Stephen Breyer, the court's necromancer

By Alykhan Velshi (Aug 2006)

Stephen Breyer*. Active Liberty: Interpreting Our Democratic Constitution.* *A*lfred A. Knopf. 176 pages. $21.00.

Originalism is the house judicial philosophy of conservatism. It maintains that the Constitution has a fixed and knowable meaning, that this meaning is not historically determined, and that it is to this original meaning that judges should turn when interpreting the Constitution. By focusing on the original meaning of the Constitution, originalism limits judicial ipse dixit and tends to yield conservative results.

Unsurprisingly, originalism is not popular in the legal academy. The Constitution was, after all, written by "dead white men" who – let me offer a conjecture – probably opposed homosexual marriage, abortion on demand, the regulatory state, and other articles of faith of modern liberalism. Any judicial philosophy that privileges the original meaning of the Constitution is likely to prove a hindrance to liberal and progressive political goals.

The latest installment in the campaign to surpass, if not downright discard, originalism is "Active Liberty: Interpreting Our Democratic Constitution" by Stephen Breyer, a Supreme Court justice. Breyer gives lie to the old chestnut that lawyers write as though they still get paid by the word. At fewer than 40,000 words, "Active Liberty" is closer in size to the Gettysburg Address (278 words) than the Internal Revenue Code (3.5 million words).

Breyer plays the role of constitutional necromancer, conjuring the spirit of the Founders to argue that the real originalists are liberals, and that the original meaning of the Constitution is discerned not only from its text, but also from an examination of its underlying purpose.

The Constitution and its discontents

Can a document written in the 18th century, which sought to enshrine common law rights that are older still, lead to progressive or liberal results? Akhil Amar, a professor of law at Yale, has suggested that it can:

> The framers themselves were, after all, revolutionaries who risked their lives, their fortunes, and their sacred honor to replace an Old World monarchy with a New World Order unprecedented in its commitment to popular self-government. Later generations of reformers repeatedly amended the Constitution so as to extend its liberal foundations, dramatically expanding liberty and equality. The history of these liberal reform movements—19th-century abolitionists, Progressive-era crusaders for women's suffrage, 1960s activists who democratized the document still further—is a history that liberals should celebrate, not sidestep.

Justice Hugo Black, for example, relied on the original meaning of the Fourteenth Amendment to advance the decidedly liberal theory known as the "full incorporation doctrine." Black, a Roosevelt appointee, believed that the "Fourteenth Amendment, and particularly its privileges and immunities clause, was a plain application of the Bill of Rights to the states." Even though Black's contemporaries on the Supreme Court rejected this interpretation of the Fourteenth Amendment – Justice Felix Frankfurter called Black an "eccentric exception" – Black showed that originalism could be rights-expanding, not just rights-constricting.

Breyer appeals to this radical and progressive tradition to argue that liberals should look no further than the purpose and history of the Constitution when making constitutional claims. In this way, Breyer offers a powerful internal critique of originalism: his bold thesis is that the original meaning of the Constitution is better ascertained by an examination of the Constitution's purpose and the Framers' intent than a textual interpretation of the Constitution's provisions, and that this analysis when pursued shows that the Framers preferred something called active liberty.

Active Liberty, an older kind of self-government

Breyer argues that the overriding purpose of the Framers was to strengthen

“active liberty, the right of individuals to participate in democratic self-government.” Breyer provides a definition of active liberty by referring to Benjamin Constant’s famous essay, “The Liberty of the Ancients Compared to That of the Moderns,” and declaring his (and the Framers’) support for the “liberty of the ancients.”

For Breyer, active liberty is a distillation of Constant’s “liberty of the ancients.” It is a participatory, republican liberty in which citizens play a prominent role in political debates. Active liberty is to be contrasted with modern liberty, or Constant’s “liberty of the moderns,” which emphasizes freedom from government, rather than the freedom to participate in government. In modern America, outposts of active liberty would probably include referenda, ballot initiatives, direct election of state judges, and the ability to recall politicians. Breyer uses Athens as a case study in active liberty.

An examination of Constant’s essay “The Liberty of the Ancients Compared to That of the Moderns” shows that Breyer distorted the thrust of Constant’s argument and ignored what Constant himself pointed out were the pitfalls of the liberty of the ancients. In his essay, Constant explained that the liberty of the ancients was best epitomized by Sparta, not Athens. Partly because active citizenship was a burdensome process, Constant argued that the liberty of the ancients thrived in societies with large slave populations, because the existence of slavery allowed public-spirited citizens to focus on the democratic polity. “Without the slave population of Athens,” Constant explained, “Athenians could never have spent every day at the public square in discussions.”

This is why Constant repudiated the liberty of the ancients in favor of the liberty of the moderns, which we today understand as “negative liberty,” which is to say, freedom from the state. Constant was explicit on this point: “It follows from what I have just indicated that we can no longer enjoy the liberty of the ancients, which consisted in an active and constant participation in collective power. Our freedom must consist of peaceful enjoyment and private independence.”

Constant’s main argument in “The Liberty of the Ancients Compared to That of the Moderns” was that the liberty of the ancients was not liberty at all. For Constant, the liberty of the ancients — what Breyer calls active liberty — was in fact anathema to liberty. “Thus among the ancients,” Constant explained, “the individual, almost always sovereign in public affairs, was a slave in all his

private relations.” Inexplicably, it is with reference to the liberty of the ancients that Breyer’s promotes active liberty.

Breyer’s refusal to engage with Constant’s arguments against the liberty of the ancients, or to acknowledge that Constant believed the United States was typical of the liberty of the moderns, are all serious omissions, but not fatal ones. We can remove Constant from the picture entirely, and evaluate the plausibility of Breyer’s main argument that the Framers were supporters of active liberty.

Is it fair to say that the Framers, having overthrown a monarchy, were keen to delegate extensive authority to the common man? The best answer has to be, not quite. Of course, the Framers sought to create a republic that gave effect to the people’s desires and their inalienable right to life, liberty and the pursuit of happiness. But this is trite history.

The salient theme of the American Founding is the many limits the Framers placed on popular democracy, partly in response to the fear that mischievous factions would hijack the political process. The system the Framers designed featured a President not directly elected by the people but instead by an Electoral College; the original Senate was similarly not directly elected; the franchise was restricted; electoral boundaries were drawn to minimize the “mischief of faction”; and a Constitution was put in place to ensure that popular majorities could not overwhelm minority rights.

Indeed, many of the Founders wanted to go further still. James Madison, for example, proposed extending the terms of office for Senators and Congressmen, further insulating them from the public. One does not have to be an expert on the American constitutional project to know that the Framers were not, shall we say, enamored with the radical direct democracy of Athens.

Breyer’s distortion of Constant’s argument, coupled with his overly-simplistic, and probably disingenuous, retelling of the Founding, blunt the core of his argument. Breyer’s central claim is that the Framers sought to entrench a system of active liberty, which was a derivative of Constant’s liberty of the ancients. The truth is, the Framers sought to do no such thing; that, for Constant, liberty of the ancients was not liberty at all; and that Breyer’s endorsement of active liberty deserves Justice Robert Jackson’s rejoinder that “loose and irresponsible use of adjectives colors all non-legal and much legal discussion.”

Purposivism and intendment

In the process of advancing his claim about the Framers' preference for active liberty, Breyer admits that this does not always manifest itself in the actual text of the Constitution. To overcome the limits posed by the Constitution's text, Breyer proceeds to argue that the Constitution should be interpreted purposively to maximize active liberty. If confined to a reading of the Constitution that emphasized its actual words, Breyer would undoubtedly reach results similar to the conservative originalists on the Supreme Court. Freed from the text, however, Breyer has fewer constraints when interpreting the Constitution. All he needs to do is attribute a purpose to the Constitution – active liberty, in this case – and interpret the Constitution to promote that purpose. Breyer proposes that the same approach be followed when interpreting statutes.

This approach to the meaning of words reminds me of a passage from Lewis Carroll's "Through the Looking-Glass":

> 'When *I* use a word,' Humpty Dumpty said, in a rather scornful tone,
> 'it means just what I choose it to mean – neither more, nor less.'

Breyer, rather like Humpty Dumpty, downplays the significance of the actual text of the Constitution. In defending his "loose constructionism," Breyer explains that this is consistent with active liberty because it is more likely to give effect to the intention of Congress – the people's representatives – than either a literal or textualist interpretation of the words themselves.

Breyer proposes that a judge should place himself in the shoes of a "reasonable member of Congress" – whatever that is! – and ask how he "would have wanted a court to interpret the statute." Analytically, this is a deeply flawed approach. The "reasonable member of Congress" is a polite fiction, an abstraction designed to allow a judge to determine what *he* thinks the purpose of a statute is. As Cass Sunstein, a professor of law at the University of Chicago explained in a favorable review of "Active Liberty," "'Purpose' is sometimes what judges attribute to the legislature, based on their own conception of what reasonable legislators would mean to do."

Breyer does not satisfactorily explain why a "reasonable member of Congress" is the ideal standard. There are many other standards one could use to determine a

statute's purpose. Why not ask what problem a statute was trying to fix and interpret the statute purposively so as to fix the problem – the so-called "mischief rule"? Or, since one needs a majority in both houses of Congress to pass a law, why not determine who the marginal voter was, and give preference to what he wanted the legislation to accomplish, because but for his vote, the law never would have passed? Or, since the President's signature is required to pass a law (with a few limited exceptions), and because we operate in a system of coequal branches of government, why should the intention of "a reasonable member of Congress" trump the President's? Even if one believes that statutes should be interpreted purposively, this does not of itself imply that a "reasonable member of Congress" is the best abstraction, or interpretive tool, for discerning purpose.

Under Breyer's purposive approach, a judge can look at legislative history, committee reports, and statements by members of Congress in order to ascertain the purpose of a statute. Or, to put it another way, a judge can look at just about any source he wants. This substitutes law with discretion and is the opposite of Breyer's democracy-enhancing thesis.

When a judge departs from the actual words and structure of a statute and tries to determine its underlying purpose on the basis of what is not included in the text, he crosses the line between interpreting law and making law. Even where the text of a constitutional provision is ambiguous, relying on these third-hand aids is also problematic because it allows a judge to pick-and-choose, the better to achieve his desired outcome. This is an abuse of the judicial function. Judges should avoid even the appearance of straying from the text, both because of the inherent dangers in this approach, and because it undermines public faith in the judicial system.

Any time a law is ruled unconstitutional for violating the Constitution's imputed purpose, rather than for violating its actual provisions, democratic self-government is undermined. This is especially true given the great deal of uncertainty – uncertainty that to this day vexes historians – concerning what the Framers intended. It also ignores the fact that, at its root, the Constitution, just like any law, is a compromise, and to assume that there is some sort of common purpose animating all those who reached a compromise is deliberately naive.

In practice, Breyer's purposivism is unworkable. He does not adequately explain what happens when active liberty comes into conflict with ambiguous text in the Constitution. It is all fine and well reading a presumption favoring active liberty into the Constitution, but surely when this theory runs into conflict with the document, the text should triumph. For Breyer, this is not self-evidently true. Indeed, Breyer's theory of active liberty operates at such a high level of generality that it is infinitely malleable. Therein lays the danger of his approach. In its desire to read deeper meaning into the Constitution, it overlooks the fact that the Constitution's words have an actual meaning, and that ignoring this in favor of a dubious esoteric meaning elevates the judge above the Constitution.

The Constitution's Patina, to scrub or not to scrub

No judicial philosophy has held sway among a majority of Supreme Court justices for any significant length of time. As a result, all judicial philosophies have their bugbears – past judicial decisions with which they disagree – and must at some point develop an approach to dealing with wrongly decided cases.

Should important constitutional law decisions that were wrongly decided be abandoned wholesale? Or should the "doctrine of stare decisis" – the principle that courts should follow past precedent – trump the Constitution? Even though stare decisis is a fancy Latin expression that, ipso facto, merits respect, we should query why it is that the force of precedent alone can justify upholding an incorrect constitutional decision.

The late Chief Justice William Rehnquist had a strong commitment to the doctrine of stare decisis. In *Dickerson v United States*, the Chief Justice wrote, "while stare decisis is not an inexorable command, even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification."

Justice Thomas is on the opposite side of the debate. In Ken Foskett's biography, "Judging Thomas: The Life and Times of Clarence Thomas," Justice Scalia is quoted as saying: "[Justice Thomas] doesn't believe in stare decisis, period…If a constitutional line of authority is wrong, he would say let's get it right…I wouldn't do that."

Thomas' brief concurrence in *United States v Morrison* illustrates this nicely. He

argued that the Supreme Court should, “replace its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding.” In calling for the court to overturn precedent dating back almost a century, Thomas did not once discuss “stare decisis,” or anything else for that matter, as a limiting factor.

Scalia, by contrast, has tempered his originalism with what can be called, for the purposes of brevity, a reliance doctrine. As Scalia explained on February 21, 2006 at a speech at the American Enterprise Institute, where the public has come to rely on a judicial decision, judges should be careful about overturning it in the name of constitutional purity.

Scalia offered a powerful illustration of this: In 1925, in *Gitlow v New York*, the Supreme Court held that certain provisions of the First Amendment applied to state governments through the Fourteenth Amendment. This decision cannot be justified on originalist grounds.

Still, as Scalia explained in his speech, he would be unwilling to rule that the First Amendment does not apply to the states. To Scalia, the thought of the Supreme Court decreeing that the First Amendment’s protection of free speech does not apply to state governments is unconscionable. Americans having come to rely on this protection from state governments, removing this would undermine faith in the legal system.

Another approach supported by Judge Michael McConnell, a judge on the 10th U.S. Circuit Court of Appeals, holds that past precedents that command overwhelming public support should likewise not be overturned, even if they were wrong decided. McConnell shares Scalia and Rehnquist’s belief that incorrect decisions can be laundered through the effluxion of time and intervening events.

Breyer, by contrast, is AWOL from this debate, offering no explanation of how an approach grounded in active liberty would deal with bad legal precedents. In its place, Breyer endorses a dodge of a position: pragmatism.

Instead of applying and creating bright-line rules, Breyer believes that judges should try to find a pragmatic solution to controversial disputes that are before them. This approach is as seductive as it is wrongheaded.

In our legal system, the vast majority of legal disputes will never reach the

Supreme Court, and the vast majority of legally enforceable agreements will never be litigated. This is because judges have laid down clear rules and we live our lives and manage our affairs within the confines of these rules.

Breyer's pragmatic approach ignores this. It suggests that the Supreme Court should decide cases based on facts, rather than based on law. This is wrong, and badly wrong. The mere resolution of disputes between parties is a secondary part of the judicial function. Lawyers, when advising clients, need to know what the rules of the game are, and it is the role of judges to tell them.

First Among Many, a hierarchy of rights

Even if we accept Breyer's argument that the Framers sought to encourage active liberty and that the Constitution is the distillation of that effort, this does not of itself imply anything in the way of how judges should interpret the Constitution. Interpreting the Constitution to maximize active liberty will invariably denigrate other constitutional rights.

Take the issue of abortion. An approach that seeks to maximize active liberty in that arena would, perforce, strengthen outlets for democratic decision-making. Following this approach however would strike at the heart of *Planned Parenthood v Casey*, which recognized that state regulations on abortion must not place an "undue burden" on a woman's access to an abortion. This followed from the doctrinal position articulated in previous abortion rights cases, such *Roe v Wade*, which posited a general right to privacy.

But Constant was well aware of what liberty of the ancients meant for personal autonomy and privacy. "The individual," Constant wrote in "The Liberty of the Ancients Compared to That of the Moderns," "almost always sovereign in public affairs, was a slave in all his private relations."

Under Breyer's framework, the constitutional right to an abortion, and the right to privacy more generally, would be weighed against how they strengthen active liberty. Can it really be said that an unwanted pregnancy and child are such an important burden on a woman's ability to participate in democratic decision-making that they trump everyone else's right to pass laws restricting abortion? Perhaps; but basing abortion rights on such shaky ground is a very dangerous path for liberals to tread.

It is also worthwhile pointing out that Breyer's leading opinion in *Stenberg v Carhart*, which held that Nebraska's law restricting partial-birth abortions was unconstitutional, did not discuss how this approach could be reconciled with active liberty.

No doubt there are many other areas where treating active liberty as if it were the animating purpose behind the Constitution will conflict with other constitutional rights. Breyer offers no hierarchy of rights, nor does he discuss how privileging active liberty might interfere with pre-existing rights. Breyer's framework gives few insights to judges, fewer still to the lawyers who argue before them.

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Breyer plays the role of constitutional necromancer, reviving the spirit of the Founders in order to advance an implausible claim about their intentions. Breyer's argument relies on a disingenuous interpretation of political philosophy, an incorrect understanding of history, and a judicial methodology that substitutes law with discretion.

Breyer's central thesis – that textualist originalism is less faithful to the intent of the Framers than his own loose constructionist active liberty – is an implicit acknowledgment that constitutional law should center on the original purpose of the Constitution. It is, in this regard, another data-point in the triumph of originalism.

Just as it is a tribute to the success of originalism that Breyer, a liberal, has sought to ground his judicial philosophy of active liberty in the original intent of the Framers, it is also a tribute to Breyer himself. By positing a theory of constitutional interpretation that – shockingly! – gives the Constitution a central role, Breyer affirms our traditions of republican self-government. For all its faults, if Breyer's book succeeds in drawing liberals back to the text, history, and purpose of the Constitution, it will have been an overwhelming success.

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