E-mail Author
Send to a Friend
Version

December 14, 2005, 8:31 a.m.

Mystics of the Court

Stephen Breyer's activism.

By Representative Tom Feeney

Give Supreme Court Justice Stephen Breyer his due. With the publication of his new book *Active Liberty*, he enthusiastically embraces a *mea culpa* approach to allegations that Supreme Court justices invent, recreate, and expand constitutional principles as they please. Viewed as a response to Justice Antonin Scalia's *A Matter of Interpretation*, Breyer's book, openly advocates for the notion that U.S. constitutional law is whatever a majority of Supreme Court justices wishes based upon their own notions of what "democracy" and fairness should produce. In other words, I and thousands of other attorneys wasted our time taking constitutional law since that jurisprudence boils down to the ability to count to five.

Breyer attacks "textualism" or strict construction and advocates that appointed judges have implicit powers to impose "democratic" results on citizens even if that entails overriding decisions of elected legislatures. He argues:

> In a word, my theme is democracy and the Constitution. I illustrate a democratic theme — "active liberty" — which resonates throughout the Constitution. In discussing its role, I hope to illustrate how this constitutional theme can affect a judge's interpretation of a constitutional test.

Breyer essentially resurrects the notion of a "living Constitution" that adapts to current cases, controversies, and thought. As he notes, the Founders "wrote a Constitution that begins with the words 'We the People.' The words are not 'we the people of 1787.' " That difference in words provides carte blanche for Breyer and at least four other Justices to conjure up post-modern meaning to the document's words. Here's one practical lesson for laymen: When drafting a contract, don't say "I agree to do X." Say "I in 2005 agree to do X." Otherwise, some judge may divine future obligations you never contemplated.

This notion of a static Constitution permanently rooted in 1787 conveniently ignores Article V's amendment process and the subsequent 27 amendments. This process requires obtaining approval from two-thirds each of the Senate and House of Representatives and three-quarters of the state legislatures — a true manifestation of what We the People of [fill in the year] desire. It's much easier to engage in what I call "jurisprudential mysticism" and count to five.

Breyer argues for an "independent judiciary" to implement "active liberty." But the real question is judicial independence from what? No responsible policymaker has suggested that the judiciary should not be independent from the executive and legislative branches. If the proposition is that the court system in adjudicating cases or controversies should not be subject to coercion by the executive or legislative branches (e.g., firing judges, reducing their salaries, filing criminal complaints, vetoing or overturning their decisions), everybody agrees. During good behavior, federal judges cannot be fired, have their salaries reduced, be voted

out of office, and with respect to decisions on the meaning of the Constitution, be overturned by Congress.

That extraordinary power is tempered by the judiciary's limited role as a mere umpire applying the law or interpreting the original meaning of the Constitution. Or at least that's why the Framers adopted Montesquieu's notion on the separation of powers, as illustrated by Madison in Federalist Paper No. 47:

> The judges themselves can exercise no executive prerogative . . . nor any legislative function. . . . "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of an oppressor." (quoting Montesquieu)

But Breyer rejects such limitations. He wants an "independent judiciary" under the guise of "active liberty" to impose "democratic results" that representative, elected legislatures, and Congress have refused to impose on us. Judges imposing biased versions of "active liberty" for "democratic results" is an oxymoron: Policies dictated from the bench that nullify decisions made by representatives (statutes enacted or proposals rejected) elected in regular elections are, ipso facto, not democratic.

BREYER'S CRYSTAL BALL

Breyer gives several examples of how jurisprudential mysticism can improve on the Constitution gifted to us by our Founders and as explicitly amended through the prescribed amendment process. Two applications of the First Amendment illustrate.

As to campaign finance laws, Breyer notes: "Comparable expenditures for elections in foreign democracies are far lower" than in the U.S. So in the 2003 case of *McConnell* v. *Federal Election Commission*, Breyer and his colleagues limited the First Amendment's protection of campaign speech. If free speech during elections wasn't a key concern of the Founders in drafting the First Amendment, what was on their minds? Undermining the First Amendment during elections because other countries have less freedom is part of the approach that Yale Law School dean Harold Koh approvingly describes as the "Transnationalist Judiciary."

Under this jurisprudence — affirmed by six current Supreme Court justices including Breyer — contemporary foreign laws, constitutions, polls, traditions, fads, and customs inform Supreme Court justices on the original meaning of *our* Constitution. Never mind that our Founding Fathers, the Federalists and Anti-Federalists, 13 original states, and every state admitted since 1787 relied on the text of *this* Constitution. The intent of our Founding Fathers and the states that ratified the Constitution and its amendments must now give way to overseas laws, constitutions, and cultural activities. Active liberty means surrender of sovereignty, not to mention imposition of laws no American citizen or his representative had a chance to vote for!

In addition to free speech, the First Amendment requires that "Congress shall make no law respecting an establishment of religion." Breyer defends his decision to prohibit school vouchers that parents could use for parochial schools because "the [establishment] clause seeks to avoid among other things the social conflict, potentially created when government becomes involved in religious education." He nowhere explains how he mystically discerns this intent of the Framers, but asserts that "it was necessary to interpret the clause more broadly than the Framers might have thought likely." So under "active liberty," prohibiting an

establishment of a state-sponsored religion requires a judge to *transcend* the Founders' intent. Breyer notes: "I am not arguing that I was right. . . . I am arguing that my opinions sought to identify a critical value underlying the Religion Clause."

As Breyer fleshes out other applications of "active liberty," he refreshingly admits that desired results (i.e., consequences) guide his jurisprudence. He asks:

> Why should courts try to answer difficult federalism questions on the basis of logical deduction from text or precedent alone? Why not ask about the consequences of decision-making on the active liberty that federalism seeks to further?

Breyer confirmed this view in this exchange with George Stephanopoulos on ABC's *This Week* on October 3, 2005:

> Stephanopoulos: Let me get you to respond to some of your critics, one of them is Rep. Tom Feeney, a member of the House Judiciary Committee. He says nobody but a subjective, biased judge can determine what "active liberty" means. And he calls your approach jurisprudential mysticism.
>
> Breyer: Well, everyone can read this and come to any conclusion they want about it. That's fine. It's his view, not my view.
>
> Stephanopoulos: How do you guard against the idea that it is subjective?
>
> Breyer: That's a very good question. What I try to do in the book is to show that actually a system that refers back in the judge's mind, a framework to basic purposes and then looks at consequences in light of those purposes is more likely to lead to objective decision making, is less likely to lead to subjective decision making.

Breyer admits as much: "To be sure a court focused on consequences may decide a case in a way that *radically changes the law*." (Emphasis added.) But Montesquieu's and Madison's previously cited concerns about the tyrannical consequences of joining judicial and legislative functions are dismissed. Judges will "understand that too radical, too frequent legal change has, as a consequence, a tendency to undercut those important law-related human needs." In other words, forget constitutional checks and balances. When enacting law from the bench, judges will be constrained by their self-discipline in imposing "radical" changes too rapidly. Judicial mysticism is checked not by the Constitution or the separation of powers but by personal restraint alone.

If the combination of "judicial independence," "active liberty," and an eye towards "consequences" means substituting a judge's personal judgment for statutory enactments or the language of the Constitution, then one is no longer describing limited democratic constitutional government or the rule of law. Such a form of government may well be theoretically defensible. Plato in his *Republic* suggested that philosopher-kings were the optimal form of government. Since he was a poet, he naturally thought poets (what we would in modern day consider philosophers) should be kings. Perhaps in the modern world, judges would be natural philosopher-kings. That is a form of elite oligarchy or a benevolent aristocracy. But it is not our form of government.

Citizen ignorance justifies Breyer's approach as he claims that "more students know the names of the Three Stooges than the three branches of government." Presumably these Americans are quite competent to take up the burdens of citizenship such as military service or paying taxes but woefully incompetent for democratic self-governance within our

constitutional framework. So "active liberty" must be imposed upon us by five unelected and unaccountable justices.

In this book, a sitting justice acknowledges that Plato's governance by philosopher-kings is preferable to the inferior constitutional democratic self-governance gifted to us by our forefathers. Having lost its influence in the executive and legislative branches, the Left — often holding an adversarial stance against its fellow citizens (undoubtedly connoisseurs of the Three Stooges) — finds its last refuge in the judiciary. Rejected by its fellow citizens through the election process, this faction seeks to impose its notions through judicial activism under the guise of "active liberty." No wonder a Senate bloodbath threatens the confirmation of every Court of Appeals and Supreme Court nomination.

Aristotle taught that politics involves free people deliberating the question of how to order our lives together. America represents the best traditions of such democratic self-governance. In this corner of the world, Plato lost. We should be ever vigilant so that verdict isn't overturned under the guise of "active liberty."

— The Honorable Tom Feeney is a Republican congressman from Florida.

---

http://www.nationalreview.com/comment/feeney200512140831.asp