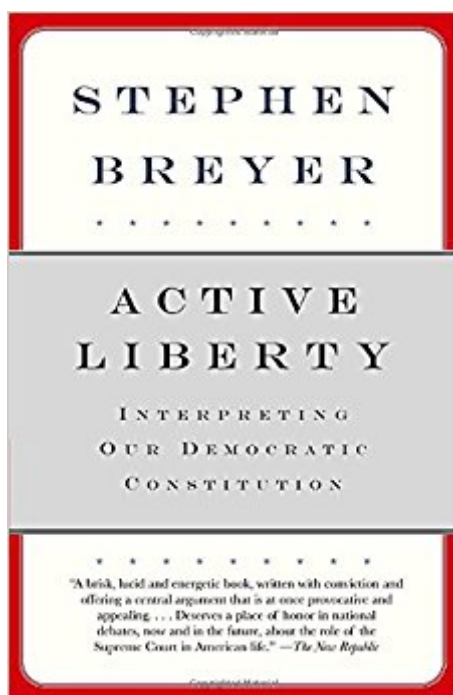


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# Active Liberty: Interpreting Our Democratic Constitution



## Synopsis

A brilliant new approach to the Constitution and courts of the United States by Supreme Court Justice Stephen Breyer. For Justice Breyer, the Constitution's primary role is to preserve and encourage what he calls "active liberty": citizen participation in shaping government and its laws. As this book argues, promoting active liberty requires judicial modesty and deference to Congress; it also means recognizing the changing needs and demands of the populace. Indeed, the Constitution's lasting brilliance is that its principles may be adapted to cope with unanticipated situations, and Breyer makes a powerful case against treating it as a static guide intended for a world that is dead and gone. Using contemporary examples from federalism to privacy to affirmative action, this is a vital contribution to the ongoing debate over the role and power of our courts.

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## Customer Reviews

Starred Review. Supreme Court Justice Breyer offers his view of constitutional interpretation at a crucial time, when the Court's future is very much at stake. Breyer himself made the crucial deciding votes recently in the two 10 Commandments cases: he notably split his vote, supporting the display in Texas and opposing the one in Kentucky, a nuanced choice that confounded many and that he explains lucidly here. Breyer works this explanation into a larger look at an important aspect of his judicial philosophy: the need for justices to look at cases in light of how their decisions will promote what he calls "active liberty," the Constitution's aim of promoting participation by citizens in the processes of government. It's an approach that emphasizes "the document's underlying values" and looking broadly at a law's purpose and consequences rather than relying on a rigid overarching

theory of judicial interpretation. The justice looks at six areas of law to show how this approach influenced, or might have influenced, high court decisions on free speech, affirmative action, and privacy, among others. For instance, in free speech, Breyer notes that an active-liberty outlook would have led the Court to support campaign finance laws controlling soft-money contributions. He explains how the Court's decision in favor of the University of Michigan law school's affirmative action program supported the participation of minorities in our political system. (Interestingly, he doesn't discuss the Court's simultaneous decision against the university's undergraduate affirmative action program.) Breyer saves his hard ball for the very end: a calm, judicious but powerful attack on the interpretive approach of some of his judicial colleagues, what he calls an "originalist" approach, relying primarily on a close reading of the text of a statute or the Constitution. Anticipating originalists' criticism that only their approach can prevent judicial subjectivity, Breyer forcefully illustrates the many constraints on subjectivity and shows that originalism is not as objective as they claim. Breyer's prose is admirably simple and clear, and his discussion shows a keen legal intellect that espouses broad values rather than narrow theories, and a deep, humane concern with fostering democracy and the well-being of the citizenry. This will be essential reading at a possibly watershed moment for the Supreme Court. 50,000 first printing. (Sept. 17) Copyright © Reed Business Information, a division of Reed Elsevier Inc. All rights reserved. --This text refers to the Audio CD edition.

An associate justice of the Supreme Court, Breyer proposes a framework for approaching constitutional issues that gives priority to the underlying purposes of the Constitution when engaging such issues. The underlying constitutional value with which he is most concerned is "active liberty," which places emphasis on democratic participation. To a lesser extent, Breyer is concerned with modern liberty, or government intrusion on the rights of individuals. Breyer maintains that the value of participation in a democracy can impact decision-making, and he gives examples in affirmative action, free speech, and federalism. His position contrasts sharply with the strict constructionist approach favored by certain of his more conservative cohorts, who try to limit their focus to the strict language of the Constitution and other statutes. Interestingly, Breyer's approach has much in common with certain conservative values, as the active liberty approach tends to defer to Congress. However, for the purpose of greater citizen participation, he envisions an approach that is adaptive and changes over time. Rather than looking exclusively to the past, Breyer appreciates the need to engage the Constitution as a living document. Vernon Ford Copyright © American Library Association. All rights reserved --This text refers to the Audio CD edition.

In this short (135 narrative pages) book, Stephen Breyer, Associate Justice of the Supreme Court, sketches the method by which he interprets the Constitution of the United States. He also attempts to persuade the reader as to the superiority of this interpretive approach. The explanation is well presented. The persuasion is less so. Nonetheless, the thoughts of an active Supreme Court Justice are well worth reading. Justice Breyer premises his approach on the writings of a French political philosopher, Benjamin Constant who, writing in the early 1800s, compared what he called the "liberty of the ancients" with "modern liberty." Ancient liberty consists of the people sharing in the sovereign authority of the government, an "active liberty." Modern liberty consists of the individual's freedom to pursue his own interests free of improper government interference. Breyer focuses on the liberty of the ancients, which he believes requires judges to focus on whether the ultimate consequence of a particular interpretation furthers "the people's right to `an active and constant participation in collective power.'" The active liberty theme is applied to several present-day issues, including campaign finance reform, congressional redistricting, privacy in an age of technological information gathering, and affirmative action. It is also applied to statutory interpretation and to the interpretation of administrative law. The result is a cogent explanation of Justice Breyer's thinking with respect to these examples but it gives no compelling reason why anyone else should use this approach. In fact, the examples demonstrate the subjectivity inherent in a member of the judiciary making what are essentially legislative determinations. Breyer acknowledges that any method of interpretation involves subjectivity but states his belief that a consequence-oriented approach is less so than others. He attributes to the ancient Greek statesman Pericles, the following: "We do not say that the man who fails to participate in politics is a man who minds his own business. We say that he is a man who has no business here." It is the best line in the book. The brevity of Justice Breyer's book helps to make it an easy read. The complexity of the subject matter is buried in the endnotes, which I suspect, only sophisticated court-watchers will bother to examine

Judge Breyer is obviously responding to Constitutional "literalists" in this short work, among them, judges Scalia and Thomas. He argues that the Constitution is a "framework" for self-governance that supports an ever evolving governance construct based on the will of the people as expressed through their legislators and legislation and associated governmental bodies. When deciding modern legal situations, Supreme Court justices must therefore "interpret" statutes and the Constitution in terms of the will and purposes of the people taking into account the "consequences" of their decisions, as well as language, precedent, history, etc. "Textualism," a version of literalism,

is an inadequate approach because the Constitution is not an extensive, precisely worded document that literally points to particular decisions. He also calls for judicial modesty in deferring to the will of the people, while literalists are far more inclined to supply meanings based on the alleged "original intent" of the Founders. Judge Breyer regards his approach as consistent with "ancient" liberty, as opposed to "modern" liberty. Ancient liberty emphasized the collective efforts of citizens in self-governance. However, he recognizes the possibilities of coercion when participation is expected, if not required; hence modern liberty - a liberty that protects one's right to be left alone. He contends that the Framers constructed a Constitutional order that expected citizen participation and created the liberty to do so. The book is strongest in the general ideas concerning judicial approach. The interpretative approach is a broad-based approach, in terms of what factors are considered. The literalist approach seems self-limiting and actually more prone to subjectivity in that judges often create precise meaning from vaguely worded language. Less successful are the examples given that supposedly demonstrate the success of the interpretive approach in such areas as free speech, federalism, privacy, affirmative action, statutory interpretation, and judicial review of administrative action. For one, the descriptions border on legalese, that is, they are difficult to follow, and secondly the positions defended at times seem peculiarly anti-democratic. It is bizarre that a CA statute that permitted a consumer to challenge Nike's claim of observing worker rights is struck down, with the author's agreement, due to Nike's right to persuade the public - strange indeed. One could disagree with the judge concerning the democratic intent of the Framers. Democracy was pretty much a forbidden word among the framers. At best, they created a highly constrained democracy that excluded the participation, by Constitutional stipulation, of a large majority of Americans. As far as desiring citizen participation - elites throughout American history have generally feared collective actions originating from below, such as labor unions, and usually enlist the state in suppressing such movements. The Populists in their early years were defeated through intimidation and blatant voter fraud. The author, most curiously, does not mention the decision in the late nineteenth century that recognized corporations as legal persons, a truly monumental decision with ramifications throughout our society, especially in the political process. Nike et al are not persons, yet they trump people. His arguments against so-called strict constructionism are compelling. The original intent of the Framers of over two centuries ago, even if it could be determined and it usually cannot, is only marginally relevant in a world that has drastically changed since 1787. Without providing an analysis of Supreme Ct decisions through the years, it is still safe to say that the Supreme Ct has been a conservative, even backward-looking, force in our society, often favoring elites. It is hardly certain that judges of Breyer's disposition will

have much of an impact on that history. But it is interesting to see the little in-fight on the Supreme Ct.

Excellent read for an attorney

Other reviews have already covered the content of this book, especially the Washington Post review on this page. Whether you agree with Breyer's philosophy or not, this book is worth reading if you're interested in learning first-hand why people with Breyer's outlook oppose the textualist approach to Constitutional interpretation taken by Scalia and others. This book is really slim, and at \$21 is overpriced (so buy it on Amazon with the offered discount!). It is based on a set of lectures Breyer gave, so don't expect a fleshed-out scholarly monograph. I would love to read Breyer's arguments and examples in a more well-developed form. Nevertheless, I think the book clearly lays out Breyer's ideas and conveys the broad structure of his argument. Most importantly, books like this give readers first-hand access to a Justice's thinking; this is can be more attractive than reading someone else's summary of a Justice's philosophy.

It is not light reading but Justice Breyer's insights stay with you. The judicial pursuit of active liberty, if followed for no other motive, can lessen the partisanship that sometimes diminishes the Court's hard and serious work.

The book was beautifully written for the layperson. Even though I know little about technical legal concepts, it made little difference in my ability to understand Stephen Breyer's book. All in all, the book gives me greater confidence in the ability of others.

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