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John Kenneth Galbraith Honor Lecture Active Liberty: Interpreting Our Democratic Constitution

Stephen G. Breyer

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It is a great privilege to deliver a lecture named in honor of Ken Galbraith. Among his many considerable talents, Ken possessed a terrific sense of humor. I remember running into Ken after he attended a friend's memorial service. And though Ken was in a foul mood because he did not much care for speeches, the service reminded him of a story. "When Rossini died," Ken told me, "his nephew decided to compose some music to

be played in the great man's honor at the funeral. Afterward, one of Rossini's friends came up to the nephew, and the nephew asked, 'Did you like my composition?' 'Yes,' the friend said, 'I did. But I could not help but think how much better it would have been if you had died and Rossini had composed the music.'" [Laughter]

That is vintage Ken Galbraith. He was – as many in this room can attest – a champion meddler, and he affected my life the year I was clerking for Arthur Goldberg. Ken had come to visit Justice Goldberg, and Goldberg was complaining about life at the Court.

Ken paid a visit to the White House, sat down with Jack Valenti and Lyndon Johnson, and said, "Arthur Goldberg is not very happy at the Supreme Court. You better find him another job." And Johnson said to Valenti, "We need a new secretary of HEW. See if Arthur's interested in the job." Valenti called up Goldberg, and Goldberg declined.

I know this happened because I distinctly remember Goldberg saying to me: "People in this administration are always calling and asking me if I want another job. I have a job." And he truly was – despite periodic complaints – quite fulfilled at the Court. But then

Adlai Stevenson passed away, leaving open the role of U.S. Ambassador to the United Nations. Perhaps, at that point, Ken placed another call to the White House. In any event, Johnson thought appointing Goldberg to the United Nations position was a great idea, and Valenti talked to Goldberg. Based on what I later heard, I understand that the ensuing conversation could be distilled to the following: “Arthur, the most important problem facing the country is Vietnam. I intend to solve this problem with the United Nations. And you’re the only one who can do it.”

Goldberg would have believed all three of those statements. According to Sol Linowitz, Johnson might have added something along these lines: “And you know, Arthur, the man

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who solves that problem can do anything.” Goldberg might well have believed that, too. I know from Justice Brennan that Goldberg consulted some of his fellow justices about the offer. All of them got along very well with Goldberg, but they thought that the U.N. position was a momentous undertaking and that he should accept the offer – even if it was unheard of to leave the Court.

Goldberg did leave, and while we regret it, he certainly did try. In his autobiography, Johnson wrote that Goldberg had asked for the U.N. job. That suggestion infuriated Goldberg, prompting him to return various presents that Johnson had given him over the years. Goldberg could not understand Johnson’s motivation for asserting that he had requested the U.N. position, but it is not inconceivable that Johnson thought that the statement was accurate. It all depends on what transpired during that conversation with Ken Galbraith, who was a master of tact.

Now let me turn to my book, *Active Liberty*. I wrote this book about the Supreme Court for several reasons. The first reason is that

I have been a judge on the Court for about twelve years now. Incidentally, if Justice Alito had arrived one month later, I would have held the record for longest tenure as junior justice, now held by Joseph Story. I missed, by one month, immortality as an answer to a trivia question. [Laughter] In the book, I explain a major difference between my job on the Supreme Court and my previous job as a judge on the Court of Appeals. Where a Court of Appeals judge considers constitutional matters only sporadically, Supreme Court work involves a steady diet of constitutional questions, which allows a Justice to develop a view of the Constitution as a whole.

Another motivation for writing the book occurred about eighteen months ago, when Justice O’Connor, Justice Kennedy, and I went to meet with Mrs. Annenberg and Vartan Gregorian. In an effort to develop a curriculum to teach high-school students about the Constitution, they surveyed the American Law Institute, which consists of lawyers from all over the country. When those lawyers were asked what part of the Constitution was most important to teach students, most responses centered primarily around three different areas: freedom of speech, freedom of religion, and equal protection of the laws. But far down on the list of responses was a word that all three of us who are Justices believe captures the Constitution’s fundamental principle: democracy.

The Constitution establishes a system of government that offers a way for ordinary Americans to express themselves regarding how their communities should function. The Constitution does not, of course, establish a pure democracy in the sense of a Greek city-state or a New England town meeting. But that ours is a delegated democracy does not undermine its basic democratic nature.

Democracy is central in understanding the Constitution because that document creates a governmental system with certain boundaries. It is the Supreme Court’s job to police those boundaries. Deciding whether a law is on the far, forbidden side of the rails or on the near, permissible side presents a difficult task. But, regardless, in between those boundaries is a vast area where people must determine for themselves – through legislatures, city councils, and various institutions – the kinds of rules they want to govern themselves. It is not the Supreme Court’s job to mandate those rules, but to determine whether the desired rules cross over into forbidden territory.

John Kenneth Galbraith

In opening remarks at the John Kenneth Galbraith Honor Lecture on May 18, 2006, Chief Executive Officer Leslie Berlowitz took note of the death of John Kenneth Galbraith only a few weeks earlier:

As all of you know, Professor Galbraith passed away on April 29, and tonight’s lecture is a small but fitting way for us to pay tribute to his life and spirit. I’d like to say a few words about his special relationship with the Academy.

In addition to being a valued Fellow of the American Academy, he was our next-door neighbor. After returning to Cambridge from his service as Ambassador to India, Ken and Kitty were frequently present at Academy meetings. On one October afternoon in particular, just a few days after Ken’s ninety-fifth birthday, he attended a luncheon here. Richard Parker was discussing his forthcoming biography of Ken. It won’t surprise any of you who knew Ken to hear what he said on that occasion: “Nothing has given me more pleasure over the years than this excellent and elegant organization. While we do not live at a great distance, the journey over here was my longest in nearly a year. I hope that travel marks my affection, my respect, and my admiration for all that the Academy does in revealing life’s deeper lessons. For that, we are all indebted.”

Our indebtedness, affection, and admiration were mutual. Ken was a towering intellect and the epitome of an engaged citizen. When John Adams and the other Founders established the Academy 225 years ago, they recognized that it would take public-spirited scholars and leaders to fulfill its lofty purposes. I think they had in mind people like Ken Galbraith. He was a treasured friend of the Academy, the country, and the world, and we will all miss him.

Two examples illustrate how my views have been influenced by the fundamentally democratic nature of the Constitution. I should

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note at the outset that I am not offering a theory of constitutional law. A theory, I learned long ago at Harvard Law School, is a complicated matter that invites logical deductions. Although lawyers on both sides of a case may frame their arguments as logical deductions, they invariably deduce opposing conclusions. [Laughter] Instead of a theory of the Constitution, I offer a theme of the document.

My first example, campaign finance, focuses on laws that restrict either the amount of money an individual may give to a candidate, or the amount that a candidate may spend on an election. The Supreme Court upheld the most recent federal law, McCain-Feingold, by a vote of five to four – an outcome indicating that this issue is a complex one. Despite this closely divided decision, some people believe that this issue is straightforward because campaign finance addresses money, and money is not speech. If money is not speech, they ask, how does regulating it interfere with freedom of expression? I find that reasoning totally unsatisfactory because even though money is not speech, the expenditure of money enables speech. If a candidate has no money, that candidate's ability to speak during an election will be severely constrained.

On the other side, many people also believe that campaign finance is an easy question, but for different reasons. Given that money enables speech, these people contend, campaign-finance regulations impermissibly limit freedom of expression. The First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech."

Campaign-finance laws must be deemed unconstitutional, under this view, because they limit speech.

In assessing whether campaign-finance laws are permissible, it is helpful to bear in mind the Constitution's democratic objective. The First Amendment is but part of a larger document, one that guarantees democratic institutions and provides for democratic elections. Indeed, the First Amendment plays an important role in ensuring that people hear different points of view and, through hearing those different points of view, are able to make informed choices in elections.

Considering the Constitution in context suggests that there may be problems with having campaign finance receive absolute protection under the First Amendment. To take an extreme example: imagine that a city has a very wealthy political family that purchases all of the television advertising time. It would be extremely difficult for candidates who were not as well financed to deliver their messages to the public.

As soon as we recognize that both sides of the controversy have attendant First Amendment interests, we shift from asserting absolutes to asking questions: What is the effect of this campaign-finance rule? Will unregulated money serve to drown out voices? How might a law restricting campaign expenditures introduce more voices into the forum? These are the questions that the Court considered in *Buckley v. Valeo* in 1976 and more recently in *McConnell v. FCC*. People may not necessarily agree with the Court's answers to the difficult questions posed by campaign-finance laws, but considering the Constitution's democratic theme can help us to ask better questions.

Affirmative action provides another instance of how this democratic theme can help resolve difficult constitutional questions. Understanding how democracy applies in this context is less obvious, but it applies nonetheless. As you all know, the Fourteenth Amendment provides that no state shall "deny any person . . . the equal protection of the laws." There are two predominant views contesting the meaning of that phrase as applied to affirmative action. Under the first view, affirmative action would be deemed unconstitutional because state activity must be "color-blind." This term comes from Justice Harlan's dissenting opinion in *Plessy v. Ferguson*, where he disputed the majority's notion that racially separate facilities could

in fact be equal. Though that is an admirable antecedent, it is difficult to know what the term "color-blind" now means when state universities seek to use color not to exclude racial minorities, but to create a more integrated society.

In contrast to the color-blind view, the purposive view considers whether the policy is designed to help or hurt racial minorities. Rather than merely reading the Fourteenth Amendment's guarantee of "equal protection of the laws," the purposive view considers the history that produced this guarantee. That history, of course, is grounded in the nation's efforts to end slavery. Though the purposive view forbids laws based on a lack of respect for the disfavored race, it may permit laws that consider race in certain, limited circumstances.

The color-blind view and the purposive view collided in *Grutter v. Bollinger*, where we weighed whether the University of Michigan could consider a law school applicant's race in its admissions process. The briefs in *Grutter* came from a wide array of sources, including universities, trade unions, major corporations, and former officials of the armed forces. The retired military officials indicated that without affirmative action in officer training schools, racial minorities would be excluded from the top cadres in the Army. Similarly, the unions, corporations, and universities expressed a desire

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to maintain affirmative action programs so that they could diversify workplaces and schools.

Justice O'Connor's opinion for the Court in *Grutter* captures the democratic nature of affirmative action when she argues: "Effective participation by members of all racial

and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. . . . [Indeed], the path to leadership [must] be *visibly* open to talented and qualified individuals of every

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race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.” Without affirmative action, Justice O’Connor suggested, too many citizens would believe that leading institutions – and, indeed, the nation’s governmental processes as a whole – belonged only to people that were different from themselves. That consequence would, I believe, threaten the democratic form of government that the Framers sought to establish.

Grutter illustrates how judges may examine the purposes embodied in a particular text and consider the consequences of various interpretive decisions. Those two tools – purpose and consequence – are complimented by four additional tools that judges have at their disposal in deciding cases: text, history, tradition, and precedent. Although all judges have access to these six tools, a very real divide exists among judges today. Some judges, who call themselves “originalists” or “textualists,” reach judicial decisions relying almost exclusively upon text, history, tradition, and precedent. They acknowledge that the other two tools exist, but they generally do not use them. Other judges – and I include myself in this second group – take a different approach by placing greater emphasis upon purpose and consequence.

I think that this emphasis is appropriate because one cannot go back and determine exactly what the Framers thought about affirmative action. Nor can one determine the Framers’ views concerning radios or automobiles or the Internet. But, whatever their predictive limitations, the Framers certainly

did understand commerce. When I have a case addressing the Commerce Clause, I consider the basic purposes of the Clause, and then apply those purposes to the modern world. Although applications may change, I believe that purposes endure.

If I am correct about how our Constitution works, then at its heart is an insistence upon creating institutions that reflect the democratic will. The Framers erred in excluding large segments of the population from civic participation, but they did understand that civic participation was necessary to ensure democracy. There are, of course, many ways of participating: become a member of a local school board; run for Congress; and, at the very least, vote. But if you do not participate, the Constitution will not work because it is a document that foresees democratic participation. We do not need activist judges, but we desperately need activist citizens.

Discussion Session

Q: Justice Breyer, there are some colleges in this country where you cannot get a degree without being able to swim four laps. Yet I have had college-age students who do not know the difference between a grand jury and a jury. I wonder if it is our constitutional right to remain ignorant of the Constitution, or if the Constitution should be made a mandatory course for high school and college graduation.

Breyer: When I was in high school in San Francisco, we took a course called twelfth-grade civics. It was a basic class that provided students with a pragmatic understanding of our democratic system. Indeed, we learned how the state government worked by going to Sacramento and seeing it in action. I am told that, since the time I attended high school, there are fewer classes that study the processes of government. That decline is deeply unfortunate, and I believe that it is intimately connected to the decline in civic participation in our nation. After all, we cannot expect people to participate if they know nothing about how the government operates.

Q: Do you always feel that the Constitution is written well enough for you to do your job? I have in mind the Second Amendment. When I look at it, as a grammarian, I get rid of the first comma and the third because they would not be grammatical in modern

English. The first clause, “a well-regulated militia being necessary to the security of a free state,” is a subordinate clause that does not make its meaning explicit (but it appears to be intended as if it had, since, at the front, it says you need a well-regulated militia), and then the main clause is clearly “the right to bear arms shall not be infringed,” but it does not say who shall not do the infringing. I look at that and say: “It is too badly written to work with.” I wonder if you ever have that feeling about that or any other provision.

Breyer: Fortunately, I do not think that the Supreme Court has heard a case on the Second Amendment since I arrived in 1994. I do not generally approach cases from a grammatical point of view, in part because the Constitution is written with such broad phrases. These broad phrases, even presuming meticulous punctuation, do not define themselves.

For instance, the Constitution permits Congress “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” Suppose that the Framers spelled out precisely what they meant by “commerce.” That approach would have worked quite well for a brief period, but then the steam engine would have been invented and complicated matters significantly. Not long after that, electricity would have followed and complicated matters further still. More recently, the twentieth century saw the invention of two types of highway – automotive and informational – which would

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have rendered a specifically worded Commerce Clause utterly meaningless. If the Constitution’s phrases had been too precise,

I may have found them easier to read as a grammarian, but I would have found them much harder to apply in today's world.

Q: After *Bush v. Gore*, is the traditional concept of federal government deferring to the state courts in the interpretation of their own constitutions still intact?

Breyer: People often ask whether I was disappointed with the outcome in *Bush v. Gore*. Of course, I was disappointed. I am always disappointed when I am in the dissent. I occasionally say to my wife, Joanna: "I've written a devastating dissent that is going to convince them. I will get five votes for sure." And she says, "I've heard that one before." [Laughter]

I do not convince my colleagues every time, but it is a great privilege of my job to write another opinion in an effort to convince them. We do not always see things the same way, and we often feel strongly about our views. But not in *Bush v. Gore*, nor in any other case during my twelve years on the Court, have I heard a voice raised in anger in our conference room. And I have never heard one judge in that room say anything slighting about another. We are professionals who understand the significance of our undertaking.

I cannot say more about *Bush v. Gore* than I wrote in dissent in that case. But I would like to place that case in historical context. In the 1830s, the Supreme Court decided *Worcester v. Georgia*, a case considering who owned the

land in northern Georgia. The Supreme Court, in an opinion written by Chief Justice John Marshall, determined that the land was in fact owned by the Cherokee Indians. Many of you know this case because President Andrew Jackson is purported to have said, "John Marshall has made his decision; now let him enforce it." And Jackson sent federal

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troops to Georgia not to enforce the decision, but to evict the Indians. The result was the Trail of Tears, on which many Indians died.

Now consider *Cooper v. Aaron*, a Supreme Court case that followed *Brown v. Board of Education*. Arkansas Governor Orval Faubus vowed to prevent the integration of schools in Little Rock, and called in the state militia to support that vow. All nine justices signed

an opinion reaffirming that racially segregated public schools were unconstitutional. But even if there were nine thousand justices, they would have been powerless to stop the state militia. What stopped Governor Faubus was President Eisenhower, who ordered paratroopers to take those black children by the hand and walk them into that white school.

Many people were deeply upset with the Court's decision in *Bush v. Gore*. And though that case has spawned many assessments of the Court's decision, I have yet to read about the need for paratroopers. Following the trajectory of the rule of law in the United States reveals that we have now arrived at the point where people will follow decisions even if they disagree with them. In many other countries, people do not share such reverence for the law.

The rule of law does not come merely from the words in the Constitution, whether they are general or specific, grammatical or ungrammatical. The rule of law does not come only from judges or even from lawyers. It fundamentally comes from ordinary people who follow the rules. It is one of the reasons I wrote this book and why I believe so strongly that we must teach our grandchildren about civics in school. The rule of law is not just the responsibility of lawyers and judges – it is everyone's. ■

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Catherine Galbraith and Justice Stephen G. Breyer