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# Barriers in the Land of the Free

Gary L. McDowell
*University of Richmond*, gmcdowel@richmond.edu

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Law

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Active Liberty

The best way to get judges to write books is apparently to lure them to the lecterns of prominent lecture series, then turn their remarks into something more permanent. Perhaps the most successful of these schemes was Judge Benjamin Cardozo's 1921 Storrs lectures at the Yale Law School that appeared in the same year as *The Nature of the Judicial Process* . While a judge on the New York Court of Appeals, before he was elevated to the US Supreme Court in 1932, Cardozo saw two further series of lectures appear in print as *The Growth of the Law* (1924) and *The Paradoxes of Legal Science* (1928). They still have a shelf life.

Through the years, Cardozo's influential extrajudicial works have been joined by others of enduring importance, not least Justice Antonin Scalia's A *Matter of Interpretation: Federal Courts and the Law* (1997). In these Tanner lectures, Scalia sought to spell out his textualist approach to constitutional and statutory interpretation. Given that his elevation to the high court in 1986 by the then President, Ronald Reagan, was in many ways the opening salvo in the war over judges that continues to engulf US domestic politics, Scalia's book was timely and important. Joining this tradition is Justice Stephen Breyer's Tanner lectures, a not-so-thinly-veiled response to Scalia, whose approach to interpretation, Breyer insists, is likely to result in irreparable "constitutional harm".

The essence of Breyer's argument derives from what he calls the concept of "active liberty", the idea that the constitution's "democratic nature" demands "a sharing of (the) nation's sovereign authority among its people". In practical terms, it means that 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" should be the focus of those who, like Breyer, wield the judicial power of the nation. This "principle of active liberty - the need to make room for democratic decision-making", he insists -"argues for judicial modesty in constitutional decision-making, a form of judicial restraint".

Apparently, up to a point. In truth, Breyer's theory of "active liberty" is not so much a means of restraining judges from interfering with the political processes as it is itself a fundamental "source of judicial authority", one that empowers judges to be both "actors in the deliberative process" and "substantive interpreters of relevant constitutional and statutory provisions". The result of Breyer's less-than-original theory of judging is that it leads inexorably to an "interpretive approach that places considerable importance upon consequences". The political end, it seems, will nearly always justify the judicial means.

At its core, Breyer's interpretive approach rejects judicial reliance on the legal or constitutional text and the original intention behind them. Such a "literal, textual or originalist approach", he says, will inevitably "undermine the constitution's efforts to create a framework for democratic governance" and is thus "inconsistent with the most fundamental original intention of the framers themselves".

Rather than being guided by "language, history and tradition ", Breyer's judge is free to aim at decisional "consequences" of contemporary policy importance that will conform to the judge's own view of the constitution's more abstract "enduring values". In Breyer's estimation such judges will be able to condescend and "explain in terms the public can understand" exactly what the constitution means, especially the parts that seem less than "coherent" when viewed in light of that document's "democratic imperative". So much for judicial modesty.

Ultimately, Breyer's approach of interpreting the constitution in light of his theory of "active liberty" leaves little room for his much vaunted "democratic decision-making" in which the sovereign people can see their will translated into law. One sees this most clearly, oddly enough, in the one great issue the author sidesteps. While he addresses the right to privacy/freedom from governmental surveillance as one area in which to make his point by example (the others are freedom of speech, federalism, affirmative action, statutory interpretation and administrative law), he ignores that most publicly divisive notion of privacy, the one that relates to sexual and reproductive behaviour.

When it comes to abortion, homosexuality or the possibility of gay marriage, Breyer has no intention of cordoning off space for "democratic decision-making" in which the people sharing "sovereign authority" are able to exercise their democratic right "to make or control the nation's public acts". As a result, one is left with no doubt that decisions such as *Roe v Wade* (creating the right to abortion) and *Lawrence v Texas* (prohibiting laws against homosexual sodomy) are precisely what Breyer sees as the proper "consequences" of an interpretive approach rooted in his principle of "active liberty".

The most devastating flaw here is his belief that originalism is at odds with the founders' views of constitutional interpretation, going so far as to suggest that such an approach simply "cannot be found" in the records. Only by overlooking Alexander Hamilton's argument in *The Federalist* , that the constitution is the embodiment of "the intentions of the people", and Chief Justice John Marshall's claim that the search for original intention is nothing less than "the most sacred rule of interpretation", especially under a written constitution understood to be "the greatest improvement on political institutions", could such a theory be advanced. That a sitting justice of the highest court is willing to make that argument will be more than slightly distressing to many. One comes away with a nagging sense that Breyer is far more familiar with the European intellectual sources that interest him, which lie at the root of his notion of "active liberty", than he is with the American founders themselves.

Books such as *Active Liberty* are important because of what is said or because of who says it. In the case of Scalia's *A Matter of Interpretation* , it is both. In this instance, the book's importance lies primarily in the fact that the author is a member of the US Supreme Court and is widely touted as the great intellectual counterbalance to Scalia and those literalists, originalists and textualists Breyer dismisses out of hand. But Scalia and his jurisprudential followers must be astonished that this is the best Breyer can offer, so weak is its punch. Indeed, it is not too much to suggest that had the manuscript been submitted for a blind review at any third-rate university press it surely would never have seen the light of day, so stunningly superficial is it.

Gary L. McDowell is professor of leadership studies, political science, and law, University of Richmond, Virginia, US.