

Introduction

What Is Liberal?

Before turning to Scalia, the question must be asked, what is liberal?

Over centuries and even recent decades, what qualifies as liberal has changed considerably. For example, supporting rights to private property and a minimal government were once considered hallmarks of liberalism as framed by John Locke and Adam Smith. Scalia has been described as “hid[ing] a political ideology sympathetic to classical Manchester Liberalism. Such an ideology, as originally articulated in nineteenth-century England, emphasized limited government, faith in the market-place and commitment to legalism, materialism, property rights, and enforcement of majoritarian morality as essential to the creation of free society.”¹ Classic liberalism is related to modern libertarianism, which often finds support among conservatives anxious to insulate their property from government regulation.²

What about liberalism today? A 1986 book by Oxford scholar John Gray cited four elements as comprising liberalism: “It is *individualist*, in that it asserts the moral primacy of the person against the claims of any social collectivity; *egalitarian*, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and *meliorist* in its affirmation of the corrigibility and improvability of all social institutions and political arrangements.”³

None of the standard philosophical concepts seems to qualify as a useful definition for purposes of this book. I have decided to forgo an overarching definition in favor of particular positions on which at least a fairly general consensus exists, recognizing that there may be anomalies, even contradictions, in particular cases. For purposes of this book, a liberal opinion is liberal when it produces liberal results, even though the standard and reasoning are neutral. For example, a ruling declining to extend the time for filing a notice of appeal is facially neutral. However, the ruling will almost always harm criminal defendants, many of whom are without lawyers, rather

than corporations, so it will be viewed as conservative. As a result, my approach is undertheorized and practical. It also ignores some long-range problems and issues, such as political stability.⁴ It is a public and political rather than internal and moral paradigm and contains aspects of John Rawls's concept of justice as fairness.⁵ Also, some characteristics of liberalism may be in conflict in a case. The elements listed below are more specific and more numerous than many formulations.⁶ A "liberal" *generally* supports

- respect for and the primacy of the individual;
- a broad right to free speech, freedom and protection of the press, and freedom of assembly (although generally for some restrictions on campaign spending);
- the right to privacy and to be let alone, including pro-choice on abortion and right to die;
- broad and enforced antidiscrimination laws;
- affirmative action for disadvantaged minorities;
- the removal of barriers based on class, income, nationality, gender, and sexual orientation;
- a secular orientation and preference for secular rationales and arguments and a strong separation of church and state;
- representative government with broad voting rights and participation, with federal government protection;
- one person, one vote, with severe limits on gerrymandering;
- the rule of law and an independent judiciary;
- ready access to the courts, including free or subsidized access for those without funds;
- pro-plaintiff in civil cases;
- extensive rights for criminal defendants and others held in custody by governments;⁷
- abolition of the death penalty;
- strong gun control;
- limited power and influence of corporations and the very rich;
- government transparency, including access to information from the government;
- federal, not state, government controlling entitlements;
- the government, especially federal government, exercising regulatory control over businesses and property;
- protection of the environment, including lenient standing rules;
- limited or no immunity for wrongful governmental actions.

Yale Professor Bruce Ackerman, among others, has argued that Justices like Stevens, Souter, Ginsburg, and Breyer were not liberals but moderates. "Justices Breyer and Ginsburg are main-stream moderates, not aggressive liberals, when measured against the likes of Justices Brennan and Marshall."⁸ I do not engage that question but treat decisions as liberal that meet the criteria.

One more question has to be answered: how should a Scalia opinion be treated when it is neither the most nor least liberal in the case? I include it, but note that the opinion was flanked by both a more and less liberal one. Because Scalia was a known conservative, according to some an unvarnished conservative, it seems preferable to include those opinions as liberal, both in the text and in charts included in the book.