

## BOOK REVIEW

### ACTIVE LIBERTY: A PROGRESSIVE ALTERNATIVE TO TEXTUALISM AND ORIGINALISM?

ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION. By Stephen Breyer. New York: Alfred A. Knopf. 2005. Pp. x, 161. \$21.00.

*Reviewed by Michael W. McConnell\**

The work of the federal courts generally blunders along unnoticed except by legal professionals and the immediately interested parties. The judiciary may not be the least dangerous branch, but it is usually the most boring. From time to time in American history, however, the courts burst onto the front page. We seem to be in the midst of one such time.

The odd thing is that — unlike any earlier time in American history — *both* sides of the political spectrum proclaim themselves unhappy with the courts. Charges of judicial “activism,” once a staple of conservative critiques of the courts, now are heard as often from liberals and progressives. Liberals excoriate decisions of the Supreme Court that limit congressional power to regulate intrastate activity under the commerce power, that shield state governments from paying damages for violation of federal civil rights laws, that (sometimes) protect property rights, that curb the power of juries to impose massive punitive damage awards, that limit the power of governmental institutions to engage in racial affirmative action, and so forth. Conservatives are no less indignant at decisions that limit the power of states to enforce traditional moral norms, that overturn legislative judgments about the conviction and punishment of criminals, that (sometimes) use international norms to trump American law, that create constitutional rights not mentioned in the Constitution, and that strip our public culture of its religious elements and discriminate against religious individuals in the enjoyment of public benefits.

Conservatives, however, say there is an important difference. They offer a principled justification for the pattern of decisions they favor: that judges should interfere with legislative decisions only when neces-

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sary to protect individual rights or structural principles genuinely derived from the text of the Constitution, as interpreted in light of its history and tradition. Thus, they say, the principle of enumerated powers necessarily implies some limit to Congress's commerce power, the Eleventh Amendment confirms that states were understood to enjoy sovereign immunity against suits for money damages, the Fifth Amendment expressly protects private property, and the colorblindness principle of the Equal Protection Clause precludes affirmative action. One might quibble, and many do, with any of these conclusions on textual or historical grounds — but in doing so, one is arguing on textualist, originalist turf.

Liberals have yet to propound a comparable theory that would explain, for example, why *Roe v. Wade*<sup>1</sup> and *Lawrence v. Texas*<sup>2</sup> are legitimate, but decisions striking down affirmative action and punitive damage awards are not. If judges are entitled to interpret the broad provisions of the Constitution in light of their own perceptions of justice, equality, or other moral-political values, this would justify the former decisions (to those who agree with them as a matter of political morality), but it would do nothing to discredit the latter decisions. If it is legitimate for progressive judges to read their values into the Constitution, can it be any less legitimate for conservative judges to do the same? Liberal constitutionalists need a coherent theory if they wish to offer a persuasive critique of conservative decisions, beyond mere political disagreement about results.

Enter Justice Stephen Breyer. In a slim volume entitled *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer articulates an approach to constitutional interpretation based on what he calls the principle of “active liberty.” He offers the approach as a counterpoint to the conservatives’ textualism-originalism, which he forcefully criticizes in the final chapter of the book. Less obviously but perhaps more importantly, Justice Breyer’s active liberty approach is also a counterpoint to a prominent form of progressive constitutionalism associated with the Warren Court, which often goes by the label of a “Living Constitution.” This is the idea that judges should interpret the broad provisions of the Constitution in light of modern needs and values, as discerned by the judges themselves. In the words of one eminent exponent of this view, Professor Ronald Dworkin, “judges must answer intractable, controversial, and profound questions of political morality that philosophers, statesmen, and citizens have debated for many centuries, with no prospect of agreement” and “the rest of us

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> 539 U.S. 558 (2003).

must accept the deliverances of a majority of the justices.”<sup>3</sup> I call this the “moral-philosophic” approach. It is not so much a theory of interpretation as it is a theory of who should make fundamental moral decisions for the Nation: the nine Justices of the United States Supreme Court.

In contrast to the moral-philosophic approach, Justice Breyer advocates a more “modest” judicial role, in the tradition of Justices Brandeis, Holmes, and Frankfurter (pp. 19–20), and one more tied to traditional legal authorities. “A judge cannot ‘enforce whatever he thinks best,’” he writes, quoting Judge Learned Hand (p. 18). “‘In the exercise of’ the ‘high power’ of judicial review,” writes Justice Breyer, quoting Justice Brandeis, “‘we must be ever on our guard, lest we erect our prejudices into legal principles’” (pp. 18–19). But Justice Breyer is not merely an advocate of judicial restraint. We live in a “different time” than Brandeis, Holmes, and Frankfurter (p. 19), and our jurisprudence must take account of “later decisions” that “abolished legal segregation, that gave life to the Constitution’s liberty-protecting promises, that helped to make ‘We the People’ a phrase that finally includes those whom the Constitution originally and intentionally ignored” (p. 20). Justice Breyer’s project is to explain how these “later decisions” — a euphemistic phrase encompassing the large body of progressive decisions from the New Deal and the Warren Courts (p. 10) — can be justified without abandoning across the board, Living Constitution–fashion, the idea of judicial restraint (p. 20).

Justice Breyer’s argument comes in two steps. First, he makes a historical argument that “the Constitution [is] centrally focused upon active liberty, upon the right of individuals to participate in democratic self-government” (p. 21), which he believes “the current Court” has “underemphasiz[ed]” (p. 11). Second, he argues that this premise can serve as “a source of judicial authority and an interpretive aid” that “helps make sense of our Constitution’s structure” and “can bring us closer to achieving the proper balance” between democratic authority and individual liberty (p. 6). “All judges,” he explains, “use similar basic tools” to help them interpret the laws:

They read the text’s language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand the phrase’s purposes or (in respect to many constitutional phrases) the values that it embodies, and they consider the likely conse-

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<sup>3</sup> Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, in *THE BILL OF RIGHTS IN THE MODERN STATE* 381, 383 (Geoffrey R. Stone et al. eds., 1992).

quences of the interpretive alternatives, valued in terms of the phrase's purposes. (pp. 7–8)

Judges differ in how much emphasis they place on each tool. Justice Breyer contends that a jurisprudence grounded in active liberty should place greater emphasis on “purposes” and “likely consequences” than on language, history, and tradition (p. 8). He thus offers an alternative to the textualist-originalist approach, justifying the great body of progressive decisions over the past generation while criticizing the conservative forays into federalism, colorblindness, and the like.

This is potentially an important endeavor; we must see whether it succeeds. But before turning to the distinctive features of Justice Breyer's proposed interpretive approach, I wish to call attention to a different aspect of this book. In addition to its other purposes, Justice Breyer's book underscores what American judges of all stripes have in common. It thus serves as a welcome antidote to the frenzied rhetoric about the courts so often heard in political circles, on editorial pages, and even, alas, in law schools. From the rhetoric, one might think that the courts of the United States are inhabited by judges diametrically opposed in their visions of the Constitution, engaged in a fight to the death over the character of our Republic. Justice Breyer reminds us that American jurisprudence rests on a broad and usually consensual base; most cases are decided unanimously, or nearly so (p. 110); and all judges “use similar basic tools” (text, textual context, history, tradition, precedents, evidence regarding purpose, and “likely consequences”). Law is not simply politics in another guise. Disagreements do emerge in the most difficult cases and they are significant, but they do not threaten the rule of law. As Justice Breyer says, “[t]he matter is primarily one of approach, perspective, and emphasis” (p. 7).

I think most judges, appellate lawyers, and others familiar with the way our courts work would agree that this rhetoric of crisis and division — of advocacy groups painting exemplary nominees as extremists and of politicians imagining that activist federal judges are running amok — is an unrecognizable portrait of our system. Our differences are certainly important, as this book demonstrates, but differences should not be confused with chasms. If Justice Breyer's elegant and accessible little book helps to calm the waters, it will have done a national service.

#### I. ACTIVE LIBERTY AS A HISTORICAL ACCOUNT OF THE FOUNDING

Justice Breyer begins his historical argument by reminding us of the distinction between two understandings of liberty: “freedom from

government coercion” and “freedom to participate in the government itself” (p. 3). The latter he calls “active liberty.” It is the “active and constant participation in collective power”<sup>4</sup> by the citizens of the republic (p. 4). Participation in government “is most forceful when it is direct, involving, for example, voting, town meetings, political party membership, or issue- or interest-related activities” (pp. 15–16). Americans of the founding generation used the terms “republicanism” and “popular government” for this understanding of liberty.

Active liberty is distinct from the idea that the overriding purpose of constitutionalism is to “protect the individual citizen from the tyranny of the majority” (p. 4). That understanding of liberty generally goes by the name of “classical liberalism.” The classical liberal tradition emphasizes limited government, checks and balances, and strong protection of individual rights. Of course, our liberal republican tradition values both kinds of liberty. But Justice Breyer argues for “increased emphasis” on active liberty, which he thinks the Rehnquist Court underemphasized or overlooked (p. 11). “My thesis is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts” (p. 5).

Justice Breyer defends this position on historical rather than normative or philosophical grounds. It is “Consistent with the Constitution’s History,” as he entitles an early chapter (p. 21). Perhaps this is a backhanded acknowledgment of the force of originalism, the idea that constitutional interpretations gain their legitimacy from a connection to the historical meaning of the text. Invoking historians Gordon Wood and Bernard Bailyn (p. 21), noting that the Preamble begins with the affirmation of “We, the People” (p. 25), and stressing that the Senate and the President, as well as the more popularly elected House of Representatives, are accountable to the electorate (pp. 25–27), Justice Breyer concludes that “the original Constitution’s primary objective” was to “creat[e] a form of government in which all citizens share the government’s authority, participating in the creation of public policy” (p. 33).

I do not quarrel with that conclusion as a general matter. By the standards of its day (1789), the American constitutional system was the most republican in the world. With few exceptions (Alexander Hamilton was accused of being one of them), Americans of all shades of opinion agreed that government not only must be based on the consent of the governed, but also must be conducted by officials chosen directly or indirectly by the people and answerable to them. And in the

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<sup>4</sup> Justice Breyer quotes BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in *POLITICAL WRITINGS* 309, 316 (Biancamaria Fontana trans. & ed., 1988). An internal quotation mark has been omitted.

centuries since 1789, the American system has become ever more democratic: the franchise has been extended to all citizens over the age of eighteen, without regard to property ownership, religion, sex, or race; the secret ballot has made the citizen more independent and secure in exercising the franchise; the Electoral College has been transformed from an independent body into a means of aggregating popular votes for President; the introduction of primary elections (unknown in the rest of the democratic world), as well as an initiative-and-referendum process in some states, has made the system even more accountable to popular opinion; the Voting Rights Act of 1965<sup>5</sup> has secured the promise of the Fifteenth Amendment; and the spread of education and mass media has enabled most of the people, if interested, to keep informed and to make their opinions known. However democratic the American polity may have been at the Founding, today it is much more so — and vastly more so than the relatively bureaucratic and elite-dominated systems of our counterparts in Western Europe. Justice Breyer is therefore right to identify republican self-government as an overriding theme of American constitutionalism.

But the relevant history is more complicated and ambivalent, and therefore more interesting and illuminating, than Justice Breyer lets on. Within the broad republican consensus of the American Founders, there were sharp differences of opinion regarding just how much active liberty they wanted for the Nation. Justice Breyer does not take much notice of these disputes. He points out that in the heady days immediately after the Revolution, most Americans optimistically assumed that rule by the people would prevent oppression. Early state constitutions experimented with such hyperdemocratic institutions as unicameral legislatures, short terms of office, and weak executives (p. 24). By 1787, however, when the delegates gathered to draft the federal Constitution, “these initial forms of democratic government had proved disappointing” (p. 24). Justice Breyer explains these disappointments as a matter of flawed structure and insists that despite the need to reassess, “the main point” is that “the Framers did not abandon their basically democratic outlook” (pp. 24–25).

In fact, the Constitution drafted in Philadelphia and ratified in 1788 was intentionally less democratic than these early experiments. It provided for large districts of more than 30,000 people,<sup>6</sup> lengthy terms

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<sup>5</sup> Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

<sup>6</sup> U.S. CONST. art. 1, § 2, cl. 3 (“The Number of Representatives shall not exceed one for every thirty Thousand . . .”). The last change made to the Constitution by the Convention, as a gesture to the more democratic opposition, was to reduce the minimum size of districts to 30,000. Previously the number had been 40,000. <sup>2</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 644 (Max Farrand ed., 1911).

of office<sup>7</sup> (even the two-year House terms were long by the standards of the day), a more elite upper House (suggestively named the “Senate,” borrowing the name of the aristocratic Roman body) chosen indirectly by state legislators rather than by popular elections,<sup>8</sup> a powerful and independent chief executive also elected indirectly,<sup>9</sup> and a life-tenured judiciary.<sup>10</sup> The Framers rejected proposals for term limits, instructions, and recall, preferring to make the representatives more independent of, and less immediately accountable to, the electorate.

On each of these points, the advocates of active liberty — popular participation in government — vociferously objected. At the Convention, Elbridge Gerry accused James Madison of favoring a “limited Monarchy” because of his advocacy of long terms for congressional office.<sup>11</sup> “Brutus,” a pseudonymous essayist opposed to ratification, complained that the “great body of the yeomen of the country cannot expect any of their order in [the Congress] . . . [.] It will and must be esteemed a station too high and exalted to be filled by any but the first men in the state, in point of fortune; so that in reality there will be no part of the people represented, but the rich . . . .”<sup>12</sup> Patrick Henry charged that the large size of electoral districts would “destroy that connection that ought to subsist between the electors and the elected” and would “lead[] us to an Aristocracy.”<sup>13</sup> My favorite opposition essay is a satire published under the name of “Montezuma” (the epitome of an undemocratic despot) purporting to praise the proposed Constitution to fellow members of “the Aristocratic [sic] party of the United States.” Montezuma reassured his supposed supporters that, while “indulg[ing]” the people in “something like a democracy,” the wise drafters of the federal Constitution had “guard[ed] against every possible danger” of actual popular control.<sup>14</sup>

The Federalist defenders of the Constitution proclaimed these democratic deficits a virtue. At the Convention, Madison argued that to promote stability and to protect against future majorities who might

<sup>7</sup> See U.S. CONST. art. I, § 2, cl. 1 (providing for two-year terms for members of the House of Representatives); *id.* art. I, § 3, cl. 1 (providing for six-year terms for members of the Senate); *id.* art. II, § 1, cl. 1 (providing for four-year terms for the President).

<sup>8</sup> See *id.* art. I, § 3, cl. 1 (stating that senators shall be “chosen by the Legislature” of each state).

<sup>9</sup> See *id.* art. II, § 1, cls. 2–4 (describing the Electoral College system).

<sup>10</sup> See *id.* art. III, § 1 (stating that federal judges “shall hold their Offices during good Behaviour”).

<sup>11</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 6, at 215.

<sup>12</sup> Brutus III, N.Y. J., Nov. 15, 1787, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 377, 380–81 (Herbert J. Storing ed., 1981).

<sup>13</sup> Patrick Henry, Speech in the Virginia State Ratifying Convention (June 12, 1788), *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 239, 243–44.

<sup>14</sup> Montezuma, Essay, INDEP. GAZETTEER (Phila.), Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 53, 53–54.

threaten the rights of property, the Constitution should provide for relatively long terms of office.<sup>15</sup> He supported three-year terms for the House and seven- or nine-year terms for senators.<sup>16</sup> Larger districts and longer terms of office would produce representatives “whose enlightened views and virtuous sentiments render them superior to local prejudices and to schemes of injustice,” as Madison put it in his esteemed essay *The Federalist No. 10*.<sup>17</sup> Hamilton candidly conceded, in *The Federalist No. 35*, that the representative body would, with “few exceptions,” be composed of “land-holders, merchants, and men of the learned professions,” the natural aristocracy of America.<sup>18</sup> But this was good, for such men would be more likely “to prove . . . impartial arbiter[s]” and to act in a manner “conducive to the general interests of the society.”<sup>19</sup> Federalists sought to insulate representatives from the parochial concerns and partialities of the electorate, freeing them to legislate with an eye toward the genuine and long-term common good.

Justice Breyer’s historical account skates discreetly around this controversy, highlighting the democratic elements in the constitutional scheme and playing down the less democratic elements. Is it possible that he does not want to call attention to the fact that, in emphasizing active liberty, he more closely resembles the Antifederalist opponents of the Constitution than its Federalist advocates? This might seem to detract from the force of his historical argument. But in a broader sense, Justice Breyer need not be embarrassed by the connection between active liberty and Antifederalism. The Antifederalists were true cofounders of the American constitutional regime. In the balance between participatory, responsive government and other values — respect for minority rights, effective and energetic administration, expertise, continuity — we often need a reminder of the value of active liberty. “Brutus” and Patrick Henry served that function at the Founding, and Justice Breyer serves it now. But greater attention to the founding-era debates over this issue would have yielded insights — ironies, perhaps — that complicate Justice Breyer’s account.

Consider first that the advocates of active liberty insisted that governmental authority should, where possible, be vested in the state and local governments rather than in the federal, precisely because they are more responsive to popular opinion and enable ordinary citizens to participate more actively.<sup>20</sup> Justice Breyer, by contrast, regularly votes

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<sup>15</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 6, at 422–23.

<sup>16</sup> *Id.* at 214, 361 (House of Representatives); *id.* at 218, 423 (Senate).

<sup>17</sup> THE FEDERALIST NO. 10, at 83–84 (James Madison) (Clinton Rossiter ed., 1961).

<sup>18</sup> THE FEDERALIST NO. 35 (Alexander Hamilton), *supra* note 17, at 216.

<sup>19</sup> *Id.*

<sup>20</sup> For a succinct exposition of this point, see HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15–23 (1981).

with the wing of the Supreme Court that rejects constitutional claims for the autonomy and authority of state and local governments and supports a broader reading of federal power. It would be interesting to know why Justice Breyer seems to believe that active liberty is best advanced through expansive interpretations of national power when those most concerned about active liberty at the Founding took the opposite position.

Oddly, Justice Breyer characterizes “the Court’s recent federalism decisions” as protecting the freedom of “individuals and businesses” but as “retrograde” in “respect to the furtherance of active liberty” (p. 59). He says these decisions “discourage” the use of “cooperative, incentive-based regulatory methods,” which he calls “cooperative federalism” (pp. 58–59). Whatever one might think of the recent federalism decisions as a matter of constitutional theory, Justice Breyer’s particular critique seems misplaced. Protecting the power and autonomy of state and local governments may or may not protect individual freedom, depending on whether local political forces are more libertarian or more interventionist in nature (and we have both kinds of places). Madison argued that smaller jurisdictions were more — not less — likely to interfere with individual rights,<sup>21</sup> and some modern libertarians agree.<sup>22</sup> But devolution of authority to lower levels of government does seem to advance the cause of participatory democracy. Even Justice Breyer concedes, at one point, that “[b]y guaranteeing state and local governments broad decision-making authority, federalist principles . . . facilitate and encourage . . . citizen participation in the government’s decision-making process” (p. 57). But if, contrary to the recent precedents Justice Breyer criticizes, the federal government could simply command state governments to enact or enforce laws in accordance with federal mandates, there would be no need for the “cooperative, incentive-based” methods Justice Breyer favors. The federal government persuades and induces states only because it cannot command them.

Justice Breyer also criticizes the Court’s recent federalism decisions on the ground that the “participation principle must be implemented against the backdrop of a highly complex set of technology-based social problems that defy decision purely at local or purely at federal levels” (p. 57). If I understand this correctly, he means that active liberty must take second seat when dealing with technically complex social problems. Aside from the fact that this calls into question just how much weight Justice Breyer gives to active liberty when it conflicts

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<sup>21</sup> THE FEDERALIST NO. 10, *supra* note 17.

<sup>22</sup> See, e.g., CLINT BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM (1993).

with other values, Justice Breyer does not explain how his point applies to such essentially local matters as domestic assaults, firearms near schools, or state sovereign immunity, none of which has any obvious connection to technological complexity.

Justice Breyer's position also seems in tension with the characteristic position of active liberty advocates in a second respect: their attitudes toward judicial authority. Those most concerned about democracy in the ratification debates worried that an unelected and unaccountable judiciary would undermine popular government by latitudinarian construction of the Constitution. "I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers," Brutus wrote of the Supreme Court, "and yet placed in a situation so little responsible [to the people]."<sup>23</sup>

Brutus, the most farsighted of the Antifederalist critics of the judiciary, pointed to three characteristics of the federal judiciary as particularly likely to undermine popular government. First, the courts would be effectively supreme over the legislature: "[T]he supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature."<sup>24</sup> Anticipating *Marbury v. Madison*<sup>25</sup> by fifteen years, Brutus observed that "if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law." In effect, "the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers."<sup>26</sup>

Second, Brutus warned, the federal courts would be "empowered[] to explain the constitution according to the reasoning spirit of it, without being confined to the words or letter." In other words, they would stray from the text, consulting its "spirit, intent and design" in addition to "the words in their common acceptance." This approach to interpretation would "give a certain degree of latitude of explanation."<sup>27</sup>

Third, he predicted that "[w]hen the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature," it was "to be expected that they will extend

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<sup>23</sup> Brutus XV, N.Y. J., Mar. 20, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 437, 438.

<sup>24</sup> Brutus XII, N.Y. J., Feb. 7, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 422, 423.

<sup>25</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>26</sup> Brutus XII, *supra* note 24, at 423-24.

<sup>27</sup> Brutus XI, N.Y. J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 12, at 417, 419, 421.

theirs.”<sup>28</sup> In this manner, they would expand their power, building precedent upon precedent, in derogation of the legislature. “In short,” Brutus argued, the federal judges “are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”<sup>29</sup>

Federalists responded by attempting to reassure the ratifiers that courts would be able to exercise “neither FORCE nor WILL but merely judgment,”<sup>30</sup> that judicial review would be in service of constitutional judgments made by the people,<sup>31</sup> and that the federal courts would be subject to efficacious political checks, including — most remarkably — impeachment.<sup>32</sup>

Proponents of active liberty at the Founding thus thought that empowering judges to act in opposition to the legislature on the basis of the perceived “reasoning spirit” of the Constitution and laws would threaten popular government. Taking the same premise of active liberty, Justice Breyer draws quite different implications, arguing that active liberty is best advanced by emphasizing “purposes” rather than text (pp. 8, 17). But this is far from obvious. There is ever a danger, as Brutus anticipated, that in deciding a case according to hypothesized “purposes” rather than the “words or letter,” the judge may (perhaps even unconsciously) substitute his own will for that of the legislature.

As the two examples of federalism and nontextual interpretation attest, Justice Breyer takes an attractive premise, active liberty, with a long and distinguished historical pedigree and presses it into service in support of positions that proponents of that premise have historically opposed. That does not make Justice Breyer wrong. But his argument would have been richer, and perhaps more persuasive, if he had grappled with the contrary views of earlier exponents of active liberty.

## II. JUSTICE BREYER’S JURISPRUDENCE OF ACTIVE LIBERTY

As already noted, Justice Breyer’s approach to interpretation emphasizes three distinct themes: judicial restraint, principal reliance on legislative (or constitutional) purposes rather than text and history, and attention to likely consequences (pp. 17–18). The first theme, judicial restraint, distinguishes Justice Breyer’s approach from the “Living Constitution” jurisprudence of an earlier generation of progressive ju-

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<sup>28</sup> *Id.* at 422 (footnote omitted).

<sup>29</sup> Brutus XV, *supra* note 23, at 438.

<sup>30</sup> THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 17, at 465.

<sup>31</sup> *Id.* at 468.

<sup>32</sup> THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 17, at 484–85.

rists. It is a telling sign of how far we have come from the Warren and Burger Court eras that a leading figure on the “liberal” wing of the Court would so forcefully advocate judicial restraint. The second and third themes distinguish Justice Breyer’s approach from textualism and originalism. But all judges — textualists and originalists included — pay attention to legislative and constitutional purpose and examine the consequences of the actions they review and of the decisions they render. The distinctive feature of Justice Breyer’s approach is not that he looks to purposes and consequences, but that he treats these as being opposed, in some sense, to text and history.

In general, Justice Breyer develops his themes through a series of illustrations — cases involving speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law — rather than by presenting “a general theory of constitutional interpretation” (p. 7). As a result, it is not always clear how the themes fit together, or how they relate to text and history, the force of which he does not discount entirely. Nonetheless, because judging is a practical enterprise, perhaps we can learn more from Justice Breyer’s concrete examples than we would from a more theoretical presentation.

Interestingly, despite its prominence in political debate over nominees, *stare decisis* — adherence to precedent — plays no explicit role in Justice Breyer’s interpretive approach. Indeed, he mentions precedent only in passing (pp. 119–20). Perhaps this is because he not infrequently votes to overturn precedents with which he disagrees.<sup>33</sup> He tells us that “[judges] understand that too radical, too frequent legal change” has a “tendency to undercut” the “human need to plan in reliance upon law,” but he counters this with the observation that overturning a precedent “is not always a bad thing” (p. 119). I doubt that anyone favors legal change that is *too* radical and *too* frequent, but that standard leaves a lot of room for revisiting old decisions.

Nor does Justice Breyer make any reference to the Supreme Court’s controversial practice of citing foreign sources of law in constitutional cases, a practice he has defended in other fora.<sup>34</sup> It would be interesting to learn how this practice can be squared with the idea that courts should “promote active liberty by insisting on interpretations, statutory as well as constitutional, that are consistent with the people’s

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<sup>33</sup> See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *City of Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

<sup>34</sup> Justice Breyer defended the practice in a debate with Justice Scalia at American University on January 13, 2005. See Justices Antonin Scalia & Stephen Breyer, Discussion at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at <http://www.wcl.american.edu/secle/founders/2005/050113.cfm>), cited in Stephen G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 749 & n.11 (2005).

will” (p. 115). I presume the “people” whose active liberty is at issue are the American people. Either the foreign court decisions to which the Supreme Court refers are “consistent with the [American] people’s will” as expressed in our laws, in which case references to foreign decisions are redundant, or those decisions are inconsistent with the people’s will, in which case giving them nontrivial weight would seem problematic from Justice Breyer’s own point of view. Attentive readers must wonder why he does not take this opportunity to explain how the positions can be reconciled. But let us pay attention to his arguments, not to other matters we may wish he had addressed.

#### *A. Judicial Restraint*

Justice Breyer speaks often of “judicial modesty in constitutional decision-making, a form of judicial restraint” (p. 37). By this he means nothing more complicated than judicial deference to the decisions made by the politically accountable branches of government. And it must be said that, both in the book and (more importantly) in his judicial opinions, Justice Breyer often displays an admirable modesty. He avoids rhetorical grandiosity. Even when disagreeing with others (fellow Justices or parties), he refrains from hectoring or scolding; he respects differences of opinion. He appreciates the virtues of gradualism, respects the law of unintended consequences, and (especially in lower-profile cases involving such important but technical issues as jurisdiction, regulation, antitrust, and procedure) is practical rather than ideological. He understands that it is not his role to remake the world. It is therefore fitting that he begins his book with an appeal to the virtue of “judicial restraint” (p. 17).

The vocabulary of “judicial activism” and “judicial restraint” is notoriously contested. Activism and restraint can be evaluated according to any number of metrics: Does the court overturn a decision of the political branches? Does it depart from precedent? Does it depart from text and original meaning? Is the holding broad or narrow? Sometimes, “activism” appears to be nothing but an all-purpose epithet, meaning “a decision I disagree with.” For this Review, I follow Justice Breyer’s implicit definition: a decision is “restrained” if it defers to democratic decisionmaking. (He does not use the term “activism.”) If this is the definition, it should be apparent that restraint is a comparative rather than an absolute virtue. With the exception of a few academics, most observers agree that courts should sometimes overturn democratic decisions (those that clearly transgress the Constitution, as the observer thinks it should be interpreted). The question is

how readily they should do so. A “restrained” judge does so only in a relatively “clear” case.<sup>35</sup>

The connection between active liberty and judicial restraint is straightforward and persuasive: if democratic participation in our collective decisionmaking is the major premise of our constitutional system, it follows that the judgments of elected legislatures and executives on debatable issues should prevail over the judgments of unelected, life-tenured judges. Justice Breyer bases his call for judicial restraint on two considerations: “technical circumstance,” meaning the legislature’s superior ability to gather and assess the relevant facts, and “democratic value,” meaning the “right of a majority to embody their opinions in law” (p. 17). Judicial restraint thus pertains both to empirical judgments regarding the effects of a law and to normative judgments regarding contested issues of justice and morality. We might add that decisions upholding acts of the political branches leave the democratic actors free to experiment, to gather experience about consequences, to deliberate, and to change course, while decisions striking down such acts impose a single, difficult-to-change answer on the entire nation. Justice Breyer is on solid ground, then, when he argues that greater emphasis on active liberty should lead to more judicial restraint.

But judicial restraint is not a substantive theory of constitutional interpretation. As Justice Breyer notes, it is an “attitude” (p. 19) that might (or might not) inform constitutional interpretation under any substantive approach. A textualist-originalist, for example, might be restrained (upholding the actions of the political branches unless the text and history are clearly to the contrary) or unrestrained (striking down the actions of the political branches on the basis of contestable interpretations of text and history). A practitioner of the moral-philosophic approach similarly might be restrained, or not, depending on how much latitude he gives to the judgments of elected officials on empirically or philosophically debatable questions. So too with any substantive theory of constitutional interpretation. The question is always one of degree. It is best tested by how often a judge votes to uphold a democratic decision with which he disagrees, since when he agrees with the result judicial restraint is doing no work.

Unfortunately, after his early discussion, Justice Breyer rarely comments on the role of judicial restraint in actual constitutional cases. To be sure, he argues for “a special degree of judicial modesty and caution” in cases involving the effect of technological change on privacy on the ground that “a premature judicial decision risks short-circuiting,

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<sup>35</sup> See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 139–52 (1893).

or preempting, the ‘conversational’ lawmaking process” (p. 71). That seems right, but one wonders why the point cannot be generalized. Justice Breyer also criticizes others on the Court for being too quick to invalidate laws (such as commercial speech regulations, affirmative action policies, or campaign finance rules) that he thinks, on balance, yield beneficial results. But those cases involve no judicial restraint on his part: he approves of the laws that he votes to uphold.

What about the dog that didn’t bark? No theory of interpretation today is complete without some discussion of *Roe v. Wade*, abortion, and substantive due process. Yet these words do not so much as appear in Justice Breyer’s book. For many informed people, even many supporters of abortion rights, the Supreme Court’s decision in *Roe* is the *über*-example, the 800-pound gorilla, of unrestrained judging.<sup>36</sup> If Justice Breyer were to say that *Roe* was unjustified as an original matter, as many pro-choice academics have done,<sup>37</sup> his advocacy of judicial restraint with respect to other issues would gain immensely in credibility. Alternatively, he could explain why *Roe* is consistent with, or a legitimate exception to, his interpretive approach. That would be interesting and perhaps revealing. But to give *Roe* a silent acquiescence, without explanation or even mention, while criticizing his colleagues’ votes on commercial speech and federalism, is simply not convincing. What could he mean by judicial restraint?

His silence on this issue is all the more troubling when we consider that it was Justice Breyer who wrote the opinion for a 5–4 Court extending *Roe v. Wade* to protect partial birth abortions.<sup>38</sup> This was an instance where his vote tipped the balance. But instead of moderating the *Roe* decision, as the Court did in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>39</sup> or even leaving it unchanged, Justice Breyer expanded its reach to include a controversial procedure recently outlawed by a significant majority of the states. Active liberty — the right of the people to deliberate and enact legislation — played

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<sup>36</sup> See Cass R. Sunstein, *Sunstein, J., Concurring in the Judgment, in WHAT ROE V. WADE SHOULD HAVE SAID* 249, 249 (Jack Balkin ed., 2005) (“I think it unquestionable that *Roe* has become our generation’s *Lochner*, that is, the preeminent symbol of judicial overreaching.”).

<sup>37</sup> See, e.g., ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 27–29 (1975); ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 53–55, 113–14 (1976); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 *YALE L.J.* 920 *passim* (1973); Jeffrey Rosen, *Rosen, J., Dissenting, in WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 36, at 170; Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 20, 24, 31 (1996); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781, 820–21 (1983); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 300–02 (1973).

<sup>38</sup> See *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>39</sup> 505 U.S. 833 (1992).

no evident role in this decision. The attentive reader is entitled to wonder why not.

To get a better grasp on Justice Breyer's approach to judicial restraint, we might look at his pattern of voting in constitutional cases. Justice Breyer has voted to sustain federal legislation more often than the Court as a whole, and especially more often than the more conservative Justices.<sup>40</sup> But if we examine cases involving the constitutionality of state and local laws, a much larger set, Justice Breyer has been significantly less "restrained" than the Court as a whole, and much less so than the conservatives.<sup>41</sup>

If we are interested in measuring judicial restraint, it makes little sense to leave out decisions involving state and local laws. Not only does ignoring state invalidations have "a strong ideological bias," as one scholar has noted,<sup>42</sup> but it leaves out most of the cases in which the Supreme Court strikes down legislation.<sup>43</sup> Perhaps there is a good reason judges should be more deferential to Congress than to state legislatures, but Justice Breyer does not supply one. From the perspective of active liberty, the freedom of communities to take diverse approaches to issues of local concern would seem to be particularly important. The federalism cases, which constitute a significant portion of the decisions in which the Court has invalidated federal legislation, might well be seen as less detrimental to active liberty than those involving substantive policy choices, because they do not dictate a par-

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<sup>40</sup> See Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19.

<sup>41</sup> I rely here primarily on JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002), which appears to present the most comprehensive statistics. Based on the 1986 Term through the 1998 Term, this study shows that the more liberal Justices, including Justice Breyer, were much more likely to strike down democratically enacted laws as a whole, though less likely to strike down federal laws. *Id.* at 415–16. These results are consistent with the finding in Lori A. Ringhand, *Judicial Activism and the Rehnquist Court* (Sept. 7, 2005), available at <http://ssrn.com/abstract=765445>, that from the 1994 Term through the 2004 Term Justice Breyer was slightly more than half as likely as Chief Justice Rehnquist, the most deferential of the conservative Justices, to strike down a federal law but was nearly twice as likely to strike down a state law. *Id.* at 10, 19. Although predating Justice Breyer's service on the Court, Ruth Colker & Kevin M. Scott, *Dissing States?: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002), found that from the 1986 Term to the 2000 Term the conservative Justices voted far less often to strike down state and local action. *Id.* at 1324–25. However, THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY* (2004), offers statistics for the 1994 Term through the 2000 Term showing that Justice Ginsburg was the least likely to strike down federal, state, or local laws, followed by Justice Breyer and Chief Justice Rehnquist, and that the other conservative Justices were more likely to strike down the three types of legislation in the aggregate. *Id.* at 251. It is not apparent why this study reaches different results from the others.

<sup>42</sup> Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1146 n.20 (2002).

<sup>43</sup> See KECK, *supra* note 41, at 251 (showing more votes to strike down state statutes and local ordinances than to strike down federal statutes); Ringhand, *supra* note 41, at 35, 41 (same).

ticular result; they determine only which level of government is vested with authority to act. *United States v. Lopez*,<sup>44</sup> invalidating the Gun-Free School Zones Act,<sup>45</sup> and *United States v. Morrison*,<sup>46</sup> striking down certain provisions of the Violence Against Women Act,<sup>47</sup> for example, did not take decisions regarding these issues out of the political process but simply ensured that the decisions would be made at a state or local level.

From a different angle, we might wonder whether a commitment to active liberty might entail *rejection* of judicial restraint in a certain set of cases. Gerrymandering, like malapportionment in the 1960s, seems to undermine democratic accountability. Should the courts be more activist in that area? What about laws passed long ago that no longer command majority support? Alexander Bickel proposed revival of the concept of desuetude, which would deal with old and unenforced laws, but with the caveat that courts should invalidate them in a way that would permit legislative deliberation and reenactment, if that is what the people now desire.<sup>48</sup> Such an approach, which resembles the Court's original capital punishment decisions, might offer a more active liberty-friendly form of judicial intervention than do the modern privacy cases, which leave no room for legislative response or disagreement.

Of Justice Breyer's three themes, judicial restraint is the one most logically and directly connected to the premise of active liberty. But Justice Breyer's illustrative cases leave us with a puzzle: how does he decide when to be deferential, and when not? Without examples of cases in which judicial restraint should, and should not, lead the judge to vote to uphold a law with which he disagrees, the invocation of judicial restraint has little operative content. So what is the role of judicial restraint in his practice of judicial review?

### B. *Purposive Interpretation*

The second theme of Justice Breyer's interpretative approach is his emphasis on "statutory purpose and congressional intent" over text and history (p. 85). As with the other tools of legal interpretation, Justice Breyer begins with what most American judges have in common. "Most judges," he says, "start the same way. They look first to the statute's language, its structure, and its history in an effort to deter-

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<sup>44</sup> 514 U.S. 549 (1995).

<sup>45</sup> Pub. L. No. 101-647, § 1702, 104 Stat. 4789, 4844 (1990).

<sup>46</sup> 529 U.S. 598 (2000).

<sup>47</sup> Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.).

<sup>48</sup> See Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 61 (1961).

mine the statute's purpose" (p. 86). They then use this understanding of purpose, along with language, structure, and history, to determine the proper interpretation. "Thus far," he says, "there is agreement." The differences arise in "truly difficult" cases, a category he does not define. In those cases, some judges look primarily to language and "text-related circumstances" (structure and accepted canons of interpretation), and others "look primarily to the statute's purposes for enlightenment" (pp. 86–87). Justice Breyer puts himself in the second camp. His explanation is rooted in the connection between interpretation and active liberty:

Legislation in a delegated democracy is meant to embody the people's will, either directly (insofar as legislators see themselves as translating how their constituents feel about each proposed law) or indirectly (insofar as legislators see themselves as exercising delegated authority to vote in accordance with what they see as the public interest). Either way, an interpretation of a statute that tends to implement the legislator's will helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose. (p. 99)

Justice Breyer applies this purposive approach first to statutory and then to constitutional interpretation.

Justice Breyer is surely correct that the democratic premises of our system can be well served by statutory interpretation that seeks to discover "the legislator's will" and thus "the public's will" (p. 99). He offers several persuasive examples, from disparate fields of statutory interpretation.<sup>49</sup> In these cases, the statutory text was truly ambiguous, and his analysis seems not only sensible, but also in accord with the most probable meaning of the text, read in light of its history. It is by no means clear, however, and these examples do not show, that the legislator's will (and hence the public will) is most accurately discerned when the court emphasizes congressional purpose *at the expense of text*. It is one thing to consult evidence of congressional intent as a means of interpreting ambiguous text, and quite another to invoke actual or imputed congressional intent as a reason to depart from the text, create exceptions to the text, extend the statute beyond the reach of the text, or embellish the text with unstated features. In those cases, textualism may serve Justice Breyer's stated democracy-enhancing goals better than his own approach. In any event, the argument between textualist and purposivist interpreters is not rooted in any disagreement over the democratic premise of interpretation, and is thus not over the relative importance of active liberty. It is an intramural

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<sup>49</sup> Those examples are the analyses of whether an exception to the Federal Arbitration Act applies to retail store employees, and whether the statute of limitations for filing federal habeas petitions should be tolled by earlier federal habeas proceedings (pp. 91–98).

disagreement over what methodology will best translate the public will into law.<sup>50</sup>

Equally troubling is the ambiguity between actual and imputed intent: is the purpose to which Justice Breyer refers the actual purpose entertained by the legislators, or is it a hypothetical purpose imputed to them by the judiciary? If we look to the demonstrable meanings and intentions of those who enacted a provision, then purposive interpretation can serve the democratic end of interpreting the laws as they were understood by those who enacted them. Indeed, that is what originalists say they do. But if by “purpose” we mean a hypothesized objective based on what seems most reasonable, that “purpose” may exist only in the mind of the judge. Which definition does Justice Breyer employ? He explains:

At the heart of a purpose-based approach stands the “reasonable member of Congress” — a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem. The judge will ask how this person (real or fictional), aware of the statute’s language, structure, and general objectives (actually or hypothetically), would have wanted a court to interpret the statute in light of present circumstances in the particular case. (p. 88)

To ask what a hypothetical “reasonable member of Congress” “would have wanted,” I suspect, is not much different from asking what the judge thinks would be best, at least within the general constraints of the statutory scheme. It is hard to see how posing the question that way serves active liberty.

Moreover, Justice Breyer does not seem to recognize, at least in his book, the inherent difficulty of identifying a single statutory purpose outside the text. In each of his examples, the statutory purpose seems (to him) obvious, if only we can avoid the distractions of text and canons of interpretation. It is sometimes true that purposes are not hard to discern. But in difficult, controversial cases — the cases that divide the Supreme Court, the cases his book is about — there is generally no consensus regarding statutory purpose. Many statutes are compromises between conflicting purposes; many are the product of overlapping purposes that diverge in particular applications. Often a statute enacted for one purpose has unforeseen side effects. Indeed, when a case goes to court, this is generally an indication that different interests in society favor different understandings of purpose. It is not often true that only one of these understandings is reasonable.

The identity of the “reasonable” decisionmaker becomes even more problematic when we turn from statutory interpretation to constitu-

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<sup>50</sup> Those who reject the democratic premise in favor of some other value — limited government, efficiency, egalitarianism, technocratic good sense, coherence across various fields of law, or whatever — might well reject both textualism and purposivism.

tional interpretation, where the purposes behind various provisions are much contested. If we look to actual historical reasons a provision was adopted, the inquiry is indistinguishable from originalism. But the idea of a “reasonable framer” or “reasonable ratifier,” divorced from text and history, is singularly unhelpful. Justice Breyer does not spell out how this inquiry should proceed, and an examination of his illustrative cases only deepens the mystery. In his discussion of the University of Michigan Law School affirmative action case, *Grutter v. Bollinger*,<sup>51</sup> Justice Breyer says the outcome turned on whether to interpret the Equal Protection Clause as colorblind, or instead to “understand the clause as more narrowly purposive” (p. 77). In taking the second view, he appealed to the history of the clause to support the conclusion that the purpose was “narrower” than the colorblindness interpretation suggests:

[The Equal Protection Clause] grows out of a history that includes this nation’s efforts to end slavery and the segregated society that followed. It reflects that history. It consequently demands laws that equally respect each individual; it forbids laws based on race when those laws reflect a lack of equivalent respect for members of the disfavored race; but it does not similarly disfavor race-based laws in other circumstances. (p. 77)

In his discussion of the Cleveland voucher case, *Zelman v. Simmons-Harris*,<sup>52</sup> by contrast, Justice Breyer states that “it was necessary to interpret the [Establishment C]ause more broadly than the Framers might have thought likely” (p. 121). But why does he give the Equal Protection Clause a “narrowly purposive” interpretation, while giving the Establishment Clause a “broad[]” interpretation?<sup>53</sup>

The answer plainly is not active liberty. The program he voted to strike down in *Zelman* was an act of a state legislature, extensively debated by representatives of the people. The program he voted to sustain in *Grutter* was adopted by an elite educational institution, surely deserving of less democratic deference than a legislature. If Justice Breyer had voted to uphold both programs, one might say he was consistent with regard to judicial restraint. But voting to strike down the product of legislative debate and to sustain the product of elite institutional judgment calls for explanation.

The two examples also seem to reflect inconsistent assessments of the capacity of democracy to deal with social conflict. In explaining his vote against the voucher plan, Justice Breyer said that the provision of aid to disadvantaged students to attend nonpublic, including

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<sup>51</sup> 539 U.S. 306 (2003).

<sup>52</sup> 536 U.S. 639 (2002).

<sup>53</sup> One might also ask whether Justice Breyer employs a similar “narrowly purposive” interpretation of the Equal Protection Clause in other contexts.

religious, schools “may seem a fine idea” (p. 121). But think of the complications:

[W]ill different religious groups become concerned about which groups are getting the money and how? What are the criteria? How are programs being implemented? Is a particular program biased against particular sects, say, because it forbids certain kinds of teaching? Are rival sects failing to live up to the relevant criteria, say, by teaching “civil disobedience” to “unjust laws”? How will claims for money, say, of one religious group against another, be adjudicated? (p. 121)

Justice Breyer thus “saw in the administration of huge grant programs for religious education the potential for religious strife. And that . . . was the kind of problem the First Amendment’s religion clauses seek to avoid” (pp. 121–22). His confidence in active liberty apparently goes only so far: some conflicts are too sensitive for democracy to handle.

Affirmative action plans, however, present a similar danger. The University of Michigan plan in *Grutter* benefited some racial and ethnic groups (African Americans, Hispanics from Mexico and Puerto Rico, Native Americans) and not others (Hispanics from Cuba or Central America, Asians), and assigned different levels of benefit to different groups.<sup>54</sup> We might therefore pose Justice Breyer’s *Zelman* questions: Will different racial and ethnic groups become concerned about which groups are getting the benefit and how? What are the criteria? How are programs being implemented? Is a particular program biased against particular groups? Are applicants failing to live up to the relevant criteria, say, by manipulating evidence regarding their status as a member of a minority? How will claims for benefits, say, of one racial group against another, be adjudicated? Are there no dangers of “racial strife,” and is racial strife not one of the problems the Equal Protection Clause seeks to avoid?<sup>55</sup> An attentive reader will wonder why he treats the cases so differently.

Recall Justice Breyer’s objective, which is to show that his approach to constitutional interpretation provides an objective basis for judging. Rather than consider whether a challenged program is “good or bad, in a particular judge’s opinion,” he explains, the judge must examine it “through the lens of the relevant constitutional value or purpose. The relevant values limit interpretive possibilities” (p. 120). By proceeding in this fashion, the judge “is more likely to be disciplined in emphasizing, for example, constitutionally relevant consequences rather than allowing his own subjectively held values to be

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<sup>54</sup> See *Grutter*, 539 U.S. at 319; *id.* at 393 (Kennedy, J., dissenting).

<sup>55</sup> Justice Breyer noted that the risks generated by “excessive racial self-identification and resulting strife” were serious enough to justify the *Grutter* majority’s “expectation” that the affirmative action program would no longer be necessary in twenty-five years (p. 84).

outcome determinative. In all these ways, a focus on consequences will itself constrain subjectivity” (p. 120). As Justice Breyer’s examples indicate, however, the approach cannot “constrain subjectivity” if the judge is free to adopt his own understanding of “the relevant constitutional value or purpose.” To say that the judge will interpret the provision as a “reasonable” decisionmaker “would have wanted” broadens rather than limits the “interpretive possibilities.”

### C. Consequences

The third theme of Justice Breyer’s jurisprudence of active liberty is an emphasis on consequences. A “[f]ocus on consequences,” Justice Breyer tells us, “allows us to gauge whether and to what extent we have succeeded in facilitating workable outcomes which reflect [the people’s] will” (p. 115). Consequences thus serve “as an important yardstick to measure a given interpretation’s faithfulness to these democratic purposes” (p. 125). He contrasts his emphasis on purpose and consequences with the approach of those who “ask judges to focus primarily upon text, upon the Framers’ original expectations, narrowly conceived, and upon historical tradition” (p. 116).

Attention to consequences is ordinarily associated with pragmatic jurisprudence. This is the view that, at least in hard cases, authoritative legal materials (text, history, tradition, and precedent) either cannot or should not provide the answer; the pragmatic judge should resolve the hard case in light of his best judgment of a fair and sensible outcome. Judge Richard Posner is our generation’s most eminent advocate of this view. He goes so far as to say that constitutional interpretation by the Supreme Court is “lawless” in the sense that it is largely unconstrained: an “ocean of discretion.”<sup>56</sup> Justice Breyer’s approach obviously has some affinity with the pragmatic view. His emphasis on “workable outcomes” and “real-world consequences” (pp. 115–16), and his claim that his approach would avoid “seriously harmful consequences” (p. 129), evidently based on his own balance of costs and benefits, all tend to identify Justice Breyer as a pragmatist.

But to the degree that Justice Breyer is a pragmatist, this tendency is in tension with his commitment to active liberty. The principal claim in his book is not that legal interpretation should promote pragmatic outcomes, but that it should “promote active liberty by insisting on interpretations, statutory as well as constitutional, that are consistent with the people’s will” (p. 115). The people’s will may sometimes coincide with the judge’s view of what is practical or fair, but sometimes it does not. Most significant constitutional cases — think of is-

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<sup>56</sup> Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 41 (2005).

sues like capital punishment, abortion, hate speech, flag burning, vouchers, allocation of power between state and federal governments, affirmative action, and detention of unlawful enemy combatants — are significant and difficult precisely because there are plausible arguments and reasonable people of good will on both sides. It simply is not the case that one perspective on these issues is unambiguously fair and sensible and the other is not. But if Justice Breyer is right that the principal commitment of our Constitution is to active liberty, then the courts should not seek their own answers to vexing moral-philosophical questions of this sort. They should seek answers that are “consistent with the people’s will.” Pragmatism may have many virtues, but it is not a doctrine based on active liberty. Pragmatic judging provides an elite corrective to the messiness of democracy — a modest technocratic corrective, in Posner’s version; a perfectionist moral-philosophic corrective, in Dworkin’s version; but in any event, something other than obedience to the people’s will.

An exponent of active liberty therefore cannot be an unalloyed pragmatist. To be sure, when other indices of the people’s will are lacking, judges should interpret statutes in a coherent, fair, and sensible fashion, but that is about as far as active liberty can go toward pragmatism. It is for this reason that Justice Breyer, unlike Judge Posner, insists that his approach to interpretation contains “important safeguards of objectivity” (p. 118), and that judges using his approach must confine their consideration of consequences to those “related to the particular textual provision at issue” (p. 120). He does not advocate that judges “consider simply whether the consequences of a proposed decision are good or bad, in a particular judge’s opinion” (p. 120). Interpretation, under Justice Breyer’s approach, is not “lawless.”

Why, then, does Justice Breyer so emphasize consequences? It is not as if some judges ignore them and look only at “text and history.” This is a false dichotomy. Textualist and originalist judges do not look at “text and history” *instead of* “consequences”; they look at consequences *in light of* text and history. And every judge strives, within the constraints of authoritative legal materials, to reach fair and sensible results and to make the law more coherent. As Justice Breyer acknowledges, however, textualist-originalist interpreters “fear that, once judges become accustomed to justifying legal conclusions through appeal to real-world consequences, they will too often act subjectively and undemocratically, substituting an elite’s views of good policy for sound law” (p. 116). That is a reasonable concern, and Justice Breyer does not say otherwise. The question is whether untethering consequences from text and history would be an improvement.

One problem is that viewing “consequences” independently of text and history would flatten out the differences between constitutional principles, and effectively reduce most constitutional interpretation to a judicial rebalancing of costs and benefits. Take Justice Breyer’s ex-

ample of freedom of speech. Writing in the tradition of Alexander Meiklejohn, Justice Breyer begins with the principle that “strong pro-speech judicial presumptions” should be applied to restrictions on speech that is intended “to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live,” but not to the regulation of commercial speech, where the application of strong presumptions would be “too severe a restriction upon the legislature” (p. 42).<sup>57</sup> This approach is similar to traditional “tiers of scrutiny” and is designed to limit the discretion of judges to evaluate the consequences of particular restrictions on speech according to their own assessments of value. Having stated this traditional view, however, Justice Breyer immediately takes it back: his theory argues “against category boundaries that are too rigid or fixed and against too mechanical an application of those categories” (p. 43).

Thus, when he turns to the regulation of political campaign contributions, which are surely intended to shape public opinion, Justice Breyer disregards any “pro-speech judicial presumptions” and delves immediately into an analysis of whether the campaign finance statute “strike[s] a reasonable balance between electoral speech-restricting and speech-enhancing consequences” (p. 49). He defends the statute on the ground that “a restriction on speech, even when political speech is at issue, will sometimes prove reasonable, hence lawful” (p. 48). This is the vocabulary of rational basis scrutiny — a level of scrutiny lower even than that accorded commercial speech restrictions. This does not just avoid “category boundaries that are too rigid or fixed” (p. 43), but disregards doctrinal categories altogether. If such an approach were applied across the board, it would make the substance of the Constitution essentially irrelevant — replacing its enumerations of powers and rights with a generalized examination of “reasonableness.”

This is not a small matter. Much of the force of American constitutionalism stems from the simple, direct, and meaningful language of the Constitution itself. Such phrases as the “freedom of speech,” the “free exercise of religion,” and the prohibition of “cruel and unusual punishment” have power in our culture. I recall that when my former boss, Justice William J. Brennan, was asked in a television interview why Nazis should be permitted to march through a neighborhood in Skokie, Illinois, largely inhabited by Holocaust survivors, his answer was: “the First Amendment, the First Amendment, the First Amendment.”<sup>58</sup> I doubt it would have been as persuasive to say that it “poses a reasonable balance between the rights of the Nazis to frighten the

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<sup>57</sup> He does not say what presumption should apply to other forms of nonpolitical speech, such as art, science, pornography, or prayer.

<sup>58</sup> *Miller's Law* (COURT TV television broadcast Oct. 2, 1997).

people of Skokie and the rights of the people to be secure in their homes.” At points of crisis in our constitutional history, when courts need to speak law to power, or to defend the rights of the unpopular, it is better to invoke the words of our foundational document than to ask the people to trust judges to make reasonable balances.

Perhaps Justice Breyer means only that courts should be more attentive to empirical evidence of consequences, as opposed to focusing on abstract intentions. But again, his campaign finance example raises questions. Justice Breyer’s account of the likely consequences of the campaign finance statute consists essentially of an uncritical recitation of the stated goals of the statute. The campaign laws “seek” to further a “democratic objective”; they “seek” to “democratize the influence that money can bring to bear upon the electoral process” (p. 47). Strikingly, he does not discuss the consequences predicted by the statute’s opponents, such as the entrenchment of incumbents by making it more difficult for challengers to raise sufficient funds to overcome the advantages of incumbency, or the redirection of contributions to shadowy independent groups that would be less accountable to public opinion than are political parties and official campaigns. He explicitly defers to Congress’s judgment on the ground that “the extent of the campaign finance problem” is a matter “about which the legislature is comparatively expert” (p. 49), without noting that it is also a matter about which incumbent legislators have a rather obvious conflict of interest.

Contrast this analysis of campaign finance restrictions with his analysis of the Cleveland voucher program. One would think the Ohio legislature is relatively expert with regard to education, one of the most important state functions, and with regard to conditions in its largest city. But in his discussion of the consequences of the voucher program, Justice Breyer does not even mention — let alone defer to — the legislature’s stated reasons or expectations for the program: that disadvantaged students in the failed public school system of Cleveland would benefit both directly from educational alternatives and indirectly from increased competition and accountability to parents. Nor does Justice Breyer mention the legislature’s constitutional theory: that public support for education at all schools, public and private, on neutral terms, is not a preference for religion. Nor does he refer to empirical evidence regarding the program’s educational effects. Instead, he poses a series of rhetorical questions, leading to the conclusion that competition among religiously affiliated schools for a greater share of state funding would produce “religious strife” (pp. 121–22). The campaign finance and voucher cases both arise under the First Amendment. Why the difference in assessing good and bad consequences?

Consider also Justice Breyer's analysis of the Court's recent cases invalidating federal statutes prohibiting the possession of firearms near schools<sup>59</sup> and punishing gender-motivated acts of violence.<sup>60</sup> In both cases, the Court concluded that the statutes exceeded Congress's power under the Commerce Clause because the regulated activities were intrastate and noncommercial. Here, Justice Breyer does not discuss consequences at all. He says only that "in these instances the public has participated in the legislative process at the national level. Indeed, Congress held elaborate public hearings only to find its legislative work nullified" (p. 62). But the same could be said whenever a statute is invalidated. Many informed observers across the political spectrum, including the late Chief Justice Rehnquist, the Federal Courts Study Committee, the Judicial Conference, and many legal scholars, have criticized on pragmatic grounds the expansion of federal criminal law to cover crimes of local character.<sup>61</sup> Such laws needlessly complicate lines of responsibility, lead to sentencing disparities, distract federal law enforcement agencies from their areas of comparative advantage, prevent experimentation, and clog the federal courts. To a textualist or originalist, these policy considerations might not matter, but it seems odd that they would not matter to a consequentialist.

As these examples suggest, an emphasis on consequences places a premium on the judge's choice of which consequences to emphasize. It is always possible to tell a story about consequences, and usually at least two: a story that supports the rationale for the enactment and a story that explains opposition to it. It is usually possible to connect those stories to a plausible account of a hypothetical purpose of the constitutional provision at play, at some level of generality. But we need some basis for choosing between them. That has to come from somewhere else.

Moreover, as Justice Breyer's examples perhaps unintentionally suggest, if courts are to place greater emphasis on consequences, they need to distinguish more carefully between prediction and experience. When the statute under challenge has been enforced for a period of time, we can have some degree of confidence regarding what its consequences are. But when the statute is newly enacted or has been in force for only a few years (like the campaign finance law or the voucher program), the effects are often uncertain. This problem sug-

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<sup>59</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>60</sup> *United States v. Morrison*, 529 U.S. 598 (2000).

<sup>61</sup> See, e.g., JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS 23-28 (1995), available at <http://www.uscourts.gov/lrp/CVRPGTOC.HTM>, and sources cited therein; Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839-40 (1996); Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 U. KAN. L. REV. 503 (1995).

gests one concrete jurisprudential reform that judges attentive to consequences should embrace: make it harder for plaintiffs to obtain sweeping injunctions against newly enacted laws prior to their actual enforcement. Specific changes might include tightening the rules for standing and ripeness, adhering to a stricter standard for facial challenges, and strengthening the requirements for obtaining preliminary injunctions. If courts should base constitutional decisions less on text and history and more on “real-world consequences,” we should make sure they have a sound basis for doing so. Surely there is no virtue in a greater emphasis on guesswork, wishful thinking, or scaremongering.

### III. COMPARED TO WHAT?

Many approaches to constitutional interpretation have been employed or suggested over the years, some closer than others to Justice Breyer’s. I have already noted the affinity between his approach and pragmatism. One approach with even stronger similarities is the “representation-reinforcement” idea proposed a generation ago by John Hart Ely. Ely thought the Constitution leaves “the selection and accommodation of substantive values . . . almost entirely to the political process” and that the document is “overwhelmingly concerned, on the one hand, with procedural fairness . . . , and on the other, with . . . ensuring broad participation in the processes and distributions of government.”<sup>62</sup> Ely’s theory led him to praise progressive Warren and Burger Court decisions on reapportionment, voting rights, criminal procedure, and desegregation, while criticizing other decisions that took substantive issues out of the political process, including *Roe v. Wade*. Justice Breyer could have made his approach clearer by explaining how and why it differs from these related approaches.

Justice Breyer compares his position to only one alternative, which he calls “textualism” as it applies to statutes and “originalism” as it applies to the Constitution. This is the approach most closely associated with his colleague Justice Scalia. Much hostility to textualism and originalism is based on an unrealistically rigid characterization of the approach,<sup>63</sup> and Justice Breyer’s discussion is no exception. As Justice Breyer describes the approach, judges should “focus primarily upon text, upon the Framers’ original expectations, narrowly conceived, and upon historical tradition” (p. 116). There are, admittedly, different versions of textualism and originalism, and this may be an accurate description of some. But it seems to me that Justice Breyer’s definition misdescribes the most prominent and attractive version, in three respects.

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<sup>62</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST* 87 (1980).

<sup>63</sup> See, e.g., CASS R. SUNSTEIN, *RADICALS IN ROBES* 26–27 (2005).

First, the definition omits the textualist-originalist commitment to deference to present-day enactments of the political branches. According to most practitioners of this view, the decisions of the people's representatives enjoy a presumption of constitutionality and should be displaced only when they are demonstrably inconsistent with prior constitutional commitments manifested in text, history, and tradition. Thus, textualist and originalist judges do not "focus primarily" on text and history, but "primarily" on the right of the people to govern themselves through democratic institutions. If textual and historical sources are indeterminate, as they often are, judges are not free to resolve the ambiguity in favor of their own preferences, but must defer to the decisions of the legislature.

Second, I do not agree with Justice Breyer's assumption that originalist analysis looks to "narrowly conceived" purposes. The breadth or specificity of historical meaning is itself a historical question, and some provisions, such as those in the first section of the Fourteenth Amendment, may be very broad indeed. No less than any other approach, textualism-originalism understands that constitutional principles are not frozen in time. The task is to apply the moral-political principles of the Constitution as faithfully as possible to the circumstances of our day. Eighteenth-century Framers may not have thought to apply the First Amendment to flag burning or the Fourth Amendment to thermal imaging, but that has not stopped originalists from doing so.

Third, Justice Breyer does not acknowledge the importance of precedent to any system of legal interpretation, including the one he criticizes. To be sure, judges in the textualist-originalist camp differ among themselves regarding the weight to be given to precedent, just as is true of judges who employ other approaches. In my opinion, the doctrine of *stare decisis* is a weak link in constitutional theory across the board. All too often it is employed selectively and arbitrarily. More on that below. But most originalist judges recognize the need for a consistent, coherent doctrine of respect for settled precedent. As Hamilton wrote in *The Federalist No. 78*, following precedents is "indispensable" to "avoid an arbitrary discretion in the courts."<sup>64</sup>

Presumably Justice Breyer targets the textualist-originalist approach because of the prominence it has achieved in the last few decades as both a justification for and an objective constraint on the power of judicial review. As Justice Breyer explains, exponents of textualism and originalism "hope that language, history, tradition, and precedent will provide important safeguards against a judge's confusing his or her personal, undemocratic notion of what is good for that which the Constitution or statute demands" (p. 116).

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<sup>64</sup> THE FEDERALIST NO. 78, *supra* note 30, at 471.

Advocates of this view thus argue that it is not an ideological position, but one that safeguards the distinction between law and politics. Textualist and originalist judges, at least in principle, will on occasion vote to uphold laws they deeply disagree with, or to strike down laws they would favor, because the basis for constitutional judging (text, history, tradition, and settled precedent) is independent of their own preferences. The same is not true, even in principle, of judges who believe their responsibility is to interpret the Constitution in light of their own best sense of justice, equality, good consequences, or other normative concerns.

This is not, of course, to say that every judge claiming to follow a textualist or originalist approach will do so in an objective manner. Texts can be misread and history can be manipulated; judges are human; power corrupts; and judges may be tempted to twist the sources to make the cases come out “the right way.” The point is that *in principle* the textualist-originalist approach supplies an objective basis for judgment that does not merely reflect the judge’s own ideological stance. And when errors are made, they can be identified as such, on the basis of professional, and not merely ideological, criteria. Even in principle, constitutional interpretation based on the judge’s own assessment of worthy purposes and propitious consequences lacks that objectivity.

I hasten to add that few, if any, judges fit the stereotype of disregarding all law in favor of their own political preferences. Virtually all judges recognize a certain degree of constraint based on text, history, tradition, and precedent, and give play to their own values only within the remaining realm of discretion. The real points of division relate to how strictly or loosely judges read the constraints, and whether in the remaining gray areas they defer to democratic judgment or give play to their own ideological commitments.

Justice Breyer devotes the last full chapter of his book to explaining why the textualist-originalist approach is “unsatisfactory.” He lodges five major criticisms of textualism and originalism: (1) as a historical matter, the Framers “did not say specifically what factors judges should take into account when they interpret statutes or the Constitution” (p. 117); (2) nontextualist and nonoriginalist judging does not “necessarily open the door to subjectivity” (p. 118); (3) “language and structure, history and tradition . . . often fail to provide objective guidance in . . . truly difficult cases” (p. 124); (4) even if textualist or originalist methods of interpretation were “more likely to produce clear, workable legal rules . . . , the advantages of legal rules can be overstated” (p. 127); and (5) “textualist and originalist doctrines may themselves produce seriously harmful consequences” (p. 129).

These are familiar points, extensively debated in the literature. What should interest us most, however, is how they connect to Justice Breyer’s affirmative position. What is the connection between active

liberty and text, history, tradition, and precedent? Justice Breyer passingly concedes that textualism and originalism are “logically consistent with emphasizing the Constitution’s democratic objectives” (pp. 116–17), but he does not develop this theme. One would think that, from the perspective of active liberty, the connection to the Constitution’s democratic objectives would be the most important issue.

If judges committed to the promotion of active liberty “insist[] on interpretations, statutory as well as constitutional, that are consistent with the people’s will,” as Justice Breyer claims (p. 115), we must ask how the people manifest their will. I suggest that they do so in three ways: by creating and amending the Constitution, by developing constitutional tradition, and by electing representatives who enact legislation. These correspond to the three traditional bases for constitutional interpretation: fidelity to text, respect for settled understandings, and deference to current democratic decisions. Far from being an alternative to interpretation based on text, history, tradition, precedent, and deference to democratic decisionmaking, active liberty provides theoretical support.

First, active liberty explains why it is essential for judges to pay close attention to constitutional text and history. The theory of judicial review is not that judges are more likely to make good decisions than the representatives of the people, but that the Constitution reflects the will of the people and sets boundaries for the governing authority of elected officials.<sup>65</sup> The Constitution is a document with meaning and purpose, and legitimate interpretation must take its bearings from that meaning and purpose. To impute a meaning to the text that could not have been intended by the drafters and ratifiers divorces the words of the Constitution from the source that gives them authority.

Attention to longstanding practice and tradition, too, serves the end of active liberty, because practices that have been adopted by many decentralized democratic decisionmakers over an extended period of time, up to and including the present, provide authoritative evidence of the popular will.<sup>66</sup> And of course, for reasons already explained, judicial restraint — the principle that judges should defer to democratic decisionmaking — follows from the principle of active liberty.

Active liberty could also help to provide a consistent theory of precedent. For all the attention to *stare decisis* in debates over Supreme Court nominees, political scientists tell us that, “[o]verwhelmingly, Supreme Court justices are not influenced by landmark

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<sup>65</sup> See *id.* at 464–72.

<sup>66</sup> See Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665; Michael W. McConnell, *Tradition and Constitutionalism Before the Constitution*, 1998 U. ILL. L. REV. 173.

precedents with which they disagree.”<sup>67</sup> Many of the Court’s most celebrated decisions — *Brown v. Board of Education*,<sup>68</sup> for example — involved the overruling of prior precedents. But it is also true that many decisions, even some that were questionable or controversial when rendered, have become part of the fabric of American life; it is inconceivable that they would now be overruled. Examples might include protection against sex discrimination under the Equal Protection Clause, application of the Equal Protection Clause to the federal government, expansion of the Commerce Clause to permit federal regulation of intrastate commercial activity, or prohibition of gross malapportionment of state legislative districts. The staying power of these holdings is not attributable to the bare fact that the Supreme Court decided them, for other decisions of equally long standing remain controversial and subject to reconsideration. The difference, I think, lies in the fact of overwhelming public acceptance. Whatever may have been their original legal merit, these decisions have been accepted by the nation. Legislatures do not pass laws in defiance of these decisions; commentators do not attack their reasoning (except as an academic exercise, which serves a different purpose than provoking their reconsideration); people have forgotten they ever were controversial. This overwhelming public acceptance constitutes a mode of popular ratification, which gives these decisions legitimacy and authority under the theory of active liberty.<sup>69</sup>

Attention to the theory of active liberty thus may lead in a direction Justice Breyer did not intend. He set out to describe and defend an approach to constitutional interpretation that would not be bound by text, history, and tradition, but also would not be based solely on whether the consequences “are good or bad, in a particular judge’s opinion” (p. 120). In many ways, the attempt is admirable. Justice Breyer’s commitment to judicial restraint, his respect for differing opinions, his modesty, his practicality, and his rejection of utopianism are all welcome additions to the public debate over the role of the judiciary. But ultimately, his effort falls short. On the one hand, he asks judges to place greater emphasis on effectuating the people’s will. On the other hand, he asks them to give greater emphasis to purposes and consequences than to text, history, and tradition. But in republican

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<sup>67</sup> Jeffrey A. Segal & Harold J. Spaeth, *The Influence of Stare Decisis on the Votes of United States Supreme Court Justices*, 40 AM. J. POL. SCI. 971, 971 (1996).

<sup>68</sup> 347 U.S. 483 (1954).

<sup>69</sup> This evidently was Madison’s view. See Letter from James Madison to General La Fayette (Nov. 1826), in 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 538, 542 (Phila., J.B. Lippincott & Co. 1865) (explaining his decision not to veto legislation establishing the Second Bank of the United States, notwithstanding his earlier view that such an establishment is unconstitutional, on the ground that he regarded “the acquiescence of the people at large . . . as a construction put on the Constitution by the nation”).

government, text, history, and tradition *are* the objective manifestations of the people's will. Justice Breyer's insistence that active liberty provides the linchpin for constitutional interpretation, examined carefully, offers more support for the approach he criticizes than for the approach he espouses.