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Justice Breyer's Democratic Pragmatism

The pragmatic method is primarily a method of settling metaphysical disputes that otherwise might be interminable. Is the world one or many?— fated or free?—material or spiritual?—here are notions either of which may or may not hold good of the world; and disputes over such notions are unending. The pragmatic method in such cases is to try to interpret each notion by tracing its respective practical consequences. What difference would it practically make to any one if this notion rather than that notion were true?[1]

A Concise Statement of the Task
In interpreting a statute a court should:
Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; . . . .
It should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.[2]

I. PRAGMATISM, CONSEQUENCES, AND ACTIVE LIBERTY

As a law professor at Harvard Law School, Stephen Breyer specialized in administrative law. His important work in that field was marked above all by its unmistakably pragmatic foundations.[3] In an influential book, Breyer emphasized that regulatory problems were "mismatched" to regulatory tools;

1. WILLIAM JAMES, *What Pragmatism Means*, *in* PRAGMATISM 43, 45 (1907).

2. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374, 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (outline formatting omitted).

3. *See, e.g.*, STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

he urged that an understanding of the particular problem that justified regulation would help in the selection of the right tool.[4] One of Breyer's major innovations lay in an insistence on evaluating traditional doctrines not in a vacuum, but in light of the concrete effects of regulation on the real world.[5] Hence Breyer argued for a close connection between administrative law and regulatory policy.[6] Continuing his pragmatic orientation, he also emphasized the importance of better priority-setting in regulation—of finding mechanisms to ensure that resources are devoted to large problems rather than small ones.[7]

While some of Breyer's work touched on the separation of powers,[8] constitutional law was not his field. But as a member of the Supreme Court, Breyer has slowly been developing a distinctive approach of his own, one that also has a pragmatic dimension, and that can be seen as directly responsive to his colleague, Justice Antonin Scalia, and to Scalia's embrace of "originalism": the view that the Constitution should be interpreted to mean what it originally meant.[9]

A. Three Claims

This book announces and develops Breyer's theory. Its most distinctive feature is its effort to connect three seemingly disparate claims. The first is an insistence that judicial review can and should be undertaken with close reference to active liberty and to democratic goals, a point with clear links to the work of John Hart Ely.[10] The second is an emphasis on the centrality of "purposes" to legal interpretation, a point rooted in the great legal process materials of Henry Hart and Albert Sacks and, in particular, their brilliant note on statutory interpretation.[11] The third is a claim about the need to evaluate theories of legal interpretation with close reference to their consequences, a

4. *See id.* at 191.

5. *See, e.g.*, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); BREYER, *supra* note 3.

6. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY (5th ed. 2002). Full disclosure: I am among the "al." now working on the book, and hence Breyer and I are, in a formal sense, coauthors. But Breyer, otherwise occupied, has not worked on the book since I have joined it.

7. *See* BREYER, *supra* note 5, at 10-11.

8. *See, e.g.*, Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984).

9. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

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

11. See HART & SACKS, *supra* note 2, at 1374-80.

point whose foundations can be found in American pragmatism. In Breyer's view, any theory of interpretation must be assessed by taking close account of its actual effects.

Much of the interest and originality of Breyer's book lies in its brisk but ambitious effort to integrate these three claims. In my view, Breyer is right to see a connection between self-government and constitutional interpretation, and also to emphasize that a theory of interpretation must be attentive to its consequences. No such theory can be evaluated or defended without reference to its effects. In addition, Breyer argues convincingly for an approach to constitutional law that generally respects democratic prerogatives and also embodies a form of modesty, in the form of narrow rulings on the most difficult questions. But I shall raise two sets of questions about his analysis.

The first set involves the difficulties of purposivism. Those who emphasize active liberty and democratic self-government might well reject Breyer's purposive approach to interpretation, including Breyer's purposive reading of the Constitution. They might embrace textualism on the ground that text represents the best evidence of the public's will; they might prefer canons of construction; they might even embrace the view, associated with James Bradley Thayer, that courts should uphold legislation unless it is clearly beyond constitutional bounds.[12] The second set of questions involves the possibility that consequentialism, properly understood, might lead in directions that Breyer rejects. Those who believe in the importance of consequences might well be drawn to an approach very different from Breyer's. If consequences matter, textualism and Thayerism are not off the table.

Breyer's specific conclusions are unfailingly reasonable; the question is whether his general commitments are enough to justify those conclusions. I shall suggest that they are not. Breyer is correct to reject originalism in constitutional law, and in that domain his own approach, embracing both minimalism and restraint, has a great deal to offer. But it must be developed in a way that devotes more care to the problem of judicial fallibility, and I shall offer some notes on how the theory might be so developed. In the end, I suggest that while purposivism has its uses, Breyer underrates the arguments for starting with the text, and undervalues the role of canons of construction in statutory interpretation.

12. *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893)

B. Theory and Practice

Breyer's organizing theme is "active liberty," which he associates with the right of self-governance. It is noteworthy that in his own judicial work, Breyer is plausibly seen as the most consistently democratic member of the Rehnquist Court: Among its nine members, he had the highest percentage of votes to uphold acts of Congress[13] and also to defer to the decisions of the executive branch.[14] And indeed, a great deal of his book is a plea for judicial caution and deference.[15] But Breyer does not mean to say that courts should uphold legislation whenever the Constitution is unclear.[16] Like Ely, Breyer does not rule out the view that courts should take an aggressive role in some areas, above all in order to protect democratic governance.[17]

His short book comes in three parts. The first builds on Benjamin Constant's famous distinction between the liberty of the ancients and the liberty of the moderns.[18] The liberty of the ancients involves "active liberty"—the right to share in the exercise of sovereign power. Quoting Constant, Breyer refers to the hope that the sharing of that power would "ennoble[]" the people's "thoughts [and] establish[] among them a kind of intellectual equality which forms the glory and the power of a people."[19] But Constant also prized negative liberty, meaning individual "independence" from government authority.[20] As Breyer describes Constant's view, which he firmly endorses, it is necessary to have both forms of freedom, and thus "to combine the two together."[21]

Breyer believes that the Framers of the Constitution did exactly that. His special emphasis is on what Constant called "an active and constant

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13. Lori A. Ringhand, Judicial Activism and the Rehnquist Court (Sept. 7, 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=765445.

14. *See* Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. (forthcoming 2006).

15. Thus, for example, Breyer favors a deferential approach to campaign finance restrictions and affirmative action programs. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 48-49, 82-83 (2005). He also makes a plea for judicial caution in the domain of privacy. *Id.* at 66-74.

16. This position is defended in Thayer, *supra* note 12.

17. BREYER, *supra* note 15, at 11-12.

18. *Id.* at 3-7. The best discussion remains STEPHEN HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM (1984).

19. BREYER, *supra* note 15, at 4.

20. *Id.* at 5.

21. *Id.* at 5. It is not clear that this is, in fact, an adequate account of Constant's view.

participation in public power."[22] That form of participation includes voting, town meetings, and the like; but it also requires that citizens receive information and education to develop their capacity for effective self-governance. In Breyer's view, the citizens of post-Revolutionary America insisted on highly democratic forms of state government, promoting popular control. Breyer is aware of the highly ambivalent experiences of post-Revolutionary governments; he knows that some commentators have rejected the view that the Constitution is a democratic document.[23] Nonetheless, he believes that the Framers of the Constitution accepted the deepest aspirations of the American Revolution, creating a framework with a basically "democratic objective."[24]

In Breyer's account, the Warren Court appreciated active liberty and it attempted to make that form of liberty more real for all Americans.[25] By contrast, the Rehnquist Court may have pushed the pendulum "too far" back in the other direction.[26] In short, Breyer believes that an appreciation of active liberty has concrete implications for a wide range of modern disputes.

The second part of his book traces those implications. He begins with free speech. An obvious question is whether the Court should be hostile or receptive to campaign finance reform. With his eye directly on the democratic ball, Breyer suggests that if we focus on the "the Constitution's general democratic objective . . . 'participatory self-government,'"[27] then we will be receptive to restrictions on campaign contributions. A central reason is that such restrictions "seek to democratize the influence that money can bring to bear upon the electoral process."[28] In the same vein, Breyer insists that the free speech principle, seen in terms of active liberty, gives special protection to political speech, and significantly less protection to commercial advertising. He criticizes his colleagues on the Court for protecting advertising with the aggressiveness that they have shown in recent years. His purposive

22. *Id.* at 4; *see also* Frank I. Michelman, *Politics and Values or What's Really Wrong with Ratinoality Review*, 13 CREIGHTON L. REV. 487 (1979) (discussing the ideal of active liberty, in the form of engagement in public affairs).

23. *See, e.g.*, CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

24. BREYER, *supra* note 15, at 9.

25. *Id.* at 11.

26. *Id.*

27. *Id.* at 46.

28. *Id.* at 47.

interpretation of freedom of speech thus emphasizes democratic self-government above all.[29]

Affirmative action might seem to have little to do with active liberty. At first glance, it poses a conflict between the ideal of color-blindness and what Breyer calls a "'narrowly purposive'"[30] understanding of the Equal Protection Clause, one that emphasizes the historical mistreatment of African-Americans. Directly disagreeing with some of his colleagues,[31] Breyer endorses the narrowly purposive approach. But he also contends that in permitting affirmative action at educational institutions, the Court has been centrally concerned with democratic self-government. The reason, pragmatic in character, is that "some form of affirmative action" is "necessary to maintain a well-functioning participatory democracy."[32] Breyer points to the Court's emphasis on the role of broad access to education in "'sustaining our political and cultural heritage'" and in promoting diverse leadership.[33] In Breyer's view, it should be no surprise that the Court selected an interpretation of the Equal Protection Clause that would, as a pragmatic matter, promote rather than undermine the operation of democracy. In short, a serious problem with the attack on affirmative action is that it would produce intolerable consequences.

With respect to privacy, Breyer's emphasis is on the novelty of new technologies and the rise of unanticipated questions about how to balance law enforcement needs against the interest in keeping personal information private. Because of the difficulty of those problems, Breyer argues, on pragmatic grounds, for "a special degree of judicial modesty and caution."[34] Hence his plea is for narrow, cautious judicial rulings that do not lay out long-term solutions. In Breyer's view, such rulings serve active liberty, because a narrow ruling is unlikely to "interfere with any ongoing democratic policy debate."[35] His argument here is important because other members of the Court, most notably Scalia, have objected to narrow rulings on the ground that they leave too much uncertainty for the future.[36]

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29. In this way he seems to follow ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (photo. reprint 2000) (1948). CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993), is in the same general vein.

30. BREYER, *supra* note 15, at 80.

31. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part and dissenting in part).

32. BREYER, *supra* note 15, at 82.

33. *Id.* (quoting *Grutter*, 539 U.S. at 330-31).

34. *Id.* at 71.

35. *Id.* at 73.

36. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

Some of the most noteworthy decisions of the Rehnquist Court attempted to limit the power of Congress.[37] For example, the Court struck down the Violence Against Women Act as beyond congressional authority under the Commerce Clause.[38] It also announced an "anti-commandeering" principle, one that forbids the national government from requiring state legislatures to enact laws.[39] In the abstract, those decisions seem to promote active liberty, because they decrease the authority of the more remote national government, and because they promote participation and self-government at the local level. Breyer is no critic of federalism or defender of centralized government. Nonetheless, he strongly objects to the Court's recent federalism decisions. Breyer's special target is the anti-commandeering principle. Speaking in heavily pragmatic terms, Breyer thinks that this prohibition prevents valuable national initiatives to protect against terrorism, environmental degradation, and natural disasters—initiatives in which, for example, the national government requires state officials to ensure compliance with federal standards.[40]

Breyer also contends that an understanding of active liberty can inform more technical debates. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[41] for example, the Court announced a principle of deference to administrative interpretations of law. The Court ruled that in the face of statutory ambiguity, courts should defer to agency interpretations so long as they are reasonable. Breyer believes that this approach is too simple and too crude, in a way that disserves democracy itself.[42] When the agency has solved an interstitial question, Breyer believes that judicial deference is appropriate, because deference is what a reasonable legislature would want. But on "question[s] of national importance,"[43] involving the fundamental reach or nature of the statute, Breyer thinks that a reasonable legislature would not want courts to accept the agency's interpretation. He thus urges that courts should take a firmer hand in reviewing agency judgments on fundamental matters than in reviewing more routine matters. Here too he opposes Justice

37. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000).

38. *Id.*

39. New York v. United States, 505 U.S. 144 (1992).

40. BREYER, *supra* note 15, at 59-61.

41. 467 U.S. 837 (1984).

42. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986); *see also* Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. (forthcoming 2006).

43. BREYER, *supra* note 15, at 107.

Scalia, who endorses a broad reading of *Chevron*, one that would generally defer to agency interpretations of law.[44]

There is a larger interpretive question in the background. Should courts rely only on a statute's literal text, or should they place an emphasis instead on statutory purpose and congressional intent? Sharply disagreeing with the more textually oriented Scalia,[45] and again emphasizing pragmatic considerations, Breyer favors purpose and intent. Here he is evidently influenced by the famous legal process materials, compiled by Henry Hart and Albert Sacks. As I have noted, those materials place "purpose" front and center, and they also insist that courts should assume that legislators are "reasonable persons pursuing reasonable purposes reasonably."[46] In the same vein, Breyer emphasizes that a purposive approach asks courts to consider the goals of "the 'reasonable Member of Congress'—a legal fiction that applies, for example, even when Congress did not in fact consider a particular problem."[47]

In defending this approach, Breyer speaks in thoroughly pragmatic terms, emphasizing the beneficial consequences of purposivism. Breyer thinks that, as compared with a single-minded focus on literal text, his approach will tend to make the law more sensible, almost by definition. He also contends that it "helps to implement the public's will and is therefore consistent with the Constitution's democratic purpose."[48] Breyer concludes that an emphasis on legislative purpose "means that laws will work better for the people they are presently meant to affect. Law is tied to life, and a failure to understand how a statute is so tied can undermine the very human activity that the law seeks to benefit."[49] Thus, Breyer directly links active liberty, purposive approaches to law, and an emphasis on consequences.

The third part of Breyer's book tackles the broadest questions of interpretive theory and directly engages Scalia's contrary view. Breyer emphasizes that he means to draw attention to purposes and consequences above all. Constitutional provisions, he thinks, have "certain basic purposes,"[50] and they should be understood in light of those purposes and the broader democratic goals that infuse the Constitution as a whole. In addition,

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44. *See* United States v. Mead Corp., 533 U.S. 218, 239 (2001) (Scalia, J., dissenting); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

45. *See* SCALIA, *supra* note 9.

46. *See* HART & SACKS, *supra* note 2, at 1378.

47. BREYER, *supra* note 15, at 88. See the powerful note emphasizing this point and what the authors saw as the centrality of purpose, in HART & SACKS, *supra* note 2, at 1374-80.

48. BREYER, *supra* note 15, at 99.

49. *Id.* at 100.

50. *Id.* at 115.

consequences are "an important yardstick to measure a given interpretation's faithfulness to these democratic purposes."[51] Breyer is fully aware that many people, including his colleagues Scalia and Thomas, are drawn to "textualism" and its close cousin "originalism"—approaches that favor close attention to the meaning of legal terms at the time they were enacted. Scalia, Thomas, and their followers are likely to think that Breyer's approach is an invitation for open-ended judicial lawmaking in a way that compromises his own democratic aspirations.[52] But he offers several responses.

First, originalist judges claim to follow history, but they cannot easily demonstrate that history in fact favors their preferred method. The Constitution does not say that it should be interpreted to mean what it meant when it was ratified. The document itself enshrines no particular theory of interpretation; it does not mandate originalism. And if originalism cannot be defended by reference to the intentions and understandings of the Framers, Breyer asks, in what way can it be defended–"other than in an appeal to *consequences*?"[53] He points out that the most sophisticated originalists ultimately argue that their approach will have good consequences—by, for example, stabilizing the law and deterring judges from imposing their own views. Even Breyer's originalist adversaries are "consequentialist in this important sense."[54] They are not consequentialists in particular cases, but they adopt, and defend, their preferred approach on consequentialist grounds.[55]

Breyer's second argument is that his own approach does not leave courts at sea, for he, too, insists that judges must take account of "the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect."[56] Those who focus on consequences will not favor frequent or dramatic legal change, simply because stability is important. In any case, textualism and originalism cannot avoid the problem of judicial discretion. "Which historical account shall we use? Which tradition shall we apply?"[57] In the end, Breyer

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51. *Id*.

52. *See* SCALIA, *supra* note 9.

53. BREYER, *supra* note 15, at 118.

54. *Id*.

55. *See id*; *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2004); Posting of Randy Barnett to Legal Affairs Debate Club, http://legalaffairs.org/webexclusive/debateclub_cie0505.msp#Tuesday (May 3, 2005, 13:43 EST) ("Given a sufficiently good constitutional text, originalists maintain that better results will be reached overall if government officials—including judges—must stick to the original meaning rather than empowering them to trump that meaning with one that they prefer.").

56. BREYER, *supra* note 15, at 118-19.

57. *Id.* at 127.

contends that the real problem with textualism and originalism is that they "may themselves produce seriously harmful consequences–outweighing whatever risks of subjectivity or uncertainty are inherent in other approaches."[58] His pragmatic goal is to "help Americans remain true to the past while better resolving their contemporary problems of government through law,"[59] and he believes that his kind of purposive approach, rooted in active liberty, is most likely to promote that goal.

II. DEMOCRACY AND INTERPRETATION

This is a brisk, lucid, and energetic book, written with conviction and offering a central argument that is at once provocative and appealing. It is unusual for a member of the Supreme Court to attempt to set out a general approach to his job; Breyer's effort must be ranked among the most impressive such efforts in the nation's long history. His attack on originalism is powerful and convincing. And in defending a pragmatic, purposive-oriented alternative, Breyer writes in a way that is unfailingly civil and generous to those who disagree with him, providing a model for how respectful argument might occur, even in a domain that is intensely polarized.

But there are two general problems with his approach. The first stems from the difficulty of characterizing purposes. Texts rarely announce their own purposes; the same is true of the Constitution itself. When Breyer asks judges to identify the purposes of reasonable legislators, he is inviting a degree of judicial discretion in the judgment of what purposes are reasonable. The second problem involves consequences, viewed through the lens of active liberty. It is possible both to use active liberty as the basis for evaluating consequences and to think that courts do best if they follow the ordinary meaning of statutory texts, or defer to agency interpretations on the most important questions, or uphold legislation unless it is plainly unconstitutional. Many different approaches, not only Breyer's, can march under the pragmatic banner.[60]

Breyer's own approach requires supplemental assumptions, involving not only active liberty but a degree of confidence in judicial capacities, and therefore a willingness to use standards rather than rules in the domain of

58. *Id.* at 129.

59. *Id.* at 111.

60. *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (forthcoming 2006) (manuscript at 254, on file with author) (defending a form of Thayerism on pragmatic grounds); Scalia, *supra* note 9 (making pragmatic arguments on behalf of originalism).

judicial interpretation.[61] I believe that in constitutional law, Breyer often points in the right directions. He does so by emphasizing the value of judicial deference to democratic judgments;[62] by showing some enthusiasm for judicial minimalism, in the form of narrow decisions that leave the hardest questions undecided;[63] and by suggesting that a stronger judicial role is most defensible when democratic processes are functioning poorly.[64] For statutes, however, an emphasis on text, rather than purpose, is the right place to start; Breyer gives too little attention to the strongest arguments for textualism. In addition, the best theory of statutory interpretation would give less attention to purpose and more attention to applicable canons of construction, including those canons that counsel avoidance of constitutional questions and deference to the views of administrative agencies.

A. Originalism and Consequences

Breyer's most general claim is that any approach to legal interpretation must be defended in a way that pays close attention to its consequences. Despite its simplicity, this pragmatic point continues to be widely ignored. It has particular implications for the analysis of originalism. One of the strengths of Breyer's book is his brief but powerful criticism of that approach to constitutional law.

There is a lively historical dispute about whether those who ratified the Constitution meant to hold posterity to their specific views.[65] If the ratifiers did not want to bind posterity to their particular understandings, originalism stands defeated on its own premises: The original understanding may have been that the original understanding is not binding. Breyer properly notes this possibility.[66] But suppose that the ratifiers had no clear view on that question, or even that the better understanding is that they did, in fact, want to hold

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61. In fact, many of the disagreements between Breyer and Scalia involve a debate over standards versus rules, with Breyer typically opting for standards and Scalia for rules. *See, e.g.*, Sunstein, *supra* note 42.

62. See, for example, Breyer's treatment of commercial advertising, BREYER, *supra* note 15, at 50-55.

63. *See id.* at 66-74.

64. *See id.* at 11.

65. *See, e.g.*, Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

66. BREYER, *supra* note 15, at 117.

posterity to their understandings.[67] Even if so, it is up to us, and not to them, to decide whether to follow those views. It would be circular and therefore unhelpful to defend reliance on the ratifiers' specific views on the ground that the ratifiers wanted us to respect their specific views.

Breyer is therefore right to suggest that originalism requires some justification in nonhistorical terms; and consequences are surely relevant to any such effort at justification.[68] Suppose that the consequence of originalism would be to threaten many contemporary rights and understandings. If so, why should we accept it?[69] Originalism would authorize states to discriminate on the basis of sex, which the Equal Protection Clause was not originally understood to forbid. Originalism might well mean that *Brown v. Board of Education* was wrongly decided;[70] it would probably mean that the national government could discriminate on the basis of race and sex, because the Equal Protection Clause applies only to the states. Many originalists firmly believe that their approach would require courts to invalidate a great deal of legislation – by, for example, striking down independent regulatory agencies,[71] forbidding Congress to delegate broad discretion to regulatory agencies,[72] and imposing new limitations on national power under the Commerce Clause.[73]

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67. *See* Nelson, *supra* note 65.

68. Of course any evaluation of consequences must be value-laden, a point taken up below. *See infra* Section II.C.

69. *See generally* Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990) (discussing originalism).

70. The reason is that it is not easy to find, in the Fourteenth Amendment, a specific understanding that any relevant clause banned segregation. *See* John P. Frank & Robert F. Munro, *The Original Understanding of "Equal Protection of the Laws,"* 1972 WASH. U. L.Q. 421, 460-62 (discussing the variety of views of segregation in the Reconstruction era); *see also* RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 123-25 (1977) (noting support for segregation among framers of the Fourteenth Amendment); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 11-56 (1955). For a counterargument, see Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995). McConnell impressively shows that many members of Congress believed that under Section 5 of the Fourteenth Amendment, Congress had the authority to abolish segregation. But it is one thing to say that many members of Congress so believed, but never enacted legislation to that effect; it is quite another thing to say that the Fourteenth Amendment was understood to create a self-executing, judicially enforceable ban on segregation.

71. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994).

72. *See, e.g.*, Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate To Be Constitutional?*, 53 FED. COMM. L.J. 427 (2001).

73. *See, e.g.*, Gonzales v. Raich, 125 S.Ct. 2195, 2229 (2005) (Thomas, J., dissenting); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESERVATION OF LIBERTY 274-318

Originalism would likely eliminate the right of privacy altogether, simply because there is no such right in the document, and it is hard to show that the original understanding of any relevant provision supports the privacy right.

I do not insist that the originalist method necessarily compels all of these conclusions. And even if originalism does have these consequences, some originalists candidly acknowledge that established precedent has its claims, and that it must sometimes be respected even if it deviates from the original understanding. Justice Scalia, for example, says that he might well be a "faint-hearted" originalist[74] because he is willing to follow precedent even when he believes that it is wrong in principle.[75] My only point is that Breyer is entirely correct to note that the document itself does not require originalism, to argue that consequences matter to the choice of a theory of interpretation, and to insist that if we care about consequences, the argument for originalism does not look very plausible.[76]

B. Second-Order Pragmatism? Purposes and Fallible Judges

Breyer generally favors purposive approaches to legal texts. But he says too little about the difficulties that judges face in describing purposes. We can describe this as a pragmatic objection to his approach—an objection that might argue in favor of second-order pragmatism, that is, a form of pragmatism that rejects an inquiry into purpose, or any case-by-case approach, because it is alert to judicial fallibility.[77] If the inquiry into purposes produces indeterminacy, bias, or error, the argument for purposivism is undermined. Gertrude Stein's famous complaint about Oakland—"there is no there there"[78]—may also be true of legislative purposes. Let us begin with some technical issues.

(2004); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Douglas H. Ginsburg, *On Constitutionalism*, 2002-2003 CATO SUP. CT. REV. 7.

74. Scalia, *supra* note 9, at 864.

75. Scalia has been quoted as saying that Thomas "'does not believe in *stare decisis*, period.'" Scalia explained, "'If a constitutional line of authority is wrong, [Thomas] would say let's get it right. I wouldn't do that.'" *See* KEN FOSKETT, JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS 281-82 (2004).

76. There are other problems, including the arguable incoherence of the originalist enterprise. *See* CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 68-71 (2005).

77. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 886 (2003).

78. GERTRUIDE STEIN, EVERYBODY'S AUTOBIOGRAPHY 239 (1937), *available at* http://www.bartleby.com/73/148.html.

Recall that Breyer argues against a broad reading of *Chevron*; he believes that for major questions courts should make an independent assessment of statutory meaning, and not defer to reasonable interpretations by the executive branch. But why? His answer appears to be that reasonable legislators would want courts to assume an independent role.[79] But is this so clear? Assume that a statute–say, the Endangered Species Act, or the Food and Drug Act–contains an ambiguous provision on an issue of national importance. Might not reasonable legislators want a specialized, accountable agency to resolve the ambiguity, even on major questions? Resolution of statutory ambiguities often calls for a difficult policy judgment, and reasonable legislatures might not want difficult policy judgments to be made by federal courts.[80]

On consequentialist grounds, consider the following fact: In reviewing agency interpretations of law, Republican appointees to the federal bench show a definite tilt in a conservative direction, and Democratic appointees show a definite tilt in a liberal direction.[81] Is it so clear that a reasonable legislator would want statutory ambiguities to be resolved in accordance with whatever tilt can be found on the relevant reviewing court? Or consider an additional fact: A more refined approach to *Chevron*, of the sort that Breyer celebrates, has produced a great deal of confusion in the lower courts.[82] Does pragmatism support that outcome?

In short, it is not clear that in this context Breyer has properly identified the (hypothetical, constructed) instructions of a reasonable legislator. But the important point is far more general. In interpreting statutes, Breyer follows Hart and Sacks in arguing in favor of close attention to purposes, understood as the objectives of a "reasonable legislator." Sometimes this approach is indeed useful, especially when there is a consensus on what reasonableness requires.[83] But Hart and Sacks, writing in the complacent, consensus-pervaded legal culture of the 1950s, downplayed the possibility that disagreement, highly ideological in nature, would break out on that question. After the 1960s, when the ideological disagreements became omnipresent in the legal culture, the purposive approach favored by Hart and Sacks came under severe pressure. In

79. BREYER, *supra* note 15, at 106.

80. This argument is spelled out in some detail in Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power To Interpret the Law*, 115 YALE L.J. (forthcoming 2006).

81. *See id.*; Sunstein, *supra* note 14.

82. *See* Adrian Vermeule, *Introduction:* Mead *in the Trenches*, 71 GEO. WASH. L. REV. 347 (2003); Lisa Schultze Bressman, *How* Mead *Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443 (2006).

83. Examples are given in Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848-61 (1992).

my view, the appeal of textualism is best understood as a product of the post-1960s awareness that the search for purposes is often driven by value judgments of one or another kind, and a belief that those judgments ought not to be made by unelected judges.[84]

In the current period, it should be obvious that different judges may well disagree about what a reasonable legislator would like to do. Imagine that a law condemns "discrimination on the basis of sex," and suppose that a state adopts a height and weight requirement for police officers, one that excludes far more women than men. In deciding whether this requirement is "discrimination," how shall judges characterize the purpose of a reasonable legislator? It is inevitable that courts will see their own preferred view as reasonable. Does that promote active liberty? Does pragmatism support a situation in which judges assess reasonableness by their own lights?

Unfortunately, the problem is common. Suppose that a statute imposes special punishment on those who "carry" a firearm in relation to a drug offense; does someone "carry" a firearm when he drives a car with a firearm in the glove compartment? Writing for the Court, Justice Breyer said "yes," emphasizing what he saw as the legislature's reasonable purpose—which, in his view, would make it senseless to distinguish between a firearm "carried" in a car and a firearm "carried" by hand in a bag.[85] But perhaps the legislature's reasonable purpose was to punish the unique dangers that come from a situation in which a firearm is "carried" (literally?) on the person. If so, a purposive definition of "carry" would not include transportation via automobile.

The general points are that laws rarely come with clear announcements of their purposes and that in hard cases any characterization requires some kind of evaluative judgment from courts. In such cases, purposive interpretation is not a matter of finding something; there is no "there" to find there. Suppose that an antidiscrimination statute is invoked against affirmative action programs.[86] Does the purpose of the ban on "discrimination" argue for, or against, such programs? It would be easy to characterize the purpose as the elimination of any consideration of race from the relevant domain; it would also be easy to characterize the purpose as the protection of traditionally disadvantaged groups.[87] If judges are asked to say what "reasonable" legislators

84. *See* SCALIA, *supra* note 9, at 16-18.

85. Muscarello v. United States, 524 U.S. 125, 132-33 (1998).

86. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).

87. *See* RONALD DWORKIN, *How To Read the Civil Rights Act*, *in* A MATTER OF PRINCIPLE 316 (1985).

would like to do, they are all too likely to say what they themselves would like to do.

Hart and Sacks, Breyer's predecessors, offer a powerful and largely sensible approach to statutory interpretation, but they devote too little attention to the problem of characterizing purpose. When courts choose one purpose over another (reasonable) candidate, they are actually attempting to put the relevant text in the best constructive light.[88] Of course they are selecting an interpretation that fits the text and context; if they were not doing that, they would not be engaging in interpretation at all. But when they select a reasonable purpose, they are choosing an approach that, by their own lights, makes the best sense. A judicial judgment on this count is hardly untethered—that would be a caricature—but it is a judicial judgment nonetheless.

Many textualists distrust the resort to purposes for this very reason. They want courts to hew closely to statutory language.[89] They think that judges have used common law approaches, including analogical reasoning, in domains where they do not belong.[90] And, indeed, the Hart and Sacks materials might well be understood as a product of an early confrontation between common law thinking and a system of law that is pervaded by statutory interventions. It is also possible to argue that an emphasis on the plain meaning of the text—which is what, after all, has been enacted—promotes democratic responsibility and also disciplines the judiciary by reducing the risk that judges will infuse texts with purposes of their own.

If purpose is being characterized in a way that defies the ordinary meaning of the text, these arguments for textualism have considerable pragmatic force. Indeed, textualism might easily be defended with reference to active liberty, and in two different ways. First, textualism promotes democratic government, by encouraging the legislature to make its instructions clear. Over time, a text-oriented judiciary might even promote more clarity and better accountability from legislatures, simply because legislators will know that text will be what matters. Second, textualism constrains judicial creation of "intentions" and "purposes" to push statutes in judicially preferred directions.[91] Suppose that

88. *See* RONALD DWORKIN, LAW'S EMPIRE 229 (1986).

89. *See* SCALIA, *supra* note 9, at 23-25.

90. *Id.* at 3-9.

91. Note in this regard the very different reaction of German and Italian judges to the emergence of fascism. German judges proceeded in a purposive fashion, abandoning text in favor of legislative goals (and consequences!), in a way that promoted injustice and even atrocity. *See* INGO MÜLLER, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH 80-81 (Deborah Lucas Schneider trans., 1991). By contrast, the Italian judges paid close attention to text and to plain meaning in a way that produced much better consequences. See Guido

when judges identify intentions or purposes, they are sometimes making their own evaluative judgments, and not following legislative will. If so, those concerned with active liberty, seeking to minimize the discretion of unelected judges, might want courts to follow text and to minimize the role of intentions and purposes.

To be sure, it is easy to overstate the constraints imposed by text, and this is a strong point for Breyer. When the text is ambiguous, or leaves gaps, textualism by hypothesis is inadequate, and some other interpretive tool must be invoked.[92] There is a serious risk that in hard cases, preferences are likely to matter for textualists as for everyone else.[93] My only suggestion is that Breyer pays too little attention to the risk that any judgments about reasonableness will be the judges' own, in a way that disserves democracy itself.

Breyer is correct to say that any theory of interpretation has to be defended in terms of its consequences. But for interpreting statutes, it is not at all clear that a purposive approach, focusing on consequences in particular cases, is preferable to a text-based approach, one that asks judges to think little or not at all about consequences. A textual approach might be simpler to apply; if so, that is surely a point in its favor. And if judges cannot reliably identify reasonable purposes, textualism might also lead to better results, or consequences, all things considered.[94] Much depends on the capacities of judges; much also depends on whether the legislature would behave differently, and better, if a textualist approach is followed.[95]

None of this means that Scalia's approach is necessarily superior to Breyer's. But it does point out the necessity of engaging the possibility that on his own consequentialist grounds, and with an eye firmly on democratic goals,

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Calabresi, *Two Functions of Formalism*, 67 U. CHI. L. REV. 479, 482 (2000) ("To the scholars opposing Fascism, the nineteenth-century self-contained formalistic system became a great weapon. . . . What it conserved was the liberal, nineteenth-century political approach . . . [and] in a time of Fascism, the important thing was that it conserved basic democratic attitudes.").

92. Consider, for example, the rule of lenity, invoked in *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).

93. Evidence can be found in Sunstein, *supra* note 80; and Sunstein, *supra* note 14.

94. Some people appear to believe that interpretation, to count as such, necessarily calls for attention to the intent of those who wrote the text in question. *See, e.g.*, Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 630-32 (2005). This is a blunder. In law, it is certainly possible to interpret texts by pointing to the ordinary meaning of the words, without speculating about authorial intentions. Whether this is desirable as well as possible is another question, one that must be resolved by reference, among other things, to consequences.

95. *See* Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636 (1999).

textualism in the interpretation of ordinary statutes might be preferable to an approach that explores purposes.[96] To be sure, textualism is sometimes a fake, as when the text does not have any clear meaning. In my view, hard cases, in which the text is indeterminate, are best resolved with clear reference to the views of any applicable administrative agency and also with close attention to pertinent canons of construction. Breyer spends far too little time on such canons,[97] which play a pervasive role in statutory interpretation, even when they are not explicitly identified. Any court will inevitably interpret statutes against background understandings, some but not all of which will be reduced to canons. Properly used, such canons discipline the exercise of judicial discretion and also serve the system of separated powers.[98]

A simple example is the idea that statutes will not lightly be taken to raise serious constitutional problems. This canon serves to ensure that the legislature, and not merely the executive, will authorize intrusions on constitutionally sensitive interests[99]—an important idea that has nothing to do with legislative purposes. As another example, consider the notion that unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear.[100] Because retroactivity is disfavored in the law,[101] statutes will be construed to apply prospectively unless Congress has specifically said otherwise. Or consider the presumption against applying statutes outside of the territory of the United States.[102] If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect. Canons of this general sort, implicit or explicit, play an important role in statutory interpretation, and they often discipline judicial judgment, more so than does resort to a judicially constructed purpose.

But this is not the place to defend a particular approach to statutory interpretation. The only point is that Breyer has not shown that a purposive approach is unambiguously preferable to the reasonable alternatives.

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96. *See* Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000).

97. BREYER, *supra* note 15, at 98-99.

98. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000).

99. *See, e.g.*, Sunstein, *supra* note 80.

100. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

101. *Id.*

102. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

C. Active Liberty as an Interpretive Tool

Breyer is right to say that the Framers wanted to recognize both active liberty and negative liberty. But the Framers saw themselves as republicans, not as democrats,[103] and they did not believe in participatory democracy or in rule through town meetings. On this count, Breyer slides quickly over intense debates about what the American Framers actually sought to do.[104] Of course, they attempted to provide a framework for a form of self-government.[105] But so stated, that goal operates at an exceedingly high level of abstraction, one that cannot easily be brought to bear on concrete cases. Much of the time, it is hard to link the general idea of self-government to particular judgments about contemporary disputes in constitutional law.

Certainly Breyer does not try to argue, in originalist fashion, that the actual drafters and ratifiers of the relevant constitutional provisions wanted to allow campaign finance reform, restrictions on commercial advertising, affirmative action programs, and federal commandeering of state government. He argues instead that the idea of active liberty, which animates the Constitution, helps to justify these judgments. This is not unreasonable. But exactly what kind of argument is it? The Framers of the Constitution also placed a high premium on "domestic tranquility," to which the preamble explicitly refers. Would it be right to say that because domestic tranquility is a central goal of the document, the President is permitted to ban dangerous speech—or that because, or if, affirmative action threatens to divide the races, in a way that compromises "tranquility," color-blindness is the right principle after all?

In any case, Breyer rightly emphasizes that the Constitution attempts to protect negative liberty too. Why shouldn't a ban on campaign finance restrictions be seen to run afoul of that goal? Nor is negative liberty the only value at stake. Such restrictions forbid people from spending their money on political campaigns, in a way that might well be taken to compromise participatory self-government. In this light, we could see campaign finance restrictions as offending, at once, both negative and active liberty. Deductive logic cannot take us from an acknowledgement of the importance of active

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103. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

104. *See* JOSEPH M. BESSETTE, THE MILD VOICE OF REASON: DELIBERATIVE DEMOCRACY AND AMERICAN NATIONAL GOVERNMENT (1994); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION (1975); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997); WOOD, *supra* note 103.

105. *See* WOOD, *supra* note 103, at 10-45.

liberty to an acceptance of campaign finance restrictions; there are no syllogisms here. Instead, an evaluative judgment must be made to the effect that, properly characterized, the First Amendment and its goal of self-government do not condemn (the relevant) restrictions on campaign contributions and expenditures. I believe that for many such restrictions, this conclusion is broadly correct, especially when we consider the general need for courts to defer to congressional judgments in hard cases.[106] But the evaluative judgment is inescapable.

Or suppose that we accept Breyer's claims about the centrality of active liberty to the constitutional design. Is originalism therefore off the table? Perhaps not. We might believe, with some constitutional theorists (including Alexander Hamilton[107]), that constitutional provisions, as products of an engaged citizenry, reflect the will of "We the People" as ordinary legislation usually does not. If so, an emphasis on the original understanding can be taken to serve active liberty at the same time that it promotes negative liberty. It serves active liberty because it follows the specific judgments of an engaged citizenry. It promotes negative liberty because, and precisely to the extent that, those judgments favor negative liberty (or for that matter active liberty). I do not suggest that this argument is convincing. The Framers and ratifiers included only a small segment of early America, and in any case the fact that the Framers and ratifiers are long dead creates serious problems for those who argue for originalism in democracy's name. The only point is that Breyer's emphasis on active liberty does not rule originalism out of bounds.

Or return to Thayer's claim that the Court should strike down legislation only if it clearly and unambiguously violates the Constitution. Despite his general enthusiasm for restraint, Breyer does not mean to follow Thayer. But why not? Thayer and his followers can claim to promote active liberty because they allow the sovereign people to do as they choose. Indeed, Learned Hand, an apostle of judicial restraint, wanted courts to be reluctant to invalidate legislation in large part because he was committed to democratic self-rule.[108] Perhaps Breyer thinks that this approach undervalues both negative and active liberty, which majority rule might compromise. But is this so clear? Perhaps a

106. An obvious qualification involves incumbent protection measures. If campaign finance legislation is operating to insulate incumbents against electoral challenge, there is a strong reason, on grounds of active liberty (among others), for courts to take a strong role.

107. *See* THE FEDERALIST NO. 78 (Alexander Hamilton); *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (arguing that constitutional decisions represent the views of "We the People," and hence have a superior status to ordinary law).

108. *See* LEARNED HAND, THE SPIRIT OF LIBERTY (Irving Dilliard ed., 1960).

deferential Court will ultimately produce exactly the right mix between the two kinds of freedom.

Of course, Ely's approach, emphasizing reinforcement of democratic processes, can easily be rooted in active liberty; indeed, active liberty lies at its heart. Breyer writes approvingly of the Warren Court on the ground that its decisions promoted active liberty,[109] and Ely is the Warren Court's most systematic defender. Does Breyer mean to endorse Ely? If not, where does he differ? A puzzling gap in Breyer's book is the omission of any treatment of Ely's apparently similar argument.[110]

Recall that Breyer candidly acknowledges that legislative purpose is not something that can simply be found. Purpose is what judges attribute to the legislature, based on their own conception of what reasonable legislators would mean to do. If this is true for the purposes of individual statutes, it is also true for the purposes of the Constitution. When Breyer says that a "basic" purpose of the Constitution is to protect active liberty, so as to produce concrete conclusions on disputed questions, his own judgments about the goals of a reasonable constitution-maker are playing a central role. Fortunately, Breyer's own judgments are indeed reasonable. But he underplays the extent to which they are his own.

The same point bears on Breyer's enthusiasm for an inquiry into consequences. Consequences certainly do matter, but much of the time it is impossible to assess consequences without reference to disputed questions of value. Return to the question of affirmative action, and suppose, rightly, that the text of the Constitution could, but need not, be understood to require color-blindness. If we care about consequences, will we accept the color-blindness principle or not? Suppose we believe that affirmative action programs create racial divisiveness and increase the risk that underqualified people will be placed in important positions, to the detriment of all concerned. If those are bad consequences, perhaps we will oppose affirmative action programs. An emphasis on consequences as such is only a start. Of course, Breyer is not concerned with consequences alone; he wants to understand them with close reference to specified purposes, above all active liberty. But as I have suggested, that idea, taken in the abstract, is compatible with a range of different approaches to constitutional law; it need not be taken to compel Breyer's own approach.

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109. BREYER, *supra* note 15, at 11.

110. There is only one reference to Ely, presaged by a "cf." *See* BREYER, *supra* note 15, at 146 n.14. Note also that Frank Michelman has made closely related arguments. *See* Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

D. Theories and Judging

None of this means that Breyer is wrong. On the contrary, I believe that he is generally right. He is right to reject originalism. He is right to say that the free speech principle should be understood in democratic terms. He is right to say that when the Court lacks important information it should rule cautiously and narrowly. He is right to resist the constitutional assault on affirmative action programs (an assault that, by the way, is extremely hard to defend in originalist terms[111]). He is right to embrace a form of minimalism, counseling narrow rulings on the hardest questions. Above all, he is right to emphasize the importance of democratic goals to constitutional interpretation. But to make his argument convincing, he would have to offer a more sustained encounter between his own approach and the imaginable alternatives.

Breyer would also have to do much more to show that his own approach imposes sufficient discipline on judicial judgments. Breyer does assert the presence of such discipline, pointing to "the legal precedents, rules, standards, practices, and institutional understanding that a decision will affect."[112] This is too brisk. But it would certainly be possible for a judge concerned with active liberty and consequences to insist on stability in the law, on small rather than large steps, on avoiding disruption of established practices, and on a general presumption in favor of enacted law. No general approach can eliminate discretion from judicial decisions, but Breyer's position would be more appealing if it were developed with careful attention to the need for constraints. The most charitable, and in my view accurate, reading is that Breyer is sketching an approach to legal interpretation that will, in many cases, lead him to rule in ways that do not match his personal commitments.[113]

A deeper point lies in the background here. For the selection of a general theory of interpretation, a great deal turns on context. Breyer argues against originalism, and I agree with him; but it is possible to imagine a world in which originalism would make a great deal of sense. Suppose, for example, that the original public meaning of the founding document would generally or always produce sensible results; that violations of the original public meaning would be unjust or otherwise unacceptable; that democratic processes that did

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111. *See* Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

112. BREYER, *supra* note 15, at 118-19.

113. Note in this regard that Justice Breyer has shown a high level of deference to the decisions of the executive branch under President George W. Bush—higher in fact than that of many Republican appointees; note too that in many of these cases, Justice Breyer has ruled in favor of conservative outcomes. *See* Sunstein, *supra* note 14.

not violate the original public meaning would not cause serious problems from the standpoint of justice or otherwise; and that judges, not following the original public meaning, would produce terrible blunders from the appropriate point of view. In such a world, originalism would be the best approach to follow. The larger point is that the Constitution itself does not contain a theory of interpretation, and no single theory would make sense in every imaginable world.

It is also possible to doubt whether the Supreme Court should accept any ambitious or unitary theory of interpretation.[114] Perhaps the Court does best, in our actual world, if it avoids ambitious accounts (including Breyer's), and decides cases, if it can, with reference to reasons that can command agreement from those with diverse views about foundational questions, and from those who do not want to take a stand on those questions. Perhaps a commitment to active liberty is too contentious or too sectarian to command general assent. But at least this much can be said on Breyer's behalf: If an ambitious account is desirable, indispensable, or unavoidable, an emphasis on the commitment to democratic rule is hardly the worst place to start.

CONCLUSION

Within the Supreme Court itself, the most powerful recent theoretical arguments have come from Justice Scalia, with his insistence on originalism and his complaint that if courts are not bound by the original understanding they are essentially doing whatever they want.[115] Breyer has now developed a distinctive argument of his own, one that demonstrates the possibility of a nonoriginalist method that, while not eliminating discretion, is hardly a blank check to the judiciary. Breyer's originality lies in his effort to forge links among its three disparate moving parts: an appreciation of active liberty and its place in our constitutional tradition; a commitment to purposive understandings of interpretation; and an insistence, inspired by American pragmatism, that theories of interpretation must be evaluated in terms of their consequences. The result is an approach that is respectful of democratic prerogatives and that makes an important place for narrow rulings in the most difficult domains.

I have emphasized what seems to me a central problem in Breyer's account: the difficulty of characterizing purposes, and of counting purposes as reasonable, without an evaluative judgment of the interpreter's own. In hard

114. *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

115. *See* SCALIA, *supra* note 9, at 41-47.

cases, judgments about purpose are partly normative, not only descriptive.[116] What is true for particular provisions is true for the founding document as a whole. Active liberty is certainly a theme of the document, but it is not easy to deduce from that theme particular conclusions about the legal issues raised by campaign finance restrictions, affirmative action plans, privacy, and judicial review of agency action. Nor does active liberty, standing alone, make the choice between textual and purposive approaches to constitutional interpretation. On purely pragmatic grounds, purposive approaches run into serious problems once we acknowledge the role of judicial discretion in the characterization of purposes. A commitment to active liberty is entirely compatible with a commitment to textualism.

I have also suggested the possibility of endorsing a kind of second-order pragmatism, one that attempts to develop tools to discipline the judicial inquiry into both consequences and purposes. Perhaps we are all pragmatists now, in the sense that we can agree that any theory of interpretation must pay close attention to the outcomes that it produces.[117] Whether or not we do agree on that point, we certainly should. The problem is that many diverse views can march under the pragmatic banner. I have argued in particular for the centrality of text, accompanied by canons of construction to help with the most difficult cases.

But if Breyer's particular conclusions are not compelled by his general themes, they are always plausible, and usually more than that; and they are defended in a way that is appealingly generous and respectful of those who disagree. It is highly illuminating to see, from one of the Court's "liberals," a persistent plea for a degree of judicial modesty, a call for deference to the judgments of the elected branches, and an endorsement of rulings that are cautious and tentative. One of the largest virtues of his book is its convincing demonstration that those who reject Breyer's judgments are obliged to engage him in the terms that he has sketched—by showing how a proper respect for self-government, and careful attention to consequences, are compatible with competing judgments of their own.

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116. This point is emphasized and not deplored in DWORKIN, *supra* note 88. Insofar as he emphasizes the constructive element in interpretation, Dworkin seems to me to make a large advance on Hart and Sacks, whose approach resembles his.

117. *See* Scalia, *supra* note 9 (defending originalism in part by reference to consequentialist considerations). Note that even Dworkin describes himself as a consequentialist. *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 364 (1997).

Review grows out of Cass R. Sunstein, The Philosopher-Justice, *THE NEW REPUBLIC, Sept. 19, 2005, at 29; the author has substantially revised and expanded the discussion here, and the basic orientation has shifted. He is grateful to Richard Posner and Adrian Vermeule for extremely valuable comments on a previous draft.*