors, many of them quite eminent, for their commentary and advice. This makes the inadequacies of the book all the more astounding.

At the outset, Breyer announces that "My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." By that he means two things. The first is, as he asserts over and over again, that courts must be restrained, modest, and cautious in interfering with the rights of citizens to choose their policies, whether or not judges think those policies mistaken. Judges must practice "*judicial restraint*" (his emphasis). Second, the provisions of the Constitution should be interpreted in order to further participation by the public in collective decisions that affect their lives. The latter is what he means by "active liberty," hardly a startling concept and less useful than Breyer would have us believe. He cites Benjamin Constant for the distinction between "the liberty of the ancients"—the liberty to participate actively and constantly in the exercise of collective power (voting, public deliberation, etc.), which Breyer chooses to call "active liberty"—and "the liberty of the moderns" which is freedom from tyranny, even the tyranny of the majority. This distinction is a platitude. Both the main body of the Constitution and the various amendments, particularly the Bill of Rights and the post-Civil War amendments (the Thirteenth, Fourteenth, and Fifteenth) protect both political process rights and individual freedoms.

The difficulty is that active liberty, which Breyer says requires great judicial deference to democratic decisions, does not fit Breyer's performance on the bench. How can he persuade the reader that his belief in restraint can be squared with his vigorous judicial activism? The answer quickly becomes apparent: He does it by redefining the words and concepts of the Constitution so that his results appear to flow from interpretation. He notes that most judges agree the sources of constitutional law are "language, history, tradition, precedent, purpose, and consequences." Nothing radical on the face of that litany, one would think, but Breyer attempts a miracle of jurisprudential transubstantiation by arbitrarily assigning purposes to various constitutional provisions and predicting consequences that are by no means certain, or even likely. The result is the usual liberal agenda posing as interpretation.

Particularly telling is Breyer's effort to lend intellectual respectability to the Court's almost invariable antagonism to organized religion and to symbols of faith in the public square. Examples of the preposterous decisions of recent years are the Court's prohibition of a short nonsectarian prayer at a middle school's graduation ceremony, student prayer before a high school football game that no one be injured, and a moment of silence at the start of a school day (someone might be praying silently). These are said to constitute the dreaded establishment of religion. Breyer invents an Establishment Clause to replace the actual words of the First Amendment: "Congress shall make no law respecting an establishment of religion." Americans in 1791, when that language was placed in the First Amendment, knew very well what "establishment" meant: the preference by government for one or more religions over others, often requiring taxpayers to support religious denominations of which they were not members. Breyer avoids this obvious historical meaning by assuming a motive for the adoption of the clause and then predicting consequences that by no means follow. Breyer's version prohibits government from providing vouchers to parents to help pay for the education of their children in parochial schools. He says "the clause seeks to avoid among other things the 'social conflict, potentially created when government becomes involved in religious education.'" If so, the conflict was to be avoided only by prohibiting an establishment, not by imagining a conflict arising from all other relations between government and religion. Breyer's technique broadens the sweep of the clause far beyond anything its words permit or its Framers understood.

The reasons for the amendment's adoption were, in any event, far more complex than Breyer allows. One of them, which he does not note, was that by denying the new federal government power to legislate "respecting an establishment of religion" some supporters of the amendment wanted to prevent federal interference with the establishments then existing in several states. That fact alone casts doubt on the social divisiveness argument.

Turning to consequences, Breyer cites the proliferation of religions (fifty or more) as making the potential for conflict far more serious today so that it was "necessary to interpret the clause more broadly than the Framers might have thought likely." This is not only an admission that he will legislate a broader amendment than the one the Framers intended, it is also based on a fanciful forecast. With so many religions and denominations active in the United States today, there is simply no possibility that one or even a group could become dominant. As James Madison said of other "factions," their proliferation is a guarantee of safety.

Having perceived, to his own satisfaction, the purpose of the Establishment Clause, Breyer turns to the consequences, as he sees them, of a contrary interpretation. These consist of imaginary difficulties that, should they ever occur, would be easily rectified. For example, "will different religious groups become concerned about which groups are getting the money and how? What are the criteria?" And so on. A simple answer might be to give vouchers to any parents who wish to use private schools, religious or secular. Government benefits distributed on secular criteria can hardly be called either an establishment of religion or socially divisive.

A consequence Breyer does not address is the obvious divisiveness of requiring parents who wish to send their children to parochial schools to pay twice, once for the tuition and again through taxes to support other parents' children in public schools. The line of thought Breyer pursues, as the legal historian Philip Hamburger makes clear in his book *Separation of Church and State*, was generated in the nineteenth century by anti-Catholic groups, including nativist Protestants. The result has been discrimination against organized religion in favor of individual religiosity. In our time, the rigid separation motif is advanced by secularists who dislike and fear all forms of faith. While it would be unjust to attribute these motives to Breyer, they have become frozen into badly deformed legal doctrine which he attempts to vindicate. Breyer invents a purpose for the clause that does not square with the history of its adoption and predicts consequences for which there is no evidence.

The Justice's rationale for affirmative action is even more questionable. In *Grutter v. Bollinger* (2003), the Court upheld the University of Michigan's law school's preference in admissions for racial minorities. The theory, unexamined by the Court, was that "diversity" in experience would enrich everyone's education. (Needless to say, this enriching diversity did not apply to Caucasians with diverse backgrounds, such as the daughter of a West Virginia coal miner.) The Equal Protection Clause of the Fourteenth Amendment, Breyer said, was intended to ensure equality. But, in George Orwell's phrase, some people are more equal than others. Breyer cited with approval Justice Ruth Bader Ginsburg's statement that "government decisionmakers may properly distinguish between policies of exclusion and inclusion." He went on to say that "in purposive terms, invidious discrimination and positive discrimination were not equivalent." This is obfuscation. A policy of inclusion for some is necessarily a policy of exclusion for others, and positive discrimination for some certainly feels remarkably like invidious discrimination to those who, though more qualified, are denied admission to the school.

Breyer's claim that "some form of affirmative action [is] necessary to maintain a well-functioning participatory democracy" is sociological flapdoodle. It may be true that for a variety of cultural reasons there would be fewer blacks and American Indians in the University of Michigan's law school, but those who did not meet that school's normal admissions criteria would not be denied good legal educations or the prospect of successful careers. Supposing that they would is the old Yale-or-jail line of argument for quotas. Such students would attend schools more suited to their

present level of skills—Rutgers, Wisconsin, or Miami rather than Harvard, Michigan, or Yale. A year or two into practice and nobody cares what school you graduated from; you are judged on performance. There is also good reason to believe that the students we are talking about would benefit more from a solid education in the nuts and bolts of the law than from the airy speculations and second-rate philosophizing that infest so many courses in the most prestigious schools. There is a serious value-added problem here. Yale graduates look more impressive on average than those educated at Iowa not because they received a superior education but rather because they had better scores when they entered law school.

When he turns to freedom of speech, Breyer defends the decisions upholding campaign finance laws on the grounds that the few who give large amounts of money may have special influence over elected representatives “or, at least, create the appearance of undue influence.” The laws seek to “democratize” the influence of money. This form of democratic leveling has any number of adverse consequences, among them putting challengers who do not have strong name recognition at a disadvantage. The classic case is that of Eugene McCarthy who, dependent upon a few very large donors, could not have mounted his primary campaign against Lyndon Johnson under present laws. Nor does Breyer’s rationale fully account for the Court’s upholding of bans on political issue advertising by corporations and unions within thirty days of a primary election or sixty days of a general election. That is a prior restraint on political speech hitherto regarded as absolutely forbidden by the First Amendment. Breyer offers no justification for that, nor does he attempt to reconcile in terms of his theory the law’s exemptions for corporations that are newspaper publishers. This discriminatory prior restraint skews political influence in favor of the press, which is overwhelmingly liberal.

The book does not attempt to take on the most blatant forms of judicial activism. Thus, Breyer’s votes to uphold the constitutionally unsupportable abortion rights cases remain unexplained. No one has ever devised a plausible rationale for *Roe v. Wade* and the cases, including the partial birth case, that followed from it. Nor does Breyer try to fit decisions favoring pornography, including the invalidation of a law prohibiting computer-simulated child pornography, into his interpretive scheme. These are examples of the Court, and Breyer, striking down democratic decisions that cannot conceivably be said to violate the Constitution. It is no answer to say that his theory is only a partial one, not intended to explain everything. The fact is that his proclaimed deference to democracy is contradicted by his own record on the bench. Activism is implicit in his remark that “Certain constitutional language, for example, reflects ‘fundamental aspirations and . . . moods.’” A judge enforcing a “mood” can decide almost anything.

In the end, Breyer’s view of his role as a Justice of the Supreme Court does not differ a great deal from the view stated more candidly, and more rashly, by Justice Anthony Kennedy in an interview. “You know,” Kennedy said, “in any given year, we may make more important decisions than the legislative branch does—precluding foreign affairs perhaps.” That “perhaps” is worrisome. “Important in the sense that it will control the direction of society.” He identified as one of the important attributes of his position: “To have an understanding that you have the opportunity to shape the destiny of this country. The Framers wanted you to shape the destiny of the country. They didn’t want to frame it for you.” It is odd, then, that they should be called Framers, and also that they spent so much time and effort in writing a Constitution that simply hands the destiny of America over to judges.

There was an earlier view to the contrary by a man who was simultaneously a Justice of the Supreme Court and a Harvard law professor. In 1833, Joseph Story wrote, “Upon subjects of government it has always appeared to me, that metaphysical refinements are out of place. A constitution of government is addressed to the common sense of the people; and never was designed for trials of logical skill, or visionary speculation.” Story would have none of “aspirations” and

“moods,” and even less would he have accepted a commission to shape the destiny of the nation. He set out rules of interpretation designed to prevent giving the Constitution “an extent and elasticity, subversive of all rational boundaries. The first and fundamental rule in the interpretation of all instruments is, to construe them according to the sense of the terms, and the intention of the parties.” Reading Justices Breyer and Kennedy suggests that an “elasticity, subversive of all rational boundaries” has triumphed.

## Notes

[Go to the top of the document.](#)

1. *Active Liberty: Interpreting Our Democratic Constitution*, by Stephen Breyer; Knopf, 176 pages, \$21. [Go back to the text.](#)

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