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Justice Breyer Throws Down the Gauntlet

A Supreme Court Justice writing a book about constitutional law is like a dog walking on his hind legs: The wonder is not that it is done well but that it is done at all. The dog's walking is inhibited by anatomical limitations, the Justice's writing by political ones. Supreme Court Justices are powerful political figures; they cannot write with the freedom and candor of more obscure people. But just as Shakespeare managed to write great plays under official censorship, so Justice Breyer has managed to write a good book under self-censorship.

In recent years, the initiative in constitutional debate has passed to the conservatives. They have proposed, and to an extent achieved, a rolling back of liberal doctrines (notably in regard to states' rights, police practices, and executive power) and of the methodology of loose construction that enabled liberal Justices to provide a plausible justification for those doctrines. The liberals continue to win a significant share of victories, in such areas as homosexual rights, affirmative action, and capital punishment, but for the most part their stance, their outlook, has been defensive: defense of the Warren Court and *Roe v. Wade*. Justice Breyer is a liberal (though a moderate one), but he wants to do more than defend liberal decisions, doctrines, and methods piecemeal. He wants an overarching approach to set against the "textualism" and "originalism" of his judicial foes. His book articulates and defends such an approach, which he calls "active liberty."

The book is short, and not only clearly written but written on a level that should make it accessible to an audience wider than an audience of judges and lawyers. And despite its brevity and simplicity it will be welcomed by constitutional lawyers, perhaps even by some of Breyer's colleagues, as a rallying point for liberal constitutional thought. It is a serious, and perhaps an important—it is certainly likely to be an influential—contribution to constitutional debate. The short book of Scalia's against which Breyer is

writing¹ has been cited in more than a thousand law review articles.² Breyer can expect similar attention to his book.

But while acknowledging its merits and likely influence, I do not find *Active Liberty* convincing, and will devote the bulk of this Review to explaining why. So first—what is “active liberty”? Breyer, following Benjamin Constant, distinguishes between the “liberty of the ancients” and the “liberty of the moderns,” and aligns active liberty with the former. He fails to note that Constant was writing *against* the “liberty of the ancients,” which Rousseau had introduced into French political thought with tragic results, and in favor of the “liberty of the moderns.”³ To Constant, the liberty of the ancients signified the collective exercise of sovereignty devoid of any concept of individual rights against the state.⁴ It was an extreme version of what we now call “direct democracy,” which is illustrated by referenda in California and Switzerland and by the New England town meeting. The liberty of the moderns, by contrast, is liberty from state oppression. It is what Isaiah Berlin called “negative liberty.”⁵ It is what citizens of Athens and of revolutionary France lacked. Its instruments include representative democracy (not direct democracy, as in ancient Athens), separation of powers, federalism, and the type of legally enforceable rights against government that are found in the Bill of Rights.

Breyer understands by liberty of the ancients the liberty that Athenian citizens enjoyed for much of the fifth and fourth centuries B.C.⁶ by reason of

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Scalia's is a short book, all right, but it is not really *his* short book. His contribution to it is limited to a lead essay (entitled, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*) and a reply to critics, *id.* at 129. See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
 2. The search that produced this figure was of articles in Westlaw's JLR (Journals & Law Reviews) database. Despite the extreme brevity of Scalia's discussion of constitutional as distinct from statutory interpretation in SCALIA, *supra* note 1, at 37-47, my impression is that most of the law review commentary has focused on his approach to constitutional interpretation.
 3. BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in *POLITICAL WRITINGS* 309 (Biancamaria Fontana ed. & trans., 1988). With reference to Rousseau, see *id.* at 319-20.
 4. *Id.* at 311-12.
 5. ISAIAH BERLIN, *Two Concepts of Liberty*, in *LIBERTY* 166, 169-78 (Henry Hardy ed., Oxford Univ. Press 2002) (1958).
 6. JOSIAH OBER, *THE ATHENIAN REVOLUTION: ESSAYS ON ANCIENT GREEK DEMOCRACY AND POLITICAL THEORY* 31 (1996); see also R. K. SINCLAIR, *DEMOCRACY AND PARTICIPATION IN*

the fact that their city was a democracy. Constant, on the contrary, believed Athens to have been the ancient state that “most resembles the modern ones,”⁷ and Sparta a better example of the liberty of the ancients.⁸ But Athens was actually an excellent example of that liberty. The Athenian Assembly, to which all citizens belonged, had plenary power; there were no legislators other than the citizens themselves when attending its sessions. To prevent the emergence of a political class, the few executive officials were chosen mainly by lot, for one-year terms, though some were elected and could be reelected.⁹ Similarly, there were no judges except randomly selected subsets of citizens—jurors who voted without deliberating, unguided by jury instructions, since there were no judges to give such instructions. For that matter, there was no legal profession, though orators such as Demosthenes would draft speeches for the litigants to give at trial. There was plenty of litigation, but no concept that people had rights to life, liberty, or property that could be enforced against the polis. The only justice was popular justice.

To lodge executive and judicial power in randomly chosen citizens, and legislative power in whatever citizens choose to attend legislative sessions, is to carry self-government about as far as it can be carried. It is town meeting government writ large. It is not a feasible model for a nation of 300 million people. Breyer knows this, though he says that the Court should be doing more to promote the “active liberty of the ancients,”¹⁰ and underscores the point by saying that “‘active liberty’ . . . bears some similarities to . . . Isaiah Berlin’s concept of ‘positive liberty.’”¹¹ That was Berlin’s term for the “liberty of the ancients” as revived by Rousseau and extended, Berlin thought, by modern totalitarians!¹² Breyer does not want to turn the United States into a direct democracy on the model of ancient Athens, or on any other model. He says that “[d]elegated democracy’ need not represent a significant departure from

ATHENS 68, 80 (1988). Some of the other Greek city states were also democratic during this period.

7. CONSTANT, *supra* note 3, at 312.

8. *Id.* at 310-11, 314-16.

9. JOHN V.A. FINE, *THE ANCIENT GREEKS: A CRITICAL HISTORY* 390-402 (1983); SINCLAIR, *supra* note 6, at 68, 80. So even the Athenians flinched from the full implications of direct democracy. SINCLAIR, *supra* note 6, at 193-95; *see also* RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 154 (2003) (discussing the problematic nature of representative “democracy”).

10. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005). He contrasts “active liberty” with “modern liberty.” *Id.*

11. *Id.* at 137 n.6.

12. *See* BERLIN, *supra* note 5, at 190-91.

democratic principle,”¹³ and by “delegated democracy” he means simply—representative democracy. All he really wants to do is to interpret the Constitution in a manner that will promote his conception of democratic choice by sweeping away obstacles to such choice. His project resembles that of John Hart Ely (cited by Breyer, though only in passing¹⁴), who argued that the major thrust of the Warren Court had been to make American government more democratic,¹⁵ but not democratic in the Athenian sense.

Because he is a judge, Breyer cannot acknowledge that he wants to impose his concept of active liberty on the Constitution. Convention requires him to find the concept in the Constitution. Manfully, he tries. He recognizes that it is an uphill struggle: “The primarily democratic nature of the Constitution’s governmental structure has not always seemed obvious.”¹⁶ Indeed not—and for the excellent reason that the structure is not “primarily democratic.” It is republican, with a democratic component. The Constitution’s rejection of monarchy (no king), aristocracy (no titles of nobility), and a national church (no religious oaths of office) was revolutionary; but the governmental structure that it created bore no resemblance to that of ancient Athens and was, and remains, incompletely democratic.

Of the major components of the federal government—the executive branch, consisting of the President and Vice President and other high officials; the judiciary; the Senate; and the House of Representatives—only the last was to be elected by the people. And since the Constitution created no right to vote and allowed the states to fix the eligibility criteria for voters for members of the House (except that the criteria had to be the same as those the state prescribed for voters or members of the lower house of its own legislature) states could limit the franchise by imposing property or other qualifications for voting. The President and Vice President were to be chosen by an Electoral College whose members would in turn be chosen by the states according to rules adopted by each state legislature; there was no requirement that those rules provide for popular election of the members of the College. Other executive branch officials would be appointed by the President or by the judges. Senators would be appointed by state legislatures. Supreme Court Justices (and other federal judges, if Congress took up the option conferred on it by the Constitution of creating federal courts in addition to the Supreme Court) would be appointed by the President, subject to senatorial confirmation, for life. Political parties

13. BREYER, *supra* note 10, at 23.

14. *Id.* at 146 n.14.

15. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

16. BREYER, *supra* note 10, at 21.

were not envisaged; the best men would rule, rather than the survivors of party competition. There was not a trace of direct democracy in the Constitution: no provision for initiatives, referenda, or recalls. The Framers purported to be speaking on behalf of “We the People,” as the preamble states, but there is no novelty in adopting a nondemocratic regime by plebiscite; ask Napoleon. Even the ratification of the Constitution was by state conventions rather than by direct popular vote. The Constitution guarantees a republican form of government (presumably similar though not identical to the republican form of government created by the Constitution) to each state, but not a democratic government.

If, as Breyer states, the Framers of the Constitution had “confidence in democracy as the best check upon government’s oppressive tendencies,”¹⁷ why is there so little democracy, and none of it direct democracy, in the document they wrote? What we see in the structure of the original Constitution is not an echo of Athens but an adaptation of the institutions of the British eighteenth-century monarchy to a republican ideology. The President corresponds to the king; he exercises the traditional monarchical prerogatives of pardoning, conducting foreign affairs, appointing executive officials and judges, and commanding the armed forces. He is of course not directly elected. The Senate and the Supreme Court correspond to the House of Lords, and the House of Representatives corresponds to the House of Commons; elected, but by a restricted franchise. Subsequent amendments and changing practices and institutions made the Constitution more democratic, but Breyer insists that the original Constitution, the Constitution of 1787, was animated by the spirit of Pericles. That is untenable. There is irony in an anti-originalist trying—and failing—to give a historical pedigree to his anti-originalist approach.

Breyer’s lack of interest in the actual texture or political background and suppositions of the Constitution is consistent with the loose-constructionist approach that he champions (quite properly in my opinion). But he would have been well advised to forget Athens, accept Constant’s and Berlin’s criticisms of the liberty of the ancients, cut loose his concept of active liberty from that unattractive precedent, and acknowledge that he is trying to improve representative democracy, a project antithetical to that of restoring the liberty of the ancients.

After setting forth his concept of active liberty and trying to give it a constitutional genealogy, Breyer offers a series of illustrations of how the concept would, if accepted as the true spirit of the Constitution, shape

17. *Id.* at 23.

constitutional law. He begins with free speech.¹⁸ He contrasts political and commercial speech, arguing that the former is entitled to much greater protection because it is central to democracy. But he also defends, against free speech objections, campaign finance laws that limit political advertising.¹⁹

The notion of the primacy of political speech is a common one, but it is misleading and unhelpful. Of course it is possible to imagine restrictions on political speech that would do more harm than restrictions on commercial speech; compare a blanket prohibition of criticizing officials with a prohibition against false advertising of diet pills. But it is also possible to imagine restrictions on political speech that do less harm than restrictions on commercial speech; compare a prohibition against advocating suicide bombing with a prohibition against all price advertising. And where do scientific and artistic expression fall in Breyer's hierarchy of speech categories? He doesn't say. It is especially easy to imagine restrictions on freedom of scientific inquiry that would be more destructive of the nation's power and prosperity than restrictions on political expression. Perhaps, other things being equal, restrictions on political speech *are* more serious than restrictions on other speech because they are more difficult to remove by the political process; but other things are rarely equal.

Breyer does not discuss the particulars of campaign finance reform. He is content to argue that placing some limits on contributions to political campaigns should not be held to infringe freedom of speech. He recognizes that to tell someone you can't spend \$1 million to buy a commercial extolling the candidate of your choice curtails expression; but he thinks that limiting the ability of the rich to spend unlimited amounts on campaign advertising is justified by its contribution to active liberty. Interpreted in the light of active liberty, the First Amendment is to be understood "as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process,"²⁰ and campaign finance laws have a "similar objective."²¹ They "seek to democratize the influence that money can bring to bear upon the electoral process, thereby building public confidence in that process, broadening the base of a candidate's meaningful financial support, and encouraging greater public participation."²² This is a little vague, but the basic idea seems to be that if there are no limitations on individual

18. *Id.* at 39.

19. *Id.* at 43-50.

20. *Id.* at 46.

21. *Id.*

22. *Id.* at 47.

campaign contributions, candidates will confine their fundraising to a handful of fat cats and the ordinary people will become disaffected—alienated from the political process—because they will assume that policy is shaped by the interests of the rich and that the people’s voice is not heard.

No evidence for this speculation is offered, and it is not very plausible. For one thing, the wealthy are not a monolith; they have competing interests. For another, they do not have the votes, and so their political advertisements are aimed at average people—and it is odd to think that the fewer political advertisements there are, the greater the amount of political participation there will be. That is like thinking that curtailing commercial advertising would result in more consumption. Furthermore, if some candidates court the wealthy, others will be spurred to raise money from the nonwealthy—something the Internet has made easier to do, as we learned in the last presidential election.

I am not suggesting that Breyer is wrong to think that campaign finance laws do not violate the First Amendment. If there is no evidence that they promote active liberty, there is also no evidence that they curtail free speech significantly. I am old fashioned in regarding the invalidation of a federal statute as a momentous step that should not be taken unless the unconstitutionality of the statute is clear, and the unconstitutionality of campaign finance laws is not clear. But active liberty does not advance the analysis because it does not yield an administrable standard. Breyer tells us that the proper standard for judging the constitutionality of a campaign finance law is one of “proportionality.”²³ The law’s “*negative* impact upon those primarily wealthier citizens who wish to engage in more electoral communication” is weighed against

its *positive* impact upon the public’s confidence in, and ability to communicate through, the electoral process. . . . Does the statute strike a reasonable balance between electoral speech-restricting and speech-enhancing consequences? Or does it instead impose restrictions on speech that are disproportionate when measured against their electoral and speech-related benefits, taking into account the kind, the importance, and the extent of those benefits, as well as the need for the restriction in order to secure them?²⁴

“The inquiry is complex,” writes Breyer.²⁵ No; it is indeterminate.

23. *Id.* at 49.

24. *Id.*

25. *Id.* at 50.

“Weighing imponderables” sounds like an oxymoron (since “imponderable” is from the Latin *ponderare*, meaning “to weigh”), but isn’t quite, because often a judge can know, even without quantification, that one interest is greater than another just as one can rank competing employees by their contributions to their firm without being able to quantify the contributions. (Ordinal ranking is simpler than cardinal.) In a negligence case, for example, neither the burden of precautions nor the probability and magnitude of the accident that will occur if the precautions are not taken may be quantified or even quantifiable, yet it may be apparent that there is a grave risk of a serious accident that could easily be averted (negligence), or that the cost of the precautions would be disproportionate to the slight risk of a minor accident (no negligence). But key terms in Breyer’s test, such as “impact upon the public’s confidence in, and ability to communicate through, the electoral process,” and the “importance” of a challenged law’s “electoral and speech-related benefits,” are so indefinite that they cannot guide decision.

The broader problem is that abstractions like “democracy” and “active liberty” are so vague and encompassing that they can be deployed on either side of most constitutional questions. A decision invalidating a statute on constitutional grounds may seem undemocratic, but even if it is not a democracy-enhancing decision (as reapportionment decisions are widely thought to be), it can be defended as an application of the “higher democracy” embodied in the Constitution. So originalists are democrats along with the loose constructionists. Likewise federalists, who want to honor the democratic choices made at the state and local level, and nationalists who want to honor the democratic choices made at the federal level. And are judges more democratic when they are giving legislators a helping hand (loose construction) or when they are sticking to the statutory language (strict construction)?

Breyer’s next set of illustrations of constitutional law as inflected by active liberty concerns federalism. At first glance this seems surprising. Federalism is especially remote from Athenian democracy. But Breyer argues plausibly that in a nation as large as the United States, a federal system is needed to give the citizenry a sense of full participation in political life, since issues at the state and local level are often both more important and more intelligible to people than issues involving the national government.²⁶ Yet his leading example of how federalism understood as a helpmeet to active liberty should shape constitutional doctrine is unconvincing. It concerns the question of whether the federal government should be allowed to compel state officials to assist in

26. *Id.* at 56-57.

enforcing federal law, as by requiring sheriffs to check on compliance with federal gun laws.²⁷ The Supreme Court has said no,²⁸ and Breyer disagrees, arguing that the federal government, if it can't force state officials to assist in administering federal programs, will need a larger bureaucracy and so will expand at the expense of state and local government. That is possible, but if the Court allowed commandeering, as Breyer wants, there would probably be more federal programs because some of their costs would have been shifted from the federal treasury to the states.

He challenges the recent decisions in which the Supreme Court has limited federal regulation by defining interstate commerce more narrowly than it had done since the 1930s.²⁹ His argument is that federal laws based on an expansive understanding of interstate commerce are democratic because “the public has participated in the legislative process at the national level.”³⁰ But his active liberty defense of federalism was that political participation at the national level is less participatory than that at the state or local level. It therefore is unclear why he criticizes the Court for expanding the scope for political participation at the state or local level by narrowing the scope for federal regulation.

Here as elsewhere in the book Breyer chides his colleagues for failing to consider the consequences of their decisions. He wants them to “ask about the consequences of decision-making on the active liberty that federalism seeks to further” and to “consider the practical effects on local democratic self-government of decisions interpreting the Constitution’s principles of federalism.”³¹ Breyer’s emphasis on consequences is consistent with the common view of him as a pragmatic judge. I think that there is considerable truth to this view. He is the author of two of the most important pragmatic decisions of recent years—his majority opinion in the *Booker* case, an opinion that saved the federal sentencing guidelines from what would have been, in my opinion, a senseless invalidation of them,³² and his balance-tipping concurring opinion in the Texas Ten Commandments case,³³ which spared us a national search-and-destroy mission against all displays of the Ten Commandments on

27. *Id.* at 58-63.

28. *Printz v. United States*, 521 U.S. 898, 935 (1997); *New York v. United States*, 505 U.S. 144, 149 (1992).

29. *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

30. BREYER, *supra* note 10, at 62.

31. *Id.* at 63.

32. *United States v. Booker*, 125 S. Ct. 738 (2005); see Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 56-57 (2005).

33. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868 (2005); see Posner, *supra* note 32, at 99-102.

public property. Not that he is a completely consistent pragmatist.³⁴ Nor does his pragmatism escape the objection that pragmatism, as actually practiced by judges, fails to cabin judicial discretion. The pragmatist eschews theory and focuses on consequences, which is fine by me, but if the consequences cannot be measured or even estimated but only conjectured, the judge is left at large. As with Breyer's rhetorical questions about the effects of campaign finance laws, his suggestion that judges "ask about the consequences of decision-making" for "active liberty" and "consider the practical effects" on "local democratic self-government" founders on the inability to measure the effects of a statute or judicial decision on "active liberty" or "local democratic self-government." When would one know that some law had impaired such elusive phenomena?

The chapter on federalism endorses an approach proposed many years ago by Alexander Bickel and more recently by Guido Calabresi for promoting "dialogue" between courts and legislatures:³⁵

Through a hard-look requirement, for example, the Court would communicate to Congress the precise constitutional difficulty the Court has with the statute at issue without resorting to permanent invalidation. Congress, in reenacting the statute, would revisit the matter and respond to the Court's concerns. A clear-statement rule would have the Court call upon Congress to provide an unambiguous articulation of the precise contours and reach of a given policy solution. Those doctrines would lead the Court to focus upon the thoroughness of the legislature's consideration of a matter.³⁶

This kind of coercive, one-sided dialogue would tie Congress in knots. Offered by Breyer as an olive branch to a democratically elected branch of government, it actually would expand judicial power at the expense of the legislature by invalidating legislation not because it clearly violated the Constitution but because it failed to meet the Court's criteria of thoroughness, clarity, and precision. "Thoroughness" is an especially unsatisfactory criterion of constitutionality.

Next follows a chapter on informational privacy. Breyer points out sensibly that new technologies have altered the landscape of privacy. Courts should

34. *Id.* at 96-99.

35. See, e.g., *Quill v. Vacco*, 80 F.3d 716, 738-43 (2d Cir. 1996) (Calabresi, J., concurring), *rev'd*, 521 U.S. 793 (1997); *United States v. Then*, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

36. BREYER, *supra* note 10, at 64-65.

hesitate to offer definitive answers when there is so much uncertainty and change. Instead the answers should be allowed to “bubble up from below” in a process “best described as a form of participatory democracy.”³⁷ He illustrates with a decision in which the Court held that a federal statute that forbade broadcasting a private cell phone conversation, which some unknown person had intercepted with a scanner and delivered to a radio station, violated the First Amendment.³⁸ Breyer wrote a concurring opinion that emphasized three features of the case and indicated that he might have voted differently had any of them been missing: The radio station had been an innocent recipient of the tape of the illegally intercepted conversation; the conversation, which was between two union officials, was a matter of public interest because it contained a threat (though it seems to have been just talk) of damaging property; and the conversation was about business rather than about intimate private matters, so the affront to privacy in broadcasting the conversation was less than it might have been.³⁹

All this has little to do with “participatory democracy,” or for that matter with new technologies. The decision subordinates the privacy of conversations to the interest of the media in disseminating matters that the public may be interested in learning about. The principal effect of the decision may be to discourage the use of analog cell phones for discussion of sensitive matters. (Digital cell phones are harder to eavesdrop on than wired telephones, and most cell phones being sold nowadays are digital.) The irony is that the media know well the value of privacy of communications for themselves—newspapers and other news media are desperate to avoid having to identify their reporters’ confidential sources—but do not respect the same privacy interests of the subjects of their stories. Decisions that fail to protect the privacy of communications may result in fewer communications, with a resulting loss to freedom of speech and so, one might have thought, to active liberty.

Breyer turns next to affirmative action and declares his agreement with certain “practical considerations”⁴⁰ that Justice O’Connor had mentioned in her opinion for the Court in *Grutter v. Bollinger*,⁴¹ the case that upheld the affirmative-action program of the Michigan Law School. Those considerations are that American businesses and the American military consider affirmative action important to their operations and that effective integration of a group

37. *Id.* at 70.

38. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

39. *Id.* at 535-41.

40. BREYER, *supra* note 10, at 81.

41. 539 U.S. 306 (2003).

into the nation's civic life requires that "the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."⁴² What O'Connor seems to me to be saying, though one must read between the lines to get it, is that black people in America, because they lag *so* badly behind whites, need a helping hand to raise them to a level at which they will feel that they are well integrated into American society rather than feeling like members of a disaffected underclass.

I am comfortable with that ground for affirmative action, remote as it is from anything to do with Athenian democracy. Athens thrived on exclusion. Most of the population consisted of women, slaves, and aliens, none of whom had the rights of citizens; citizens comprised no more than twenty, and perhaps as little as ten, percent of the adult population.⁴³ I would not labor this obvious point if Breyer had not sounded a Rousseauian note in the series of rhetorical questions by which he seeks to tie O'Connor's analysis to active liberty: "What are these arguments but an appeal to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*?"⁴⁴ Solidarity and fraternity, yes, and these were ideals of Athenian society as of the French Revolution, but they are not, as he implies, democratic ideals. Nondemocratic societies have frequently achieved high levels of solidarity.

Breyer turns next to statutory interpretation. He makes good arguments against strict construction and in favor of using statutory language and other clues to infer the statute's purpose and then using that purpose to guide interpretation. But he overlooks the strongest argument against the purposive approach: that it tends to override legislative compromises. (He also overlooks the related possibility, emphasized in Cass Sunstein's review, of multiple purposes that may conflict.⁴⁵) The purpose of a statute may be clear enough, but may have been blunted, as the bill made its way through the legislative mill to enactment, in order to obtain majority support. If so, then using the purpose to resolve ambiguities might give the supporters of the statute more than they could have achieved in the legislative process.⁴⁶ And that would be undemocratic.

42. *Id.* at 332; BREYER, *supra* note 10, at 82 (quoting this passage).

43. For various estimates, see M. I. FINLEY, *DEMOCRACY ANCIENT AND MODERN* 51 (rev. ed. 1996); A. W. GOMME, *THE POPULATION OF ATHENS IN THE FIFTH AND FOURTH CENTURIES B.C.* 26 tbl.1 (1967); and MOGENS HERMAN HANSEN, *THE ATHENIAN DEMOCRACY IN THE AGE OF DEMOSTHENES* 93-94 (J.A. Crook trans., 1991).

44. BREYER, *supra* note 10, at 82.

45. Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 *YALE L.J.* 1719 (2006).

46. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 276-77 (1990).

One begins to wonder whether Breyer's deepest commitment is to democracy or to good policies. There is a possibly revealing slip when he says that "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."⁴⁷ The slip is in referring to a singular legislator, as distinct from the legislature. Legislation is passed by cobbling together a majority of often fractious legislators representing different interests. Compromise is inescapable and often blunts single-minded purpose. The public is not a singularity either.

I am not suggesting that the purposive approach is wrong. Most of the gaps in statutes are unintentional, and there is no way to fill them sensibly without reflecting on what the statute seems to have been aimed at accomplishing. But this is the counsel of good sense rather than anything to do with the ideals of Athenian democracy—as is further shown by Breyer's proposal that the best way to implement the purposive approach is to adopt the "fiction" of the "reasonable legislator."⁴⁸ The interpreter asks not what the actual legislators thought, but what a "reasonable" legislator (again singular) thought. It is the judge who decides what is "reasonable," for remember that the reasonable legislator is a fiction. To suggest that this approach will "translate the popular will into sound policy"⁴⁹ is heroic even if one passes over the uncertainties buried in the idea of the "popular will." The concept of the reasonable legislator sounds more like a method of maximizing the judge's discretion in statutory interpretation.

What is true and important is that legislators may be quite happy for judges to impose "reasonable" interpretations on the legislative handiwork; otherwise the legislators will have to spend a lot of time amending. The "textualists" do legislatures no favor by insisting that statutes speak clearly; the conditions of the legislative process, and in particular the need to compromise in order to get statutes passed, makes it impossible for legislatures to promulgate unambiguous statutes. Judges clean up after legislators, which is fine, but it is an activity remote from anything to do with direct democracy. What Breyer should have said is that loose construction may make *representative* democracy work better.

47. BREYER, *supra* note 10, at 99.

48. *Id.* at 97-101. Breyer is borrowing here from HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

49. BREYER, *supra* note 10, at 101.

The concept of the reasonable legislator or “reasonable member of Congress”⁵⁰ recurs in Breyer’s chapter on administrative law. The focus is on *Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*,⁵¹ which held that when a regulatory statute is ambiguous, the court should defer to the regulatory agency’s statutory interpretation, if reasonable. The theory is that in such cases statutory interpretation, though a quintessentially judicial task, has been delegated by Congress to the agency that enforces the statute, subject to only light judicial review. Breyer proposes that to decide in a particular case whether this delegation has occurred, the judge should “ask whether, given the statutory aims and circumstances, a hypothetical member [i.e., a reasonable member of Congress] would likely have wanted judicial deference in this situation,”⁵² or, contrariwise, would have wanted to decide the question for himself. I do not think that’s the right question. By hypothesis, the statute is ambiguous. Congress did not decide for itself, or, if it did, we don’t know what its decision was. The court will have to resort to “reasonable member” interpretation. Realistically, the question is whether Congress should be taken to have wanted the courts to resolve the ambiguity or the regulatory agency. I don’t know how to answer such a question.

Toward the end of the book Breyer discusses the objection, raised by textualists such as his frequent sparring partner Justice Scalia, that the kind of loose-construction approach that Breyer champions “open[s] the door to subjectivity.”⁵³ Well, it does, and the only good answer to Scalia is that textualism or originalism proves in practice to be just as malleable as active liberty. Against the charge of subjectivity Breyer argues mainly that “a judge who emphasizes consequences, no less than any other, is aware of the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect.”⁵⁴ He offers only one example—of course, it is *Brown v. Board of Education*, which overruled *Plessy v. Ferguson*. This singular example is consistent with a reluctance to overrule constitutional decisions. But Breyer’s own practice as a Justice evinces no great reluctance to overrule; “[a]ware of” does not mean “committed to.” He joined *Lawrence v. Texas*,⁵⁵ which overruled *Bowers v. Hardwick*,⁵⁶ and he joined *Roper v. Simmons*,⁵⁷ which overruled

50. *Id.* at 106.

51. 467 U.S. 837 (1984).

52. BREYER, *supra* note 10, at 106.

53. *Id.* at 118.

54. *Id.* at 118–19.

55. 539 U.S. 558 (2003).

56. 478 U.S. 186 (1986).

Stanford v. Kentucky.⁵⁸ *Lawrence* and *Roper*, the first invalidating state statutes that criminalize homosexual sodomy, the second invalidating state statutes that authorize the execution of juvenile murderers, are notably bold “liberal” decisions. Neither decision was based on a consideration of consequences. The sodomy statutes struck down in *Lawrence* had virtually no consequences, since by the time the case was decided the statutes were almost never enforced. They had become little more than a statement of social disapproval of homosexuality, and the Court substituted its own, more “enlightened” moral view—which is fine with me, but not democratic. The psychological studies offered in *Roper* to show that juveniles lack adequate moral maturity to appreciate the significance of murdering someone were misunderstood by the Court.⁵⁹ What the studies actually showed was that there is no inflection point at age 18 at which murderers suddenly discover the moral significance of their acts. The Justices overlooked an empirical literature concerning the incremental deterrent effect of capital punishment.⁶⁰

Defending on consequentialist grounds his dissent in the school voucher case, *Zelman v. Simmons-Harris*,⁶¹ Breyer said that he “saw in the administration of huge grant programs for religious education the potential for religious strife.”⁶² This is a conjecture; and it ignores the fact that, unless a voucher program was permitted to go into effect, we would never be able to verify or falsify the conjecture. We would never learn whether, for example, the provision of additional money for private education (school voucher programs cannot constitutionally be limited to religious schools—that much at least is clear) would stimulate more secular competition for religious schools by providing more money for secular private schools. It is now more than five years since the Supreme Court upheld school vouchers, and there are no signs of the religious strife that Breyer predicted.

Zelman is the answer to someone who might wish to defend Breyer’s casual attitude toward assessing consequences on the ground that speculation is the best a judge can do. One thing the judge can do is allow social experiments to be conducted so that measurable consequences can be observed. Another is to deal responsibly with empirical evidence, as the Court failed to in *Roper*.

57. 543 U.S. 551 (2005).

58. 492 U.S. 361 (1989).

59. Posner, *supra* note 32, at 64–66.

60. *Id.* at 64 n.108 (citing this literature).

61. 536 U.S. 639, 717 (2002).

62. BREYER, *supra* note 10, at 121–22.

To foreclose social experiments adopted by elected legislatures is not only unpragmatic; it is undemocratic. It is true that Breyer votes more often than his conservative colleagues to uphold federal statutes, but his democratic credentials are placed in question by his joining such decisions as *Lawrence* and *Roper*, in which the Court struck down state legislation, and by his dissent in *Zelman*. He is also an enthusiastic citer of foreign constitutional decisions, and that is a form of elitism, for decisions by foreign courts are not events in American democracy. Even when the foreign nation is a democracy, its judges are not appointed or confirmed by elected U.S. officials, as our federal judges are, let alone elected by Americans, as most of our state judges are. And speaking of popular democracy, I think it unlikely that Breyer believes that judges should be elected or that he would support proposals for making it easier to amend the Constitution or for allowing the recall of federal judges by popular vote.

Breyer's methodology for deciding constitutional cases is thus not itself notably democratic, and it is also fuzzy, but this does not trouble him overmuch because he believes that "insistence upon clear rules can exact a high constitutional price."⁶³ He illustrates this contention with the question of whether "three strikes and you're out" laws, which can result in a criminal being sentenced to life even though his third crime was a minor one, such as a theft of golf clubs or videotapes, can be adjudged cruel and unusual punishment.⁶⁴ The Court thought not.⁶⁵ Breyer dissented. He acknowledges in his book that the position he advocated in his dissent "would leave the Court without a clear rule."⁶⁶ And here we get close to the heart of Breyer's strength (at times perhaps weakness) as a Justice. He is not a dogmatist, generating rules from some high-level theory. He is in search of workable results. His opinion in the sentencing guidelines case (*Booker*⁶⁷) was a triumph of ingenuity and political skill in forging a compromise that preserved a sentencing scheme far superior to one that in the name of the Sixth Amendment would give untrammelled sentencing discretion to trial judges whose knowledge of penology is inferior to that of the Sentencing Commission.

But clear rules do have value, and vague standards have drawbacks. I am thinking of Breyer's dissent in *Eldred v. Ashcroft*.⁶⁸ The Court upheld the

63. BREYER, *supra* note 10, at 128.

64. *Id.*

65. *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing v. California*, 538 U.S. 11 (2003).

66. BREYER, *supra* note 10, at 129.

67. *United States v. Booker*, 125 S. Ct. 738 (2005).

68. 537 U.S. 186 (2003).

constitutionality of the Sonny Bono Copyright Term Extension Act, which extended the copyright term from life plus fifty years to life plus seventy years, against a challenge that the extension violated the Constitution's Copyright and Patent Clause, which authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing *for limited Times to Authors and Inventors* the exclusive Right to their respective Writings and Discoveries."⁶⁹ What concerns me is not the merit of the constitutional challenge but Breyer's suggested standard: A statute extending a copyright term "lacks the constitutionally necessary rational support (1) if the significant benefits that it bestows are private, not public; (2) if it threatens seriously to undermine the expressive values that the Copyright Clause embodies; and (3) if it cannot find justification in any significant Clause-related objective."⁷⁰ This standard leaves up in the air how a judge is to decide whether a copyright term is too long.

Although Breyer is the Justice most knowledgeable about intellectual property in general and copyright in particular, his dissent in *Eldred* attracted no support from his colleagues; Justice Stevens, the other dissenter, did not join Breyer's dissent.⁷¹ Breyer has confessed his inability to persuade his colleagues to his views about economic regulation,⁷² another field in which, like intellectual property, he has greater expert knowledge than his colleagues. He attributes his inability in part to his colleagues' preference for "bright-line rules" in the law, which he thinks difficult to reconcile with economic reasoning because "[e]conomics often concerns gradations, with consequences that flow from a little more or a little less. . . . I tend to disfavor absolute legal lines. Life is normally too complex for absolute rules."⁷³

Justice Breyer is fluent in French. So perhaps he won't take offense if I call him a *bricoleur*, defined by *Wikipedia* as "a person who creates things from scratch, is creative and resourceful: a person who collects information and things and then puts them together in a way that they were not originally designed to do."⁷⁴ The "information and things" that Breyer has assembled to construct an approach to constitutional and statutory interpretation includes

69. U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

70. 537 U.S. at 245 (Breyer, J., dissenting).

71. 537 U.S. at 222 (Stevens, J., dissenting).

72. Stephen Breyer, *Economic Reasoning and Judicial Review*, AEI-Brookings Joint Center 2003 Distinguished Lecture 2 (Dec. 4, 2004), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=840>. What is particularly notable about this essay, and very welcome to me, is Breyer's contention that economic reasoning should play a larger, perhaps a dominant, role in decisions involving economic regulation.

73. *Id.* at 6-7.

74. *Bricolage*, in *Wikipedia*, <http://en.wikipedia.org/wiki/Bricolage> (last visited Dec. 7, 2005).

not only Athenian direct democracy and modern American pragmatism, but also Ely's "representation-reinforcing" theory of constitutional adjudication,⁷⁵ Henry Hart's "reasonable legislator" theory of statutory interpretation, Ronald Dworkin's theory (related to Hart's) that constitutional and statutory provisions should be so interpreted as to make them the best possible statements of political morality,⁷⁶ economic analysis, and appropriate deference to the conventional legal materials of precedent and statutory text.⁷⁷ The *bricolage* is as ingenious as it is complex, but the curious consequence of such eclecticism is that it puts the judge in approximately the position he would occupy if he had no constitutional theory. For couldn't Justice Breyer pull a stick out of his bundle to justify any decision that he wanted to reach? It's not as if the sticks have different weights; each is available to tip the balance in a particular case. Breyer has articulated an approach that appears to be loose enough to accommodate any result that a judge might want to reach for reasons the judge might be unwilling to acknowledge publicly, such as a visceral dislike for capital punishment, abortion, affirmative action, or religion.

But the book is so short (barely 40,000 words) and covers so much ground that the possibility cannot be excluded that Breyer has in reserve, as it were, effective responses to the criticisms I have made. Maybe the book is better understood as a manifesto, intended to reach a larger audience than normally attends works of constitutional theory, than as a work of patient scholarship addressed to academic fustians and nitpickers. The character of the book may also reflect a tension between the way Breyer thinks and judges, on the one hand, and the genre requirements of constitutional theory. He is not a top-down theorist. Active liberty is not a new algorithm for generating "objective" judicial decisions. It is not historically accurate. It is the name he has given to his own, eclectic collection of policy preferences. Whether you agree with his approach is likely to depend on whether you agree with those preferences. This is not said in criticism. It is equally true of Breyer's antagonists, and of his and their predecessors on the Supreme Court stretching back to John Marshall, or for that matter to John Jay.

The idea that conservative Justices do not legislate from the bench is rhetoric rather than reality. It is seductive rhetoric; it may have seduced Justice Breyer, who insists that he doesn't legislate from the bench either, that he is the better originalist because he grasps the democratic character of the

75. See ELY, *supra* note 15.

76. See RONALD DWORIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996); ELY, *supra* note 15.

77. Peter Berkowitz, *Democratizing the Constitution*, POL'Y REV., Dec. 2005/Jan. 2006, at 90 (reviewing BREYER, *supra* note 10).

Constitution. At this level, the debate between conservatives like Scalia and liberals like Breyer is a semantic fog. Because of the vagueness of the Constitution's key provisions and the strong emotions that constitutional cases arouse (in part because of the large, well-nigh irreversible consequences of the decisions in some of these cases), Justices are forced back on personal elements, which include ideology as shaped by temperament, experience, and deep-seated beliefs, in deciding how to vote. It has always been thus and always will be. Lawyers will want to read Justice Breyer's engaging book not to find the Holy Grail of constitutional and statutory interpretation but to learn about Breyer's values, about what makes him tick as a Supreme Court Justice, and about how therefore to craft arguments that will have a chance of persuading him.

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