

*Active Liberty*, by Stephen Breyer, Alfred A. Knopf, New York 2005, 135 pages.

Reviewed by Judge Daniel T. Gillespie

In this fascinating book, Justice Breyer uses the term “active liberty” to describe his judicial philosophy. In describing how he analyzes legislation for constitutionality, it becomes clear that his approach tends to be deferential to federal and state legislatures. Breyer describes his profound respect for the work of legislatures because it represents the considered work of men and women elected by the people themselves. The idea underlying his deference to legislatures harkens back to the idea of the New England town meeting in the early days of the Republic, where the townspeople gathered in meetings to express their views and vote on important town matters. Breyer perceives this same process being played out in Congress and state legislatures across the country, on behalf of those who elected them. Breyer sees this as the work product of a free society in the active exercise of its liberty.

In analyzing legislation he often applies the “reasonable legislator” test. He suggests that, in interpreting legislation, the Court acts properly if it endeavors to determine what a reasonable Congress person would have intended in drafting the relevant legislation. This is similar to the “reasonable person” test that trial judges apply or instruct juries to apply. Here, of course, there is no jury and the Court’s decision is final and non-appealable.

In reviewing legislation Justice Breyer looks to its underlying purpose. For example, he reports that in applying the doctrine of active liberty in a case involving commercial speech, he sought to uphold the statute in question as a valid effort of Congress to protect public health by protecting those who may be injured in the use of a compound drug that they very well might not actually need. The case, *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), involved a situation where Congress had passed a statute banning advertising for compounded drugs. Compound drugs are mixtures of two or more drugs by pharmacists to alleviate certain medical problems. They are prescribed by physicians. However, since they are generally new, untested combinations, they do not have, and are not required to have, FDA approval. Congress’ concern was that if these new compounds were allowed to be advertised, consumer demand might result in physicians over prescribing untested combinations of drugs that might possibly result in harm or perhaps even death to patients. The majority of the Court did not find sufficient evidence to support this restriction on commercial speech and struck down the law. In dissent, Justice Breyer, joined by Chief Justice Rehnquist, as well as Justices Stevens and Ginsburg, described the statute as an excellent example of active liberty. He also thought it was a proper means to achieve the underlying purpose of the legislation, which was an effort to protect public health. Breyer’s approach involves a balancing test. Applying his judicial philosophy in such a case, it appears that he might tend to tip the scales in favor of efforts of Congress to protect public health at the expense of commercial speech.

Breyer recounts how the prevailing judicial philosophy of the Court has evolved over time. Beginning with the Marshall Court and throughout the first half of the nineteenth century, the Court reinforced the authority of the federal government, he notes. He observed that the Court was concerned with protecting the interests of private

property during the late nineteenth and early twentieth century. He pointed to *Lochner v. New York* as an excellent example of that philosophy. In *Lochner* the Court had overturned an ordinance that set a maximum of sixty hours per week for bakers. That interfered with the freedom of two parties to enter into an otherwise lawful contract, that Court had held. The New Deal Court and the Warren Court, Breyer observed, dismantled *Lochner*-era decisions and in doing so moved toward a society in which citizens enjoyed more active liberty to the extent they were able to participate in government and expect the actions of their legislatures to be deferred to by the Court to a greater extent.

Overall, Justice Breyer displays a somewhat restrained view of a Supreme Court justice's role. He certainly does not exhibit the strong views of activist judges like William O. Douglas and Antonin Scalia. In fact, according to Jeffery Rosen's book, *The Supreme Court, the Personalities that Defined America*, Justice Breyer is described as having been tied with Justice Rehnquist for the role of the most restrained justice, in terms of striking down federal and state legislation, after Ruth Bader Ginsburg. Justice Breyer's philosophy runs contrary to Justice Scalia's doctrine of original intent. In fact, Breyer's book has been described as a response to Justice Antonin Scalia's *A Matter of Interpretation: Federal Courts and the Law*. Breyer notes that originalists fear that those who would interpret the Constitution in modern terms and consequences might, in the end, act subjectively, substituting their "well considered" view for the original intent of the Framers. In rebuttal, Justice Breyer responds that in carefully drafting the Constitution, the Founding Fathers wrote "we the People..." rather than "We the people of 1787...."

Justice Breyer observes that originalists fear that the original intent of the Framers will become lost as modern jurists interpret what they describe as a living document. Breyer concedes that may happen in some cases and it may be entirely proper in certain cases. Breyer describes the Ohio school vouchers case as a good example of that phenomenon. In opposing the school voucher program in that case, Breyer conceded that the majority opinion in support of the Cleveland school voucher program was consistent with the original intent of the Constitution as written. However, he pointed out, over the course of the last two centuries, immigration has resulted in 50 or more different religions in this country. That, he felt, increased the potential for religiously based social conflict. This case presents an example of a case where Breyer's approach goes beyond looking at the text of the Constitution to examine the consequences of the Court's decision. Using that approach, Breyer reported that he felt compelled to dissent on the school voucher case. Different religious groups, he worried, might become concerned about which groups would receive the funds. This potential for religious strife was exactly why the Framers sought to separate church and state, he suggested.

Nina Totenberg, in an interview of Justice Breyer on national Public Radio, noted that in interpreting the California 3-strike case, which had upheld a life sentence for a man convicted of stealing a set of golf clubs, he appeared to veer away from his "active liberty" approach of placing great deference toward the work of elected legislators. In conceding her point Justice Breyer responded that he thought the sentence involved "too much for too little." He added that he is only human, and a rote application of a set judicial philosophy is not always a good thing, because it overlooks the human factor.

In this relatively short book Justice Breyer sets forth his judicial philosophy in clear language and describes applications of it in six different contexts: free speech,

federalism, privacy, affirmative action, statutory interpretation and administrative law. He acknowledges that he is not inflexible in applying his judicial philosophy. This book is well worth reading as an excellent exposition of the jurisprudence of one jurist on today's Supreme Court.