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ACTIVE LIBERTY

INTERPRETING OUR DEMOCRATIC CONSTITUTION

STEPHEN BREYER

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To my brother and fellow judge, Chuck

Acclaim for Stephen Breyer's

ACTIVE LIBERTY

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INTRODUCTION

The United States is a nation built upon principles of liberty. That liberty means not only freedom from government coercion but also the freedom to participate in the government itself. When Jefferson wrote, “I know no safe depository of the ultimate powers of the society but the people themselves,” his concern was for abuse of government power. But when he spoke of the rights of the citizen as “a participator in the government of affairs,” when Adams, his rival, added that all citizens have a “positive passion for the public good,” and when the Founders referred to “public liberty,” they had in mind more than freedom from a despotic government. They had invoked an idea of freedom as old as antiquity, the freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation’s public acts. [1]

Writing thirty years after the adoption of the American Constitution and the beginnings of the French Revolution, the political philosopher Benjamin Constant emphasized the differences between these two kinds of liberty. He called them “the liberty of the ancients” and the “liberty of the moderns.” He described “the liberty of the ancients” as an active liberty. It consisted of a sharing of a nation’s sovereign authority among that nation’s citizens. From the citizen’s perspective it meant “an active and constant participation in collective power”; it included the citizen’s right to “deliberate in the public place,” to “vote for war or peace,” to “make treaties,” to “enact laws,” to examine the actions and accounts of those who administer government, and to hold them responsible for their misdeeds. From the nation’s perspective, it meant “submitting to all the citizens, without exception, the care and assessment of their most sacred interests.” This sharing of sovereign authority, Constant said, “enlarged” the citizens’ “minds, ennobled their thoughts,” and “established among them a kind of intellectual equality which forms the glory and the power of a people.”[2]

At the same time, ancient liberty was incomplete. It failed to protect the individual citizen from the tyranny of the majority. It provided a dismal pretext for those who advocated new “kinds of tyranny.” Having seen the Terror, Constant was well aware of the dangers of subjecting the individual to the unconstrained “authority of the group”; and he warned against “borrowing from the ancient republics the means” for governments “to oppress us.” Constant argued that governments must protect the “true modern liberty.” That liberty, “civil liberty,” freedom from government, consisted of the individual’s freedom to pursue his own interests and desires free of improper government interference.[3]

Constant argued that both kinds of liberty—ancient and modern—are critically important. A society that overemphasizes ancient liberty places too low a value upon

the individual's right to freedom from the majority. A society that overemphasizes modern liberty runs the risk that citizens, "enjoying their private independence and in the pursuit of their individual interests," will "too easily renounce their rights to share political power." We must "learn to combine the two together."[4]

In this book, while conscious of the importance of modern liberty, I seek to call increased attention to the combination's other half. I focus primarily upon the active liberty of the ancients, what Constant called the people's right to "an active and constant participation in collective power." My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts. That thesis encompasses well-known arguments for judicial modesty: The judge, compared to the legislator, lacks relevant expertise. The "people" must develop "the political experience" and they must obtain "the moral education and stimulus that come from . . . correcting their own errors." Judges, too, must display that doubt, caution, and prudence, that not being "too sure" of oneself, that Judge Learned Hand described as "the spirit of liberty."[5]

But my thesis reaches beyond these classic arguments. It finds in the Constitution's democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike. It finds a basic perspective that helps make sense of our Constitution's structure, illuminating aspects that otherwise seem less coherent. Through examples, my thesis illustrates how emphasizing this democratic objective can bring us closer to achieving the proper balance to which Constant referred. The examples suggest that increased emphasis upon that objective by judges when they interpret a legal text will yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems. They simultaneously illustrate the importance of a judge's considering practical consequences, that is, consequences valued in terms of constitutional purposes, when the interpretation of constitutional language is at issue.

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 text.[6]

To illustrate a theme is not to present a general theory of constitutional interpretation. Nonetheless, themes play an important role in a judge's work. Learned Hand once compared the task of interpreting a statute to that of interpreting a musical score. No particular theory guarantees that the interpreter can fully capture the composer's intent. It makes sense to ask a musician to emphasize one theme more than another. And one can understand an interpretation that approaches a great symphony from a "romantic," as opposed to a "classical," point of view. So might a judge pay greater attention to a document's democratic theme; and so might a judge view the Constitution through a more democratic lens. The matter is primarily one of approach,

perspective, and emphasis. And approach, perspective, and emphasis, even if they are not theories, play a great role in law.[7]

For one thing, emphasis matters when judges face difficult questions of statutory or constitutional interpretation. All judges use similar basic tools to help them accomplish the task. They read the text's language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand the phrase's purposes or (in respect to many constitutional phrases) the values that it embodies, and they consider the likely consequences of the interpretive alternatives, valued in terms of the phrase's purposes. But the fact that most judges agree that these basic elements—language, history, tradition, precedent, purpose, and consequence—are useful does not mean they agree about just where and how to use them. Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. These differences of emphasis matter—and this book will explain why.

For another thing, emphasis matters in respect to the specialized constitutional work of a Supreme Court Justice. In my view, that work, though appellate in nature, differs from the work of a lower appellate court in an important way. Because a Justice, unlike a judge on a trial or appellate court, faces a steady diet of constitutional cases, Supreme Court work leads the Justice to develop a view of the Constitution as a whole. My own view is likely similar to that of others insofar as I see the document as creating a coherent framework for a certain kind of government. Described generally, that government is democratic; it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of law itself. The document embodies these general objectives in discrete provisions. In respect to democratic government, for example, the Constitution insists that Congress meet at least once each year, that elections take place every two (or four or six) years, that representation be based upon a census that must take place every decade; and it has gradually extended the right to vote to all adult men and women of every race and religion. (It also guarantees the states a "republican form of government.") [8]

But my view can differ from the views of various others in the way in which I understand the relation between the Constitution's democratic objective and its other general objectives. My view can differ in the comparative significance I attach to each general objective. And my view can differ in the way I understand how a particular objective should influence the interpretation of a broader provision, and not just those provisions that refer to it directly. These differences too are often a matter of degree, a matter of perspective, or emphasis, rather than a radical disagreement about the general nature of the Constitution or its basic objectives.

Finally, the fact that members of historically different Supreme Courts have

emphasized different constitutional themes, objectives, or approaches over time allows us to characterize a Court during a period of its history and to speak meaningfully about changes in the Court's judicial "philosophy" over time. Thus, one can characterize the early nineteenth century as a period during which the Court, through its interpretations of the Constitution, helped to establish the authority of the federal government, including the federal judiciary. One can characterize the late nineteenth and early twentieth centuries as a period during which the Court overly emphasized the Constitution's protection of private property, as, for example, in *Lochner v. New York*, where (over the dissent of Justice Oliver Wendell Holmes) it held that state maximum hour laws violated "freedom of contract." At the same time, that Court wrongly underemphasized the basic objectives of the Civil War amendments. It tended to ignore that those amendments sought to draw all citizens, irrespective of race, into the community, and that those amendments, in guaranteeing that the law would equally respect all "persons," hoped to make the Constitution's opening phrase, "We the People," a political reality.[9]

Later Courts—the New Deal Court and the Warren Court—emphasized ways in which the Constitution protected the citizen's "active liberty," i.e., the scope of the right to participate in government. The former dismantled various *Lochner*-era distinctions, thereby expanding the constitutional room available for citizens, through their elected representatives, to govern themselves. The latter interpreted the Civil War amendments in light of their basic purposes, thereby directly helping African Americans become full members of the nation's community of self-governing citizens —a community that the people had expanded through later amendments, for example, those extending the suffrage to women, and which the Court expanded further in its "one person, one vote" decisions. The Warren Court's emphasis (on the need to make the law's constitutional promises a legal reality) also led it to consider how the Civil War amendments (and later amendments) had changed the scope of pre–Civil War constitutional language, that is, by changing the assumptions, premises, or presuppositions upon which many earlier constitutional interpretations had rested. In doing so, it read the document as offering broader protection to "modern liberty" (protecting the citizen from government) as well. While I cannot easily characterize the current Court, I will suggest that it may have swung back too far, too often underemphasizing or overlooking the contemporary importance of active liberty.[10]

For all these reasons, it is clear that themes, approaches, and matters of emphasis can make a difference. This book will describe one such theme, that of active liberty. I shall show, through a set of six examples (focused on contemporary problems), how increased emphasis upon that theme can help judges interpret constitutional and statutory provisions. I shall link use of the theme to a broader interpretive approach that places considerable importance upon consequences; and I shall contrast that approach with others that place greater weight upon language, history, and tradition.

In the process, I hope to illustrate the work of a judge of a constitutional court; to justify use of the general interpretive approach I implicitly set forth; to explain why I believe that a different interpretive approach that undervalues consequences, by

undervaluing related constitutional objectives, exacts a constitutional price that is too high; to focus increased attention upon the Constitution's democratic objective; and, in doing so, to promote reemphasis of those objectives as an important theme that significantly helps judges interpret the Constitution.

THE THEME: ACTIVE LIBERTY

THE THEME CONSIDERED . . .

The concept of active liberty—as I said at the outset— refers to a sharing of a nation's sovereign authority among its people. Sovereignty involves the legitimacy of a governmental action. And a sharing of sovereign authority suggests several kinds of connection between that legitimacy and the people.

For one thing, it should be possible to trace without much difficulty a line of authority for the making of governmental decisions back to the people themselves—either directly, or indirectly through those whom the people have chosen, perhaps instructed, to make certain kinds of decisions in certain ways. And this authority must be broad. The people must have room to decide and leeway to make mistakes.

For another, the people themselves should participate in government—though their participation may vary in degree. Participation is most forceful when it is direct, involving, for example, voting, town meetings, political party membership, or issue- or interest-related activities. It is weak, but still minimally exists, to the extent that it is vicarious, reflected, say, in the understanding that each individual belongs to the political community with the right to participate should he or she choose to do so.

Finally, the people, and their representatives, must have the capacity to exercise their democratic responsibilities. They should possess the tools, such as information and education, necessary to participate and to govern effectively.

When I refer to active liberty, I mean to suggest connections of this kind between the people and their government—connections that involve responsibility, participation, and capacity. Moreover, active liberty cannot be understood in a vacuum, for it operates in the real world. And in the real world, institutions and methods of interpretation must be designed in a way such that this form of liberty is both sustainable over time and capable of translating the people's will into sound policies.

. . . AS FALLING WITHIN AN INTERPRETIVE TRADITION . . .

The theme as I here consider it falls within an interpretive tradition. That tradition encompasses a particular view of *democracy,* as including not only the "rights of the whole people," but also "the duties of the whole people." And it calls for *judicial restraint,* basing that call upon both technical circumstance and democratic value. As to the first, "[c]ourts are ill-equipped to make the investigations which should precede" most legislation. As to the second, a judge's "agreement or disagreement" about the wisdom of a law "has nothing to do with the right of a majority to embody their opinions in law." For both kinds of reasons, even if a judge knows "what the just result should be," that judge "is not to substitute even his juster will" for that of "the people." In a constitutional democracy "a deep-seated conviction on the part of the people . . . is entitled to great respect."[1]

That tradition sees texts as driven by *purposes.* The judge should try to find and " honestly . . . say what was the underlying purpose expressed" in a statute. The judge should read constitutional language "as the revelation of the great purposes which were intended to be achieved by the Constitution" itself, a "framework for" and a "continuing instrument of government." The judge should recognize that the Constitution will apply to "new subject matter . . . with which the framers were not familiar." Thus, the judge, whether applying statute or Constitution, should "reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision." Since law is connected to life, judges, in applying a text in light of its purpose, should look to *consequences,* including "contemporary conditions, social, industrial, and political, of the community to be affected." And since "the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded."[2]

That tradition does not expect highly general instructions themselves to determine the outcome of difficult concrete cases where language is open-ended and precisely defined purpose is difficult to ascertain. Certain constitutional language, for example, reflects "fundamental aspirations and . . . 'moods,' embodied in provisions like the due process and equal protection clauses, which were designed not to be precise and positive directions for rules of action." A judge, when interpreting such open-ended provisions, must avoid being "willful, in the sense of enforcing individual views." A judge cannot "enforce whatever he thinks best." "In the exercise of" the "high power" of judicial review, says Justice Louis Brandeis, "we must be ever on our guard, lest we erect our prejudices into legal principles." At the same time, a judge must avoid being "wooden, in uncritically resting on formulas, in assuming the familiar to be the necessary, in not realizing that any problem can be solved if only one principle is

involved but that unfortunately all controversies of importance involve if not a conflict at least an interplay of principles."[3]

How, then, is the judge to act between the bounds of the "willful" and the "wooden"? The tradition answers with an *attitude,* an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution. It champions the need to search for purposes; it calls for restraint, asking judges to "speak . . . humbly as the voice of the law." And it finds in the democratic nature of our system more than simply a justification for judicial restraint. Holmes reminds the judge as a general matter to allow "[c]onsiderable latitude . . . for differences of view." And Learned Hand describes both legislative and judicial democratic attitudes when he says that the "spirit which seeks to understand the minds of other men and women," the "spirit which weighs their interests alongside its own without bias," is the "spirit of liberty" itself.[4]

My discussion of active liberty falls within the broad outlines of the tradition these statements suggest. But it takes place in a different time. The statements I quote, from Holmes, Brandeis, Stone, Frankfurter, and Hand, must be read in light of later decisions that abolished legal segregation, that gave life to the Constitution's liberty-protecting promises, that helped to make "We the People" a phrase that finally includes those whom the Constitution originally and intentionally ignored. The discussion welcomes those decisions as furthering the Constitution's basic objectives. One of my objectives is to illustrate why one can, without philosophical contradiction, essentially embrace the later decisions without essentially abandoning the traditional attitude. That is to say, the philosophical tension is sometimes less than some have imagined.[5]

. . . AND CONSISTENT WITH THE CONSTITUTION'S HISTORY

Is it reasonable from a historical perspective to view the Constitution as centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government? I believe so. I have already listed various constitutional provisions that specifically further that objective. And the now standard historical accounts of the writing of the Constitution—in the works, for example, of Gordon Wood and Bernard Bailyn—make clear that active liberty, the principle of participatory self-government, was a primary force shaping the system of government that the document creates. [1]

The primarily democratic nature of the Constitution's governmental structure has not always seemed obvious. John Adams, for example, understood the Constitution as seeking to create an Aristotelian "mixed" form of government. Our government, like the British government, would reflect the structure of eighteenth-century society. The House of Representatives, like the House of Commons, would constitute the "democratical branch" of the new federal government, embodying the people's basic decency and common sense. The Senate, like the House of Lords, would represent the aristocratic element of society, embodying its wisdom while checking the people's sometimes "barbarous . . . and cruel" passions. The Executive would represent the monarchical element of society, with the President serving as a mediator, a balancer, helping to keep social forces in equilibrium.[2]

But Adams himself recognized that his notions of constitutionalism were not widely shared. And historians now tell us that by the time the Constitution was ratified by the states, the more "aristocratic" concept held by some of the Framers was a minority view. Rather, the document created a governmental structure that reflected the view that sovereign authority originated in the people; that the "Right to legislate is originally in every Member of the Community." An important imperative modified but also reinforced this right, namely the need to protect individual liberty (i.e., the liberty of the moderns). The right was also subject to an important constraint, namely the need for workable government. The term "every Member" did not then include women or slaves; the "Community" was not theirs. But the Constitution's structure, viewed in terms of the narrow "Community" of the time, was nonetheless democratic and set the stage for that community's later democratic expansion.[3]

Democracy, of course, could not mean a Greek city-state. The nation's geographic size, along with its large and growing population, would prevent replication at the national level of the Athenian agora or a New England town meeting. The people would have to delegate the day-to-day work of governance. But the people could continue to share sovereign authority; they could continue to participate actively in the

governing processes. “Delegated democracy” need not represent a significant departure from democratic principle.[4]

Moreover, in the view of modern historians, much post-revolutionary (pre-constitutional) American political thought was characterized by suspicion of government, hostility to the Executive Branch, and confidence in democracy as the best check upon government’s oppressive tendencies. The former colonists, now Americans, saw “radical destruction” of “magisterial authority” as the way—perhaps the only way—to keep power in check, to prevent its arbitrary exercise. They embraced the concept of “public liberty,” believing that “liberty in a State is self-government.” They considered a free people to be a people that government cannot oppress, for the reason that the people have “a constitutional check upon the power to oppress.” Thus, during the time between the end of the Revolutionary War and the writing of the Constitution, the American public came to the conclusion that democratic principles must underlie the structure of post-revolutionary government.[5]

After the Revolution the citizens of many former colonies translated their democratic beliefs into highly democratic forms of state government. Pennsylvania, for example, experimented with a constitution that abolished the position of governor, substituting a twelve-member elected council; created a unicameral legislature with one-year terms; imposed strict four-year term limits; insisted that all public decision-making take place in public; and provided for a board of censors, a kind of statewide grand jury with separately elected members who would investigate all actions by the legislature and report to the public. Indeed, in many of the colonies governors were forbidden to participate in the lawmaking function; impeachment was common; and terms of office were short. Most Americans accepted the Whig maxim, “where annual elections end, tyranny begins.”[6]

Why then did the Framers not write and the states not ratify a Constitution that contained similar democratic structures? Why did they not, like Pennsylvania, approximate a closer-to-Athenian version of democracy? Why did they create so complex a form of government, placing more distance between electors and elected than even the needs of “delegation” of democratic authority might demand?

The reason, in part, is that experience with many of these initial forms of democratic government had proved disappointing. Pennsylvanians found that their government enacted conflicting policies, reflecting the vagaries of shifting public opinion; that through debt repudiation it had produced an insecure climate for business; and that those within government—a continuously changing group—were often at war with one another. Similarly, Massachusetts saw in Shays’s Rebellion a public that would fight to avoid not only debt repayment but also taxation of any sort. Other states had faced similar, though perhaps less dramatic, difficulties. [7]

Nonetheless, despite these difficulties, the Framers did not abandon their basically democratic outlook. That is the main point. They wrote a Constitution that begins with the words “We the People.” The words are not “we the people of 1787.” Rather their

words, legal scholar Alexander Meiklejohn tells us, mean that "it is agreed, and with every passing moment it is re-agreed, that the people of the United States shall be self-governed."[8]

The Constitution subsequently implements its Preamble by vesting legislative power in a House of Representatives and a Senate—both bodies made up of individuals who are ultimately responsible to the people. Article I specifies that members of the House will be "chosen every second Year by the People of the several States," i.e., by voters who "shall have the qualifications requisite for electors of the most numerous branch of the state legislature." That article also originally specified that senators would be "chosen by" state "legislatures." But in so specifying, the Framers did not seek to model the "Senate" upon the House of Lords. Rather, eighteenth-century supporters of a Senate argued that this second legislative body would *increase* democracy by providing for "double representation." They pointed out that citizens chose their state legislators through elections. And given the importance of the senatorial position, it seems likely that the voters would have held their state legislators to account for their national senatorial choices.[9]

Article II vests executive power in a President, selected by an Electoral College, not the voters. But this mechanism does not create a presidency free from democratic control. Rather, the Constitution grants state legislators, elected by and accountable to the people, the power to determine how to select the state's electors. In 1789, this meant election by legislators in five states, by the people in four states, and by mixed methods in two states (two states did not participate). By 1832 it meant electors chosen directly by the people in every state but South Carolina (which switched to popular election after the Civil War). This popular connection now means (and meant at the time) that the President and senators would consider themselves responsible to, or representing the interests of, not a particular social class, but "We the People."[10]

Thus, James Wilson, an influential figure at the Constitutional Convention, summed up the Framers' conception of the nonlegislative branches as follows:

The executive, and judicial power are now drawn from the same source, are now animated by the same principles, and are now directed to the same ends, with the legislative authority: they who execute, and they who administer the laws, are so much the servants, and therefore as much the friends of the people, as those who make them.[11]

And John Taylor, writing in 1790, described the Constitution's structure in terms that are difficult to reconcile with a retreat from democratic principle. "Power," he said, "is first divided between the government and the people, reserving to the people, the control of the dividend allotted to the government." The government's allotment of power is then "distributed in quotas still more minute" to its various branches. But though the power is dispersed, the people themselves continue to control the policy-making activities of these different branches of government.[12]

One might argue that these descriptions vastly overstate the Framers' commitment to democracy. As I have just said, the Constitution seems to create a governmental structure far more complex, and in part far more distant from the people, than principles of delegated democracy demand. Does not that fact reflect a profound retreat from democratic structure, in the direction, as Adams suggested, of aristocratic government?

Not necessarily so. That is because we can find in these same constitutional facts not so much a retreat from democratic principle as an effort to produce a government committed to democratic principle that would prove practically workable and that also, as a practical matter, would help protect individuals against oppression. Thus, we can find in the Constitution's structural complexity an effort to produce a form of democracy that would prevent any single group of individuals from exercising too much power, thereby helping to protect an individual's (modern) fundamental liberty. And we can find in that structural complexity an effort to create a form of democratic government likely to escape those tendencies to produce the self-destructive public policies that the Pennsylvania and Massachusetts experiments had revealed, a form of democratic government that could produce legislation that would match the needs of the nation.

Consider, for example, what James Madison called the problem of "faction." As described by Gordon Wood, the problem grew out of the fact that the new nation encompassed divergent social, economic, and religious interests. There were "rich and poor; creditors and debtors; a landed interest, a monied interest, a mercantile interest, a manufacturing interest" and numerous subdivisions within each category. The states' post-revolutionary experience demonstrated that the natural tendency of these groups was to choose representatives not for their "abilities, integrity, or patriotism" but for their willingness to act solely to advance the group's particular interests. This often meant that "the great objects" of society were "sacrificed constantly to local views." The unicameral state legislatures, with their small electoral districts, large numbers of seats, and annual terms, might have come close to the Athenian vision of true democracy. But these bodies were "bulging and fluctuating" and "filled with such narrow-minded politicians who constantly mistook 'the particular circle' in which they moved for the 'general voice' of society." The Framers' goal was to "secure the public good and private rights against the danger of [factionalism], and at the same time to preserve the spirit and form of popular government."[13]

How did they achieve that goal? Madison said that the answer was to broaden the electoral base so that more members of government owe their position to the many. "If elected officials were concerned with only the interest of those who elected them, then their outlook was most easily broadened by enlarging their electorate." The base could not be made too broad, to the point where the elected official loses contact with the voter. But it must be broad enough to stifle the propensity "to rash measures and the facility of forming and executing them." It must be broad enough so that "no one common interest or passion will be likely to unite a majority of the whole number in an unjust pursuit." Madison predicted that this broadening would also have the effect