



## Supreme Court Justice Stephen Breyer shows progressive streak

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Since John Paul Stevens' retirement in 2010, Stephen Breyer seems poised to become the leader of the Supreme Court's liberal wing. In the nine cases that split 5-4 along ideological lines in the court's past term, Breyer wrote four dissenting opinions — only one fewer than Justices Ruth Bader Ginsburg, Sonia Sotomayor and Elena Kagan combined.

This is a troubling development for those, liberal or conservative, who value the Constitution's protections of individual liberty. Contrary to American tradition going back to the Declaration of Independence, Breyer believes not in liberty against government overreaching, but in what he calls "Active Liberty" — the right of democratic majorities, guided by elite experts, to govern as they see fit.

Ironically, the modern judge whose views most resemble Breyer's is failed Supreme Court nominee Robert Bork. Like Breyer, Bork rejected modern cases protecting individual rights, instead favoring majority rule — and as a result was denied a Supreme Court seat.

Breyer's constitutional views were largely unknown when he joined the Supreme Court, but as a justice he has voted to adopt a narrow interpretation of many constitutionally protected liberties. While Breyer claims to believe in self-government, his opinions reveal contempt for its most basic aspect: the right of individuals to run their own lives free from excessive government interference.

Breyer's cramped understanding of freedom of expression is especially troubling. Longstanding Supreme Court precedents, dating to the dawn of the modern constitutional law era in the late 1930s, require the justices to be especially protective of certain "fundamental rights," including and especially free speech.

According to Breyer, however, most laws that infringe on freedom of expression should be upheld if the government



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U.S. Supreme Court members, first row L-R, Associate Justice Clarence Thomas, Associate Justice Antonin Scalia, Chief Justice John Roberts, Associate Justice Anthony Kennedy, Associate Justice Ruth Bader Ginsburg, back row L-R, Associate Justice Sonia Sotomayor, Associate Justice Stephen Breyer, Associate Justice Samuel Alito and Associate Justice Elena Kagan.

has a rational reason for interfering with free speech, an extremely forgiving and deferential standard.

Instead, Breyer argues that the First Amendment fully protects only laws that infringe on “core” political speech. Even then, Breyer interprets the court’s “strict scrutiny” standard — traditionally interpreted to create a very strong presumption that such laws are unconstitutional — far more narrowly than do his colleagues.

The full implications of Breyer’s lassitude on civil liberties were on display last month in *Brown vs. Entertainment Merchants Association*. All three of Breyer’s liberal colleagues joined a seven-Justice majority holding that a California statute banning the sale of violent video games to minors violated the First Amendment.

Breyer, however, penned the dissent. Although purporting to apply “strict scrutiny,” he gave no weight to the free speech rights protected by the First Amendment. Instead, he focused on the government’s interest in censoring speech deemed harmful to minors.

In this and other contexts, Breyer’s jurisprudence harkens not to great liberal justices of the mid-to-late 20th century, such as Earl Warren and William Brennan — who whatever their flaws, had a deep and abiding belief that civil liberties must be protected from government encroachment — but to an earlier generation of judges associated with the progressive movement, such as Justice Oliver Wendell Holmes Jr.

Like Breyer, many early 20th century progressive jurists had a soft spot for protecting political speech, but they otherwise rarely met a statute they thought exceeded constitutional boundaries. These progressives advocated deference to the government for the same reasons Breyer articulates: reverence for experts, belief in majority rule, and the need to protect society from itself. As a result, progressive judges approved segregation laws, laws banning private schools, laws limiting women’s ability to participate equally in the workplace, and more.

When New Deal liberals took over the Supreme Court in the late 1930s, however, they rejected the earlier progressive vision and proceeded to provide strong protection for the rights listed in the Bill of Rights.

Breyer’s apparent ascendancy as doyen of the court’s liberal wing threatens to roll back decades of these pro-liberty precedents, and to destroy the consensus on the court that freedom of speech and other essential rights must not be sacrificed to the shifting whims of legislative majorities. Almost 25 years after the failed Bork nomination, it would be odd if liberals anointed as their champion his left-leaning doppelganger.

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