

REVIEW

Justice Breyer's Mandarin Liberty

Ken I. Kersch[†]

Active Liberty: Interpreting Our Democratic Constitution,
Stephen Breyer. Alfred A. Knopf, 2005. Pp ix, 161.

Justice Stephen Breyer arrived at the Supreme Court in 1994 with a broad background in academia, government service, and the federal judiciary, and as one of the nation's leading scholars of administrative and regulatory policy and law. At the time, Breyer, a Harvard Law School law and economics scholar who had worked effectively as a congressional staffer with members of both parties and had been an architect of airline deregulation during the Carter administration, won broad support from both sides of the aisle. Although extensively published in his areas of expertise, he had written little or nothing about constitutional issues, including matters of constitutional interpretation. Most of the limited opposition to Breyer's appointment came not from Republicans, but from the left wing of the Democratic Party, which saw him as a bloodless technocrat too cozy with business interests and insufficiently committed to civil liberties and civil rights. He was nevertheless confirmed by a vote of 87–9.¹

[†] Assistant Professor of Politics, Princeton University; Visiting Research Scholar, Social Philosophy and Policy Center, Bowling Green State University (Fall 2005). Thanks to Aurelian Craiutu, Donald Downs, Clement Fatovic, Ronald Kahn, Keith Whittington, and the participants in the American Political Development Workshop at the University of Wisconsin, Madison, for helpful comments and suggestions. Research assistance was provided by Terrance Watson (Bowling Green) and Emily Zackin (Princeton).

¹ See Ken I. Kersch, *The Synthetic Progressivism of Stephen G. Breyer*, in Earl M. Maltz, ed., *Rehnquist Justice: Understanding the Court Dynamic* 241, 243–44, 248–49 (Kansas 2003) (discussing Breyer's scholarly pursuits, activities in government, and reputation as a “techno-judge”); Kenneth Jost, *The Supreme Court Yearbook, 2000–2001* 335–36 (CQ 2002) (providing general biographical information about Justice Breyer). See also Ken I. Kersch, *Stephen Breyer*, in Melvin Urofsky, ed., *The Supreme Court Justices: A Biographical Dictionary* (forthcoming 2006) (noting that for Clinton's first Supreme Court appointment, he chose to nominate Ruth Bader Ginsburg instead of Breyer because Breyer “reportedly came across as too cold and technocratic for the President's taste”). Those looking for a broad overview of Justice Breyer's jurisprudence and decisions as a Supreme Court Justice should consult these sources. Here, I consider his book from a broader, more theoretical perspective.

Unlike many modern constitutional liberals, Justice Breyer has never considered the task of interpreting the law to be, first and foremost, a “matter of principle.”² Accounts of Justice Breyer’s jurisprudence (with which he would most likely agree) have typically ended by characterizing him as a “commonsense” moderate and judicial “pragmatist,” with a predisposition for looking beyond the application of formal, a priori principles in favor of the attainment of concrete, real-world objectives.³ His particular talent has been to read technically complex regulatory contexts and to interpret statutes being applied within them in a way that best advances what he takes to be the relevant regulatory objective. He conceives of this task as a problemsolving endeavor in which courts and judges are only one part of a broader national-level regulatory apparatus. The role of the judge, in Breyer’s view, is to be mindful of the regulatory system’s purpose as a whole (and the limited institutional capacities of judges) and to work as part of a broader team of institutions focused on achieving statutory objectives.⁴

In approaching a policy problem or a case, Justice Breyer is characteristically mindful that an appropriate judgment is possible only when a wealth of empirical data is close at hand. For this reason, Justice Breyer is a committed empiricist. Because legislators and expert administrators routinely have a wealth of empirical information at their command that judges do not have, Justice Breyer has often reminded us they are typically better situated than judges to make these

² See Ronald Dworkin, *A Matter of Principle* 2–3 (Harvard 1985). See also Justice Breyer’s colloquy with Dworkin, in Robert Badinter and Stephen Breyer, eds, *Judges in Contemporary Democracy: An International Conversation* 85 (NYU 2004):

Ronnie says that judges enforce their convictions of “political morality.” . . . [T]he basic question a judge asks is “What is fair?” . . . [O]ne, highly abstract, general question that I ask about the proper result in a case [is] “Does this interpretation make sense?” where “sense” has a special legal connotation related to the basic purpose of the provision in question.

³ See, for example, Kersch, *Synthetic Progressivism* at 244 (cited in note 1); Walter E. Joyce, *The Early Constitutional Jurisprudence of Justice Stephen G. Breyer: A Study of the Justice’s First Year on the United States Supreme Court*, 7 Seton Hall Const L J 149, 163 (1996) (describing Breyer’s “moderation, technical skill, and measured analysis” and “careful and pragmatic approach to constitutional interpretation”); Mark Silverstein and William Haltom, *You Can’t Always Get What You Want: Reflections on the Ginsburg and Breyer Nominations*, 12 J L & Polit 459, 461 (1996) (describing Breyer as “a techno-judge of substantial legal skills but utterly wanting in the political and real-life experiences [President Clinton] sought”). Consider Jeffrey S. Lubbers, *Justice Stephen Breyer: Purveyor of Common Sense in Many Forums*, 8 Admin L J Am U 775, 776 (1995) (noting Breyer’s “willingness and ability to serve as a common-sense government reformer” in forums outside of the Court); Richard J. Pierce, Jr., *Justice Breyer: Intentionalist, Pragmatist, and Empiricist*, 8 Admin L J Am U 747, 747 (1995).

⁴ See Kersch, *Synthetic Progressivism* at 248–49 (cited in note 1) (“The first imperative of [Breyer’s] synthetic progressivism is that the judge should serve as a helpmeet in the formulation of wise policy.”).

assessments.⁵ For this reason, Justice Breyer counts himself a believer in judicial restraint.⁶

An admirer of European technocracy, Justice Breyer has been one of the most prominent advocates for a “comparativist” approach to legal questions,⁷ whereby lawyers and judges talk across borders and look around the world for approaches and solutions to shared policy problems. Unlike many who look abroad primarily to discern a moral consensus (such as, for example, on the death penalty), Justice Breyer’s comparativism is primarily an outgrowth of his empiricism.⁸ He argues that American judges should look to the ways in which their counterparts in other countries have decided cases because, in doing so, they will find a wealth of information that will “cast an empirical light” on many of the same purposive policy questions that commonly come before American courts.⁹

⁵ See *id.* at 249 (“Wise policymaking is [to Breyer] first and foremost a matter of . . . an empirical judgment of the kind that a legislature is more likely than a court to make with accuracy.”) (internal quotation marks omitted). See also *United States v. Lopez*, 514 US 549, 616–17 (1995) (Breyer dissenting) (“Courts must give Congress a degree of leeway.”).

⁶ Linda Greenhouse, *The Competing Visions of the Role of the Court*, NY Times C3 (July 7, 2002). See also *Pierce*, 8 Admin L J Am U at 753–54 (cited in note 3) (describing Court cases reversing agency interpretations of statutes as “starkly inconsistent with Justice Breyer’s dedication to intentionalism, pragmatism, and empiricism”). Some have alleged that Justice Breyer has been the Rehnquist Court justice least likely to void a federal statute on constitutional grounds. See Paul Gewirtz and Chad Golder, *So Who Are the Activists?*, NY Times A19 (July 6, 2005):

We found that justices vary widely in their inclination to strike down Congressional laws. Justice Clarence Thomas, appointed by President George H.W. Bush, was the most inclined, voting to invalidate 65.63 percent of those laws; Justice Stephen Breyer, appointed by President Bill Clinton, was the least, voting to invalidate 28.13 percent.

A study by political scientist Christopher Zorn, however, places Breyer near the Rehnquist Court’s center in this regard. He was more likely to void a federal statute on constitutional grounds, statistically speaking, than were Justices Rehnquist and O’Connor, but less likely to do so than Justices Thomas, Scalia, Kennedy, Ginsburg, and Stevens. He was approximately as likely to invalidate federal statutes as was Justice Souter. Christopher Zorn, *Liberal Justices, Judicial Activism, and Federal Judicial Review: An Empirical Perspective* 9 (presented at the Liberty Fund Conference on Law, Liberty, and Judicial Review, June 9–12, 2005).

⁷ I borrow the term Justice Breyer uses to describe himself in this regard. Stephen Breyer, *Keynote Address*, 97 Am Society Intl L Proc 265, 266 (2003) (“I believe the ‘comparativist’ view that several of us have enunciated will carry the day.”).

⁸ This is not the case for all the Court’s justices interested in this trend, and not exclusively the case for Justice Breyer. See Ken I. Kersch, *The Supreme Court and International Relations Theory*, Albany L Rev (forthcoming 2006). There, I argue that many of the justices, including Justice Breyer, have also been influenced by a broader, “diplomatic,” foreign policy vision. *Id.* at 2–4 (criticizing this vision as undertheorized and as a concession to popular liberal conceptions of international law). See also Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 Wash U Global Stud L Rev 345, 354–55 (2005) (“[A]t least some of the Court’s justices . . . increasingly see themselves as ambassadors doing their part, through judicial globalization, to improve the reputation of the United States abroad.”).

⁹ *Printz v. United States*, 521 US 898, 977 (1997) (Breyer dissenting) (using Madison’s examination of European political experience in *The Federalist*, numbers 42 and 43, to argue for

With the publication of *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer has now moved to undergird his longstanding jurisprudential vision with a foray into democratic theory.¹⁰ Formerly, Breyer, the scholar of statutes, administration, and regulation, was more or less content to take up a succession of relatively narrow questions that involved discerning the purpose of particular statutes and constitutional provisions and principles, each viewed more or less in isolation from the other.¹¹ In *Active Liberty*, he now argues confidently that the Constitution has a central purpose—the promotion of “active liberty” or “the right of individuals to participate in democratic self-government” (p 21). While the Constitution’s “democratic objective” in many cases counsels judicial restraint, he argues, it also should serve as a “source of judicial authority and an interpretive aid to more effective protection of [both individual and community] liberty” (p 6). He contends that it is important for a judge to see his or her interpretive task as involving “a quest for . . . workable democratic government protective of individual personal liberty” (p 34). As his use of the word “quest” suggests, this process is perpetual and provisional, always open to appropriate experimentation and the consideration of new empirical evidence. To the judge befalls the especially important task of keeping the conduits of evidence open, and the lines of discussion free.¹²

Active Liberty is a short book, written for (serious) general readers, in which Breyer sets out, explains, and seeks to justify his approach to constitutional (and statutory) interpretation. Justice Breyer understands himself to have a modest conception of a judge’s role. Consistently, he claims only modest ambitions for this book. “I am not arguing for a new theory of constitutional law,” he explains (p 110). “My argument [does] not rest[] upon logical or scientifically convinc-

an analogous contemporary endeavor by the Court). Consider Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S Cal L Rev 845, 868 (1992) (“[U]nlike our country, [foreign countries] have developed other institutions [such as the use of expert drafters and administrative judges who review proposed legislation] to bring about and maintain necessary interpretive consistency and coherence.”).

¹⁰ This process, culminating in 2005’s *Active Liberty*, was launched in Breyer’s Madison Lecture at New York University School of Law School. See generally Stephen Breyer, *Our Democratic Constitution*, 77 NYU L Rev 245 (2002).

¹¹ See Breyer, 65 S Cal L Rev at 845–46 (cited in note 9); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin L Rev 363, 364–65 (1986) (advocating judicial review of agency regulations based on a “global, comprehensive view of an agency’s objectives and its work”) (emphasis added).

¹² Here, Justice Breyer echoes a theme that has been at the center of the constitutional philosophy of another Harvard-educated scholar of risk and regulation, Cass Sunstein. See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 259 (Harvard 1999) (“Minimalism also maintains flexibility for the future, an especially large virtue when facts and values are in flux.”).

ing empirical demonstration" (id). It does not "present a general theory of constitutional interpretation" (p 7). Rather, *Active Liberty* "illustrate[s] a theme" (id). Indeed, Breyer, as we have been told by scholars of the Court no less than by the Justice himself, does not believe that such general theories are useful (pp 19, 110–11). As such, this book touts its humility, not simply as a matter of Justice Breyer's temperament, but also as a matter of his substantive convictions.¹³

Although it may not be fully argued, or defended by "logical or scientifically convincing empirical demonstration," *Active Liberty* loudly trumpets a theory of interpretation (p 110). That theory consists of two propositions. First, a judge should interpret a law in light of both its purposes (or objectives) and the consequences of that judge's interpretation for the achievement of those purposes. Second, an approach that accords due regard to the purposes and consequences of interpreting particular statutory and constitutional provisions will advance the overarching purpose of the Constitution as a whole, which is to promote "the people's will," or "democracy," or "active liberty" (pp 115–16). Breyer illustrates the usefulness of this "approach, perspective, and emphasis" by providing readers with short discussions, in a seemingly commonsensical spirit, of how a focus on purposes, and the consequences of particular interpretations for the likelihood of achieving those purposes, can helpfully inform the way that judges approach statutory and constitutional questions involving "contemporary problems" of free speech, federalism (or, as he has called it, "the 'federalist' problem"),¹⁴ privacy, affirmative action, statutory interpretation, and administrative law (pp 7, 11). Breyer bookends these "applications" chapters with short, elegantly written chapters on democratic theory and American constitutional history, grounding his approach at the book's beginning and anticipating and meeting possible objections to it at its end.

Justice Breyer's protestations to modesty notwithstanding, *Active Liberty* will be taken by many as presenting a novel and refreshing interpretive posture, on a Court starved for intellectually ambitious

¹³ Sunstein has defined "judicial minimalism" as an approach to judging that promotes "democratic deliberation" by avoiding abstractions and, while accepting agreed upon core principles in making decisions, hews closely to the relevant facts of unique, individual cases to issue provisional decisions that are subject to later refinement, clarification, and revision. Id at 4–5 (listing "time-honored" decisionmaking rules in constitutional law that keep rulings narrow and fact specific). See also Jeffrey Rosen, *Two Cheers for the Rehnquist Court*, 1 Nexus J Op 37, 39 (1996) (describing Breyer as "cautious, incremental, pragmatic, respectful of historical arguments, and suspicious of sweeping claims about fundamental values").

¹⁴ Stephen Breyer, *Keynote Address*, Symposium on Democracy and the Rule of Law in a Changing World Order, New York University School of Law (Mar 9, 2000) (noting that physical distance from federal decisionmakers tends to alienate individual citizens).

jurisprudential liberals. *Active Liberty* will also be taken by many as a brief for judicial restraint and humility in an era of highly aggressive (and, to many, frightening) conservative judicial activism.¹⁵ Although there are grounds for either type of reception, neither perspective, viewed more broadly, captures the truth.

I. PURPOSES, CONSEQUENCES, AND LIBERTY

Justice Breyer begins his argument in *Active Liberty* by noting the genuine difficulty of the questions of how to interpret a legal text, particularly as that text is applied in the sorts of close cases that comprise the most prominent part of the Supreme Court's docket (pp 7, 9). And he notes that, in approaching this task, all judges, himself included, are pluralists—that is, they are eclectic. All “use similar basic tools to help them accomplish the task” (p 7):

They read the text's language along with related language in other parts of the document. They take account of its history, including history that shows what the language likely meant to those who wrote it. They look to tradition indicating how the relevant language was, and is, used in the law. They examine precedents interpreting the phrase, holding or suggesting what the phrase means and how it has been applied. They try to understand the phrase's purposes or (in respect to many constitutional phrases) the values that it embodies, and they consider the likely consequences of the interpretive alternatives, valued in terms of the phrase's purposes (pp 7–8).¹⁶

The differences between judges in making recourse to these materials, he contends, is a matter of emphasis, both within a particular case or context and more generally. Breyer argues, however, that these differences in emphasis matter (pp 8–9).

“My own view,” he writes, explaining the origins of his own general emphases in interpreting a legal text, stems from “see[ing] the [Constitution] as creating a coherent framework for a certain kind of government” (p 8):

Described generally, that government is democratic; it avoids concentration of too much power in too few hands; it protects

¹⁵ See, for example, Thomas M. Keck, *The Most Activist Supreme Court in History 2* (Chicago 2004) (“[T]he [Rehnquist] Court has developed a distinctive new style of conservative judicial activism.”).

¹⁶ It is notable that the Court's new chief justice, John Roberts, described the judge's role in similarly pluralistic terms during his confirmation hearings. See Craig Green, *O'Connor's Opposite*, 27 Natl L J 23, 23 (Aug 22, 2005).

personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of law itself. The document embodies these general objectives in discrete provisions (pp 8–9).

In approaching constitutional cases, as Justice Breyer sees it, he is called upon to assess the implications of his understanding of the relationship between the Constitution's "other general objectives" and this overarching "democratic objective" (p 9). He acknowledges that in difficult cases, different justices will assess the implications of this relationship in different ways (pp 9–11).

These differences are evident not only by looking at the spectrum of emphases found among the justices of the current Supreme Court, but also if one surveys the nation's past. Justice Breyer is something of an historicist. Rather than seeking to advance a timeless argument for an appropriate judicial posture, Breyer the pluralist acknowledges that "members of historically different Supreme Courts have emphasized different constitutional themes, objectives, or approaches over time" (p 9). In the early nineteenth century, the Court "helped to establish the authority of the federal government, including the federal judiciary" (p 10). In the late nineteenth and early twentieth centuries, the Court "overly emphasized . . . the protection of private property" and "wrongly underemphasized the basic objectives of the Civil War amendments" (*id.*). The New Deal and the Warren Courts "emphasized ways in which the Constitution protected the citizen's 'active liberty,' i.e., the scope of the right to participate in [democratic] government" (*id.*).¹⁷

As his decision to characterize both the New Deal and Warren Courts as centrally committed to democracy and "active liberty" makes clear, Justice Breyer identifies his own constitutional agenda with that of these earlier courts, and positions himself, in significant respects, as a partisan of midcentury constitutional liberalism (p 11). And he commits himself to carrying this agenda forward into the future (pp 11–12). At the point in history in which he sits on the Supreme Court, while it is important to give due weight to "language, history, and tradition," he argues here, it is especially important to emphasize the consequences of particular interpretations on the advancement of "active liberty"—the "Constitution's democratic objective" (p 12).

Justice Breyer argues that an approach mindful of the consequences of a particular legal interpretation for the achievement of the

¹⁷ For similar views on the *Lochner*, New Deal, and Warren Courts, see Akhil Reed Amar, *America's Constitution: A Biography* 475 (Random House 2005); Morton J. Horowitz, *The Warren Court and the Pursuit of Justice* 3–4, 76–78 (Hill and Wang 1998).

Constitution's democratic objective falls squarely within "an interpretive tradition" that values not simply collective rights, but also the collective duties of the people (p 17). Such an interpretive tradition values "calls for *judicial restraint*" in the face of decisions made by a majority of the people, often through the voice of their elected representatives (id). The authority of these representatives "must be broad" (p 15). Deference to them is due not just when a judge determines for himself that, as a matter of public policy, they have decided rightly. "The people must have room to decide and leeway to make mistakes," he writes (p 15).¹⁸

This interpretive tradition, he tells us, "sees texts as driven by purposes" (p 17). "[T]he judge, whether applying statute or Constitution, should 'reconstruct the past solution imaginatively in its setting and project the purposes which inspired it upon the concrete occasions which arise for their decision'" (p 18).¹⁹ And to realize these purposes in the real world, a judge must be attentive to the consequences likely to flow from his interpretation. This requires a judge to read and map that world, taking full account of "contemporary conditions, social, industrial, and political, of the community to be affected" (id).²⁰ According to Breyer, "nothing that is logically relevant should be excluded" (id).²¹

Justice Breyer recognizes that the interpretive tradition he seeks to advance in *Active Liberty* "does not expect highly general instructions themselves to determine the outcome of difficult concrete cases where language is open-ended and precisely defined purpose is difficult to ascertain" (id). Key constitutional provisions like the Due Process and Equal Protection clauses reflect "aspirations," and were not designed to be rules of action (id).²² When faced with these provi-

¹⁸ See also *New State Ice Co v Liebmann*, 285 US 262, 286–300 (1932) (Brandeis dissenting). For Justice Breyer's views on Justice Brandeis as a like-minded empiricist, see Stephen Breyer, *Justice Brandeis as Legal Seer*, Brandeis Lecture at the University of Louisville School of Law (Feb 16, 2004), online at http://www.supremecourtus.gov/publicinfo/speeches/sp_02-16-04.html (visited Apr 4, 2006) ("[Brandeis] was right that we must continue to use facts and consequences to distinguish permissible, or better, from impermissible or worse, interpretations of the Constitution and of law.").

¹⁹ Citing Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in Irving Dilliard, ed., *The Spirit of Liberty: Papers and Addresses of Learned Hand* 155, 157 (Knopf 3d ed 1960) (arguing against a plain language approach because "words are such temperamental beings that the surest way to lose their essence is to take them at their face").

²⁰ Citing Louis D. Brandeis, in Solomon Goldman, ed., *The Words of Justice Brandeis* 115 (1953) (using social consensus to assess whether a police power statute is "unreasonable or arbitrary").

²¹ Citing Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum L Rev 527, 541 (1947) ("The rigidity of the English courts in interpreting language merely by reading it disregards the fact that enactments are . . . organisms which exist in their environment.").

²² Citing Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, in Philip B. Kurland, ed., *Of Law and Life & Other Things That Matter: Papers and Addresses of Felix Frankfurter*,

sions, judges must not act “willful[ly], in the sense of enforcing individual views” (id).²³ Quoting Louis Brandeis, he reminds judges that “we must be ever on our guard, lest we erect our prejudices into legal principles” (p 19).²⁴ At the same time, Justice Breyer argues that judges should not rely uncritically and woodenly on legal formulas in an effort to steer clear of willfulness (id).²⁵

The tradition answers with an *attitude*, an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution. It champions the need to search for purposes; it calls for restraint. . . . And it finds in the democratic nature of our system more than simply a justification for judicial restraint (id).

A. Purpose and the Legal Process

In laying out his argument that legal texts are most appropriately interpreted in light of their purposes and the likely consequences of particular interpretations for the achievement of those purposes, Justice Breyer forswears any ambitions to originality. He is right to do so. For with the publication of *Active Liberty* readers are presented with the legal process template for the interpretation of legal texts—a template that first rose to prominence in the heyday of managerial liberalism in the 1950s—in what surely must be the purest, most undiluted form ever proffered by a sitting Justice of the Supreme Court. The central argument of *Active Liberty*—that (as Breyer puts it) the law is or ought to be goal-oriented, rational, and dynamic (pp 17–20), that it ought to be understood purposively, with an animating focus on the problems to be solved, with courts interpreting the law situated, as institutions with their own distinctive competences, within a broader framework of a “problemsolving government”—is all but lifted off the pages of Henry Hart and Albert Sacks’s landmark law school text-

1956–1963 77, 94 (Atheneum 1969) (noting that “[t]he Court was of course from the beginning the interpreter of the Constitution”).

²³ Citing id at 95 (arguing that judges must also not act “wooden[ly], in uncritically resting on formulas”). Justice Breyer’s views, in this regard, are similar to Ronald Dworkin’s. See Dworkin, *Matter of Principle* at 17 (cited in note 2) (distinguishing judges who decide cases “on political grounds” from those who eschew all external constraints on their decisionmaking prerogative).

²⁴ Quoting *New State Ice*, 285 US at 311 (Brandeis dissenting) (cautioning that substantive due process can be a means by which prejudice is embodied in law).

²⁵ Citing id (“[Adjudication] demands the habit of curbing any tendency to reach results agreeable to desire or to embrace the solution of a problem before exhausting its comprehensive analysis.”).

book, *The Legal Process*, which Justice Breyer studied as a law student at Harvard Law School in the early 1960s.²⁶

To gain a deeper appreciation for Breyer's self-described "interpretive tradition" or "attitude," we can put *Active Liberty* to the side for the time being and go back to the legal process template itself. "[K]nowledge," Henry Hart wrote in 1941,

consists, not in doctrine, not in propositional statements stored away in the brain; but in the capacity to solve problems as they are actually presented in life; the capacity to see all the implications . . . of the action to be taken; the capacity to bring to bear in the taking of decisions the maximum of the available experience of mankind.²⁷

The law, Hart explained, is instituted to solve problems by availing itself of this practical knowledge:

Law is a response to the problems which are intrinsic in the existence of a society. It is an effort to deal with the problems: to deal with them in a way which at the least will preserve the minimum benefits of group living and at best will increase the benefits to the currently attainable maximum. Law, therefore, is dynamic and not static. It is a doing of something, an activity with a pur-

²⁶ See William N. Eskridge, Jr., and Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in Henry M. Hart, Jr., and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* li, c-cii (Foundation 1994) (noting that adherents of legal process theory sought to pair this "dynamic" government with "neutral" or "lawlike" principles). Justice Breyer does not mention *The Legal Process* in *Active Liberty*. He does, however, mention William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett's *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (West 3d ed 2001), a casebook that is heavily influenced by legal process approaches and that discusses extensively the nature and history of legal process thinking. See *id.* at 565–67 (describing the evolution of "the rationalist tradition in American law"). See generally *id.* at ch 7, § 2 (presenting cases and secondary sources that address legal process theories of interpretation). This rejection of grand theorizing and foundational thinking has a certain affinity with pragmatism, a major influence on early twentieth century progressives. Justice Breyer studied pragmatism systematically, both as an (undergraduate) philosophy major at Stanford and at the Harvard Law School. Kersch, *Synthetic Progressivism* at 245 (cited in note 1) ("Justice Breyer came by his pragmatism in the first instance less as a by-product of *la vie active* than as a matter of serious metaphysics."). As Breyer interacts in the coming years with Justices Roberts and Alito, it will be of interest to see how their own rejection of grand theorizing and foundational thinking, which seems to be rooted in a commitment to common law legal craftsmanship and legal professionalism, is different from Justice Breyer's, which is rooted in philosophical pragmatism and a background in administrative law and regulatory policy. I return to this theme, briefly, at the end of this Review. See text accompanying notes 218–19.

²⁷ Letter from Henry M. Hart, Jr., to John H. Williams (Oct 15, 1941), quoted in Eskridge and Frickey, *An Historical and Critical Introduction* at lxxvi (cited in note 26) (describing Hart's commitment to addressing statutory interpretation through "realistic 'problems' at a given point in time").

pose. Reflecting on this purposive quality, we come to see that it infuses the whole of law and all its parts. We come to see that every legal problem is a problem of purpose, of means to an end, and needs to be approached with awareness that this is so.²⁸

As Hart and Sacks put it in their textbook's chapter, "An Introduction to the Nature and Function of Law":

Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living Legal arrangements (laws) are provisions for the future in aid of this effort. Sane people do not make provisions for the future which are purposeless. It can be accepted as a fixed premise, therefore, that every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective, however difficult it may be on occasion to ascertain it or to agree exactly how it should be phrased.

Underlying every rule and standard, in other words, is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning. The uncertainties cannot be intelligently resolved—indeed, in a just case they cannot be intelligibly resolved—without reference to it. If the policy is in doubt in relevant respects, that doubt must be cleared up. Always the question must be faced: What purpose—what policy or objective or underlying principle—should be attributed to the arrangement in question? The immediate uncertainty about the arrangement's meaning must then be resolved not only so as to avoid irrational inconsistencies in application but so as to further the purpose so attributed.²⁹

Hart and Sacks add (and Justice Breyer agrees—prominently—in *Active Liberty*) that:

²⁸ Henry M. Hart, Jr., *Note on Some Essentials of a Working Theory of Law*, Hart Papers, Box 18, Folder 3, quoted in Eskridge and Frickey, *An Historical and Critical Introduction* at lxxxii (cited in note 26) (noting that Hart "posited [that] perhaps the crucial fact about any society is the interdependence of its members") (internal quotation marks omitted). See Thomas L. Haskell, *The Emergence of Professional Social Science: The American Social Science Association and the Nineteenth-Century Crisis of Authority* 15 (Illinois 1977) (describing "a major intellectual reorientation" at the end of the nineteenth century brought about by social scientists' recognition of "the objective fact of social interdependence"). See also Michael Willrich, *City of Courts: Socializing Justice in Progressive Era Chicago* 84–85 (Cambridge 2003) (describing the Progressive Era shift from individual rights to community rights, especially in the realm of criminal responsibility).

²⁹ Hart and Sacks, *The Legal Process* at 148 (cited in note 26).

Not only does every particular legal arrangement have its own particular purpose but that purpose is always a subordinate one in aid of the more general and thus more nearly ultimate purposes of the law. Doubts about the purposes of particular statutes or decisional doctrines, it would seem to follow, must be resolved, if possible, so as to harmonize them with more general principles and policies. The organizing and rationalizing power of this idea is inestimable.³⁰

B. Democracy and the Legal Process

This purposive approach, which looks towards government optimistically as a problemsolving endeavor, was forged in the wake of the New Deal triumph (but before the Warren Era rights revolution).³¹ For many liberals at this time, the democratic bona fides of the New Deal triumph were so self-evident that there was no felt need to elaborate any serious democratic theory on which to ground the purposive, problem-focused approach: the problemsolvers serving in the national government in Washington were experts in the science of advancing the public interest who acted, few doubted, with only the people's best interests at heart.³²

The judicial activism of the Warren Era (the implications of which were not foreseen by Hart and Sacks when they wrote their text³³), changed all that. The fact that Hart and Sacks "had an insufficiently elaborated theory of democracy," had hardly been noticed before.³⁴ Once the rights revolution took off, however, it suddenly became a "problem" that legal academics needed to solve. In subsequent years, a successor generation of "new legal process" thinkers supplemented Hart and Sacks's purposive approach with arguments that it was the most consistent with "democracy."³⁵ The major route by which they did so was to conceive of "lawmaking as a dialectic and evolutive process."³⁶ New legal process scholars emphasized "the importance of dia-

³⁰ Id.

³¹ See Lucas A. Powe, Jr., *The Warren Court and American Politics* 17 (Belknap 2000) ("[T]he Court's prime role was to facilitate the policies ordained by the elected branches.").

³² See id. at 17–18.

³³ See Eskridge and Frickey, *An Historical and Critical Introduction* at xcvi (cited in note 26).

³⁴ Id. at cxix–cxx (noting arguments that legislative intent and popular will did not match up because of suppression of the minority and manipulation of the majority).

³⁵ Id. at cxxx–cxxxi (reconceiving legal process theory to minimize the impact of undemocratic statutes, for example, those that reflect rent-seeking by special interests); William N. Eskridge, Jr., and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 333 (West 1st ed 1988) ("The new legal process thinkers justify an active role for judges and administrators by rethinking the concept of lawmaking in a democratic polity.").

³⁶ Eskridge and Frickey, *Cases and Materials on Legislation* at 333 (cited in note 35).

logue or conversation as the means by which innovative lawmaking can be validated in a democratic polity and by which the rule of law can best be defended against charges of unfairness or illegitimacy.”³⁷ For these scholars, “[l]awmaking is a continuous process of discussion, punctuated perhaps by the enactment and interpretation of statutes but mainly animated by an ongoing dialogue of interested and informed observers.”³⁸ Judges are only one of many participants in this process. As such, it is incumbent upon them to work with the other institutions of government as partners in the ongoing (and, by its nature, experimental) process of solving social problems and implementing public policy effectively. The judge’s role should be modest—deferential to the legislative and bureaucratic expertise where appropriate, but assertive in areas in which judges possess unique institutional competence (such as, for example, cases involving the protection of civil rights and civil liberties). If judges fulfilled this role properly, so the new legal process thinkers held, judges would also be acting as the helpmeets of democracy even if they voted in a countermajoritarian way.³⁹

Active Liberty, in classic new legal process fashion, marries a broader democratic theory to an articulation of Hart and Sacks’s purposive and consequentialist approach to statutory interpretation. In doing so, however, Justice Breyer has decided to rest more prominently than most of the other new legal process scholars on the original purposive approach to statutory construction as set out by Hart and Sacks themselves.⁴⁰ In this book, Justice Breyer stipulates that that more general purpose is “democracy” or “active liberty” (see pp 98–99).

Breyer argues his way to this conclusion through a series of steps. The book begins with the affirmation that “[t]he United States is a nation built upon principles of liberty” (p 3).⁴¹ But he then explains

³⁷ Id at 331 (describing three common themes in the responses of new legal process scholars to past criticisms of legal process theory).

³⁸ Id at 333 (“The legitimacy of law derives not from its formal source, but rather from its capacity for enlightening us and advancing the moral and economic dialectic of our society.”).

³⁹ See, for example, Sunstein, *One Case at a Time* at 4 (cited in note 12) (“[M]inimalist rulings increase the space for further reflection and debate at the local, state, and national levels, simply because they do not foreclose subsequent decisions.”). But see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 20–21 (Yale 1986) (elaborating the possibility that, if courts’ decisions reach too broadly, courts may become “a counter-majoritarian check on the legislative and the executive [that] ha[s] a tendency over time seriously to weaken the democratic process”); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 102–03 (Harvard 1980) (advocating that judges intervene only when the political process “is systemically malfunctioning” by trammeling minority rights).

⁴⁰ See text accompanying note 30.

⁴¹ In his emphasis on “liberty” rather than “equality” as a baseline, Justice Breyer departs from the approach of the new legal process scholar he most resembles, Cass Sunstein. See Cass R. Sunstein, *The Partial Constitution* 141 (Harvard 1993) (emphasizing, as keys to a functioning

that “liberty means not only freedom from government coercion but also the freedom to participate in the government itself” (id). As such, this “public liberty” has two dimensions. In describing and elaborating upon these dimensions, Breyer returns to a famous distinction made by the nineteenth century French political philosopher Benjamin Constant between the “liberty of the ancients” and the “liberty of the moderns” (id).⁴²

For Breyer, Constant’s liberty of the ancients involved “a sharing of a nation’s sovereign authority among that nation’s citizens,” and “an active and constant participation in collective power” (p 4). (Constant’s model here was the classical Greek polis.⁴³) Breyer writes: “This sharing of sovereign authority, Constant said, ‘enlarged’ the citizens’ ‘minds, ennobled their thoughts,’ and ‘established among them a kind of intellectual equality which forms the glory and the power of a people’” (id). In Constant’s view, Breyer tells us—and these real virtues notwithstanding—“ancient liberty was incomplete [because it] failed to protect the individual citizen from the tyranny of the majority [and it] provided a dismal pretext for those who advocated new ‘kinds of tyranny’” (id). (Constant’s thoughts here were turned both to The Terror, which he had witnessed, and in which appeals to classical ideals played a prominent part, and to the Napoleonic dictatorship, in which a tyranny was cemented through the withdrawal of significant segments of the people from public life.⁴⁴) Because of the threat of tyranny, it was essential to also recognize the importance of the “modern liberty,” “civil liberty,” or “freedom from government, consist[ing] of the individual’s freedom to pursue his own interests and desires free

state, political equality and equal opportunity to develop individual capacities); James E. Fleming, *Constructing the Substantive Constitution*, 72 Tex L Rev 211, 213–14 (1993) (noting Sunstein’s concerns with equality). The decision to emphasize liberty rather than equality is probably better attuned to the more conservative Court on which Justice Breyer is sitting, and on which he seeks to have influence. This use of “liberty” is most likely not a matter of mere strategy alone. Justice Breyer, after all, was a law and economics scholar (albeit in the generally state-friendly Harvard incarnation rather than the free-market University of Chicago guise) and had the support of many Republicans for his appointment to the Court.

⁴² This distinction was first drawn in the early texts of Madame de Staël, who exerted a strong influence on Constant. Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* 38 (Yale 1984) (noting that Constant and de Staël elaborated the distinction in their 1798 work *Circonstances Actuelles*). It is well known among political theorists, and has been adverted to by law professors in an array of contexts over the years. Breyer’s adoption of Constant’s distinction here is remarkable less for its originality than for the centrality he accords it in advancing a theory regarding the appropriate way to interpret legal texts. See id at 19 (describing Constant’s distinction as applicable to the political process but not to judicial review).

⁴³ See id at 19 (“[Popular self-government] was most fully actualized in the ancient *polis*, while [private independence] was the aspiration of all those inhabiting modern, large-scale commercial societies.”).

⁴⁴ See id at 26 (describing both Robespierre and Napoleon as “political hypocri[tes]” “who decorated cruelty with democratic symbols”).

of improper government interference” (p 5). The safeguarding of each form of liberty was necessary, but not sufficient (id). Breyer informs his readers—rightly—that Constant argued for the simultaneous importance of both kinds of liberty in the modern world, and that, to live well politically, we must “learn to combine the two together” (id).

Breyer calls Constant’s liberty of the ancients “active liberty” (p 4). And Breyer, in turn, identifies active liberty with the “democratic nature” of government (p 5). He fastens the last link in this chain by arguing—dubiously, but not in any way denying the importance of the liberty of the moderns—that the liberty of the ancients, or active liberty, is, and always was, central to the meaning of the Constitution, and represents its overarching “objective” (p 6). And, again, while never denying the significance of negative liberty, he tells us that his primary focus here will be on active liberty, that is, on “the Constitution’s democratic nature” (p 5).

This, of course, is not simply a matter of political theory. It has implications for the way Justice Breyer and, presumably, other judges (who might be persuaded) interpret law. “My thesis,” Breyer writes, “is that courts should take greater account of the Constitution’s democratic nature when they interpret constitutional and statutory texts” (p 5). A due attentiveness to “the Constitution’s democratic nature,” he tells us expressly, counsels a posture of judicial restraint (pp 5, 17). But the nature of the Constitution does more than that: “It finds in the Constitution’s democratic objective not simply restraint on judicial power or an ancient counterpart of more modern protection, but also a source of judicial authority and an interpretive aid to more effective protection of ancient and modern liberty alike” (p 6). “[E]mphasizing this democratic objective,” he contends, “can bring us closer to achieving the proper balance to which Constant referred” (id).

C. History and the Legal Process

The purposive approach as originally forged in the New Deal Era by Hart and Sacks, which looked towards government optimistically as a problemsolving endeavor, was not only initially offhand about its theory of democracy (the solving of national problems by the national government was assumed to be self-evidently democratic). It was also initially offhand about both the constitutional text itself and the text’s roots in America’s political and constitutional history (which, in many respects, advocates of the purposive approach felt did not much matter in the modern era).⁴⁵ Hart and Sacks’s “purposive” understanding

⁴⁵ This offhandedness may have stemmed, in part, from the strong influence of the progressive histories of the Founding during Hart and Sacks’s intellectually formative years, in which the

of the nature of law, and the judge's role in interpreting it was derived with statutes and the problem of interpreting them in mind, and not the Constitution.⁴⁶ As New Deal veterans grappled with the problems and promise of the modern administrative state they had helped to create, the main constitutional questions seemed to be behind them.⁴⁷ As they saw it, they now lived in a pragmatic age, in which the central questions for government were practical questions of "what works?" (they essentially drew an equivalence between what worked and what was constitutional). In the nearly fourteen hundred pages of *The Legal Process*, the Constitution—and the Founders—are mentioned rarely, and only in passing.⁴⁸

That being the case, it is notable that *The Legal Process* opens with a specific mention of the constitutional moment in 1789. But the use Hart and Sacks make of the Founding is telling:

In 1789 when the American republic was established some 800 million people inhabited the globe. Today, there are about 2,500 millions and the number is steadily increasing. These human beings have a great variety of wants, ranging from the common urge to secure the simple necessities of physical existence to the most subtle of desires to achieve some sense of oneness with the universe. The more basic wants are clearly apprehended and rela-

Founding itself (and the original Constitution) was condemned as, in many respects, undemocratic. See Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* 154 (Macmillan 1944) (implying that the Constitution was supported by "the owners of personally anxious to find a foil against the attacks of leveling democracy").

⁴⁶ See Eskridge and Frickey, *An Historical and Critical Introduction* at cvi–cvii (cited in note 26) (noting that civil rights cases and other constitutional materials failed to enter *The Legal Process* in the 1950s). For a classic articulation of the "purposive" approach to statutory interpretation as expounded by a legal process scholar, see generally Reed Dickerson, *The Interpretation and Application of Statutes* 87–88 (Little, Brown 1975) (looking to the "ulterior purpose" of statutes as "the touchstone of statutory interpretation").

⁴⁷ The key battle, of course, was the New Deal constitutional standoff in which Roosevelt threatened to pack an uncooperative Court with new justices who favored New Deal legislation. See William Leuchtenburg, *The Supreme Court Reborn* 132–34 (Oxford 1995) ("[Roosevelt] recommended that when a federal judge who had served at least ten years waited more than six months after his seventieth birthday to resign or retire, a President might add a new judge to the bench."). See also *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937) (expanding the federal government's power under the Commerce Clause to include all activities with "such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions"); *West Coast Hotel Co v Parrish*, 300 US 379, 400 (1937) (upholding state regulation of the number of hours women could work outside of the home). Hart served in the Roosevelt administration as Associate General Counsel of the Office of Price Administration (OPA). William N. Eskridge, Jr., and Philip P. Frickey, *The Making of The Legal Process*, 107 Harv L Rev 2031, 2036 (1994) (noting that "[t]he OPA experience filled Hart with a new enthusiasm for teaching legislation").

⁴⁸ So far as I can tell, a constitutional Framers is mentioned only once: James Madison is referenced briefly in the discussion of federalism, the book's only sustained (albeit brief) foray into a constitutional subject. Hart and Sacks, *The Legal Process* at 168 (cited in note 26).

tively fixed. Others often are only dimly felt, and are subject to change by many complex processes both of external suggestion and of internal reflection. But whatever for the time being each individual's wants may be, human life is an unceasing process of fixing upon those on which time and effort are to be expended, and trying to satisfy them. . . .

The coexistence on the face of the same planet of these ever-changing and increasing millions of people, having these wants and such abilities to satisfy the wants under these conditions of interdependence, are the basic facts of social science, and pose its basic problems. . . .

Among those who have succeeded in surviving for the time being, whose wants, taken as they are at any given time, and which of them, are to be satisfied, and how? To the extent that presently existing wants are subject to change by external suggestion, which wants are to be encouraged and which discouraged? These are all questions which in some fashion or other *must* be answered—by events if not by conscious choice. Law being a pervasive aspect of social science, the questions pose problems which are basic also for lawyers.⁴⁹

By the Warren Era, however, when, among liberals and conservatives alike, cries reached a crescendo that liberal activist judges were no longer interpreting the Constitution, either as written or as intended by the Framers, but instead were simply writing into law the judges' own policy preferences, it was no longer politically and intellectually plausible for judges and law professors to dispense with either the Constitution or with arguments from history. It was at this time that purposive and consequentialist new legal process scholars supplemented their newly forged democratic theories with a "republican" reading of American history—a reading that first appeared in historical literature in the middle of the 1960s⁵⁰—which in its own way emphasized the same sort of classical republicanism that Constant had in mind when describing what he referred to as the liberty of the an-

⁴⁹ Id at 1–2.

⁵⁰ See, for example, J.G.A. Pocock, *Civic Humanism and Its Role in Anglo-American Thought*, in J.G.A. Pocock, *Politics, Language, and Time: Essays on Political Thought and History* 80, 101 (Athenum 1971) ("There is in fact evidence of a continuing attempt throughout the eighteenth century to explain how the individual of an urban and commercial society could be a citizen, free, virtuous, and above all uncorrupt."); Bernard Bailyn, *The Ideological Origins of the American Revolution* 281 (Belknap 1967) (positing that at the time of the Revolution "[r]epublican states" formed "a new social basis for the middle level of government"). See also Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 302 (Yale 1998) (listing "historians [who] have explored the strong republican strands of the Founding").

cients. The law school civic republicans, who arrived on the scene in numbers in the 1980s, argued—as Breyer does in his book—that “the historical evidence supports the view that the republican tradition is the dominant tradition and that public values should inform legislation (and its implementation) at all levels.”⁵¹ “Is it reasonable from a historical perspective,” he asks, “to view the Constitution as centrally focused upon active liberty, upon the rights of individuals to participate in democratic self-government?” “I believe so,” he concludes (p 21).

The reading of history Justice Breyer advances here is nothing new (though the degree to which the republican strain represents the dominant one in American political thought is debatable⁵²). The real interest in Justice Breyer’s historical overview lies at the end, where he translates this civic republican reading of American history into his own patented (and technocratic) legal process idiom. Justice Breyer refers to the active liberty thrust of the Constitution as its “primary objective,” which is manifested in three ways (p 33). First, “all citizens share the government’s authority . . . in the creation of public policy” (id). Second, “the Constitution’s structural complexity” was a “respon[se] to certain practical needs, for delegation, for nondestructive (and hopefully sound) public polices, and for protection of basic individual freedoms” (id). Third, “the Constitution’s democratic imperative” should be understood “as accommodating, even insisting upon, these practical needs” (pp 33–34). “In sum,” he concludes, “our constitutional history had been a quest for workable democratic government” (p 34). (This, it is worth noting, is a somewhat idiosyncratic move, because many of

⁵¹ Eskridge and Frickey, *Cases and Materials on Legislation* at 331 (cited in note 35) (describing these scholars’ claims as a “powerful analytic attack on pluralism” and a rejection of interest groups as the principal generators of legislation). See, for example, Sunstein, *The Partial Constitution* at 23–24 (cited in note 41) (“[T]he framers’ belief in deliberative democracy drew from traditional republican thought.”); Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L J 1013, 1030–31 (1984) (using *The Federalist* to argue that the Framers sought “a constitutional economy of [republican] virtue”).

⁵² See, for example, Michael P. Zuckert, *Natural Rights and the New Republicanism* xix (Princeton 1994) (“America was not ‘founded in the dread of modernity,’ as one of the civic-republican historians puts it, but founded in the embrace of modernity.”); Joyce Appleby, *Liberalism and Republicanism in the Historical Imagination* 338 (Harvard 1992) (“[B]y presenting this mode of political discourse as encapsulating Americans within a closed ideology, the republican revisionists have gone beyond their evidence.”); Isaac Kramnick, *Republicanism and Bourgeois Radicalism: Political Ideology in Late Eighteenth-Century England and America* 40 (Cornell 1990) (“Liberalism there was in late eighteenth-century England and America alongside the older ideal of republicanism, a progressive liberalism still subversive of the status quo.”); John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and Foundations of Liberalism* 20 (Basic 1984) (arguing that the key thinkers in the Revolutionary and Constitutional eras did not employ civic republicanism in their writings).

the republican theorists themselves saw the Constitution as, in many respects, a betrayal of, or a retreat from, the republican tradition.⁵³)

II. *ACTIVE LIBERTY* AS RHETORIC AND TOOL

To trace the origins of Justice Breyer's "interpretive tradition," of his "attitude" in approaching a legal text, of course, is not the same thing as to critique it. There are a number of ways, though, that we can critique Breyer's philosophy. First, we can ask if he uses Constant's understanding of "active liberty" appropriately in justifying his stated interpretive stance. Second, we can see how Justice Breyer's emphasis on purposes and consequences in the service of what he understands to be active liberty informs his reasoning and his decisions in concrete, contemporary cases. If we do so, I think that we shall see that this Justice uses "active liberty" and appeals to democracy in a chiefly rhetorical way, and that, in many respects, this permits him to obscure the ways in which his "attitude" is perhaps the least "democratic" of any of the Supreme Court's currently sitting justices.

A. *Active Liberty* as Rhetoric

Justice Breyer's decision to invoke Benjamin Constant as a touchstone is understandable, both with respect to Justice Breyer's own approach to law and politics and more generally. Both Breyer and Constant endeavor to be clear-eyed about the attractions and dangers of a belief in human progress, on the one hand, and conservatism, on the other. Like Justice Breyer, Constant believed that a sensible liberal politics is best conceived of, not as a deduction from a first-fact or a principle, but rather as a sensible means, given the ambient context, of solving pressing political problems.⁵⁴

Breyer's decision to invoke Constant's understanding of the nature and promise of liberal freedom in the modern world is also understandable—and, in many respects, welcome—because, among modern liberals, Constant is clearly possessed of a rare wisdom. Where others (particularly contemporary academics) have derived their understanding of

⁵³ See Gordon S. Wood, *The Radicalism of the American Revolution* 253–54 (Knopf 1992) (contending that the Framers used the Constitution to grant political power to an elite group of supposedly virtuous and "disinterested gentry"); Gordon S. Wood, *The Creation of the American Republic, 1776–1787* 606 (North Carolina 1969) ("[T]he Americans of 1787 shattered the classical Whig world of 1776.").

⁵⁴ "The liberal state is desirable not because it mirrors human nature or respects eternal human rights, but because it is the political arrangement most adequate to solving the problems of European society in its current stage of economic, scientific, and moral development." Holmes, *Benjamin Constant* at 32 (cited in note 42) ("[Constant] deliberately supplanted the contract myth with a theory of social change.").

liberty from almost geometric proofs, resting on a cloud of abstractions that would bring a twinkle to the eyes of Aristophanes, Constant framed his views as a profoundly reflective participant in actual politics, as a member of the French Assembly, and, indeed, (after having previously criticized him ferociously) as part of a group that helped Napoleon draft France's 1815 constitution.⁵⁵ He was engaged in public life, moreover, at a time when many of the most profound political questions, presented in their deepest form, were on the table, and when the consequences of various theories and choices became readily apparent because these theories and choices were put swiftly into action in the actual world.⁵⁶ Constant's reflections on politics and liberty were additionally informed by a broad and deep reading of history and political theory, as well as by a profound interest in, and insight into, human nature and individual psychology.⁵⁷ He was possessed of a well-rounded, deeply humanistic understanding of politics.

That said, though, it is not at all clear of what real use Constant, and his concepts of the "liberty of the moderns" and the "liberty of the ancients" can be—other than as a rhetorical jumping off point—to a modern American judge like Justice Breyer, faced with concrete legal cases aimed at "interpreting our democratic Constitution" (pp 5–6). Unlike Alexis de Tocqueville, Constant never visited America and was not a lawyer. And Constant was not a judge.⁵⁸ Much of his writing, including his famous essay on "Ancient and Modern Liberty," was written as he navigated his way—politically, intellectually, and personally—through the tumult in ideas and political practice that shook France from the late eighteenth century to the early nineteenth century. In this context, Constant took up the deepest questions of government, including those involving the relevance of classical democ-

⁵⁵ See Holmes, *Benjamin Constant* at 12, 17–19 (cited in note 42) (noting that "Constant's celebrated lecture comparing ancient and modern liberty" was delivered after his experiences in the Tribunat and Napoleon's government).

⁵⁶ For an analysis of the debates of that period, see Aurelian Craiutu, *Liberalism under Siege: The Political Thought of the French Doctrinaires* 58 (Lexington 2003) (describing Constant's efforts to develop "viable representative institutions" in France while avoiding a "dangerous" return to the monarchy). See also *id.* at chs 3, 5 (describing French political philosophers' efforts to create a viable government in the wake of the 1789 Revolution).

⁵⁷ Holmes, *Benjamin Constant* at 13 (cited in note 42) (noting that Constant's work outside of the realm of the strictly philosophical "allow[s] us to penetrate deep to the psychological roots of liberal politics"). Constant was also a novelist, and a master delineator of human motivation and introspection. See, for example, Benjamin Constant, *Adolphe* 37 (Penguin 1964) (L.W. Tancock, trans) ("At that time all I wanted was to give myself up to the kind of primitive and impulsive reactions which lift the soul out of the common rut and make it look upon everyday things with disdain.").

⁵⁸ See Holmes, *Benjamin Constant* at 4 (cited in note 42).

racy to the modern world, and the nature and future of freedom itself within the modern, pluralist, capitalist nation-state.⁵⁹

To be sure, Constant was deeply interested in constitutionalism. He was particularly interested in the role that a balance of powers played within a constitutional system.⁶⁰ Perhaps his ultimate achievement in this context was to arrive at the conviction that (constitutionally) limited and representative government that both protected individual rights (that is, a private sphere), and encouraged a realistic and appropriate level of engagement in politics, was the best form of government for the modern world.⁶¹

What was Constant for? As Stephen Holmes has described it:

Constant advocated a constitutional system that stipulated direct popular elections, integral renewal and inviolability of representatives, two chambers, an executive veto, the right of dissolution, a responsible executive liable to dismissal, an independent judiciary, trial by jury, a ban on retroactive laws, absolute freedom of the press, and an institutional barrier between the army and the police. The legislature was to have the right to initiate new laws and repeal old ones; and it was to control the purse strings of government, voting every year on taxes and on support for the armed forces. Equally important, it was to scrutinize all executive actions such as treaties with foreign governments.⁶²

Perhaps his most significant contribution is his vigorous defense of government by elected representatives.⁶³

In arriving at these views, Constant looked admiringly to the handiwork of the American Founders.⁶⁴ He evinced a strong affinity

⁵⁹ See id at 19–20.

⁶⁰ See Benjamin Constant, *Principles of Politics Applicable to All Governments* 35 (Liberty Fund 2003) (Etienne Hofmann, ed) (Dennis O’Keeffe, trans) (“The mutual supervision of diverse sections of the government is useful only in preventing one of them from aggrandizing itself.”). In this, though, he emphasized the role that the King would play as a neutral power standing above all political parties and groups. See id at 51 (“When hereditary monarchy rested on divine right, the very mystery which sanctioned this theocratic institution was able to invest the monarch with superior enlightenment.”). See also id at 151 (“[W]e believe . . . that the indispensable conditions for making judicial power the safeguard of citizens are the same under all forms of government.”). It bears considering whether Justice Breyer has come to see judges as replacing kings in this role.

⁶¹ See Holmes, *Benjamin Constant* at 2–3 (cited in note 42) (noting that Constant’s philosophy reflected his experiences during “the Revolution, the Restoration, and the Empire”).

⁶² Id at 131 (elaborating also the need for checks and balances between branches of government). The liberal side of Constant is emphasized in Aurelian Craiutu, *The Battle for Legitimacy: Guizot and Constant on Sovereignty*, 28 *Historical Reflections* 471 (2002).

⁶³ See Holmes, *Benjamin Constant* at 132 (cited in note 42).

⁶⁴ See id at 49. See also Garry Wills, *Explaining America: The Federalist* 265 (Doubleday 1981) (“We have been told that Madison pitted interest against interest in a constructive process

for Scottish Enlightenment thought, including that of David Hume, Adam Smith, and Adam Ferguson—thought that itself had had a profound influence on the American Founders. (Indeed, Constant had spent a formative year in Edinburgh.⁶⁵) The Constitution had already settled most of these matters: the Constitution, for example, and the American people, were fully committed to government by elected representatives, an independent judiciary, separation of powers more generally, and trial by jury, thanks in large part to the influential writings of another liberal French thinker, Montesquieu. This being the case, it is not clear what Justice Breyer's appeal to Constant adds. In interpreting our own Constitution, why not cut out the middleman, and go straight to the Founders themselves? It is not at all clear that an originalist approach to constitutional interpretation, of the sort advocated by Justices Thomas and Scalia, is any less faithful to the spirit of "active liberty" as delineated by Constant and the Constitution, than is Justice Breyer's progressively inflected, "purposive" legal process approach.

If we move beyond Constant's defense of representative government (in the face of claims of Rousseau, Robespierre, and the appeal to many of a revival of the classical Greek polis) to his advocacy of a politics for the modern world that sagely combined "the liberty of the ancients" with the "liberty of the moderns," the same considerations arise. To be sure, there are, and have been, Americans who believe that citizens should focus on private concerns alone, and not bother themselves with questions of the public good as advanced through participation in public life. And to be sure, there are, and have been, Americans who believe that the good life can be lived only through sustained, direct, and continuous (to the point of full-time) participation in government. We could doubtless find people who claim that the practice of direct democracy in service of the collective good should always trump claims made on behalf of private interest and private right. But the American Founders did not believe this.⁶⁶ And the structure of our government does not reflect either of those extremes: in its basic outlines, its "framework," as Justice Breyer likes to describe it (and the justifications that were made to defend it) (p 110), it repre-

of self-correction[, but Madison really said] that interest is to be eliminated from the political arena, distilled out of the process.").

⁶⁵ See Holmes, *Benjamin Constant* at 183 (cited in note 42). See also Gertrude Himmelfarb, *The Roads to Modernity: The British, French, and American Enlightenments* 94, 200–01 (Knopf 2004) (finding the influence of the Scottish Enlightenment on early American political thinkers both Federalist and Antifederalist).

⁶⁶ See, for example, Amar, *The Bill of Rights* at xii (cited in note 50) ("A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with a language of rights; states' rights and majority rights alongside individual and minority rights.").

sents a sage combination of both.⁶⁷ It accepts what Constant, in his times, in his country, was forced to argue at length: that liberalism and democracy were not opposites, but rather, ultimately, mutually supportive.⁶⁸ The American Founders (as Constant himself clearly saw) knew this.⁶⁹ And, for that reason, we already have a system of government that looks to both ancient and modern liberty as worthy of protection.

B. *Active Liberty* as Tool

Justice Breyer's decision to remind us of all of this philosophical tradition in the first chapter of *Active Liberty* is all to the good—and entirely uncontroversial. He then, however, purports (in a chapter entitled “Applications”) to demonstrate the way in which an attitude mindful of the importance of Constant's “active liberty” helps him to think through (if not ultimately decide) hard cases of contemporary constitutional law. It is probably not quite fair to say that Constant's conceptions of liberty have nothing to do with Justice Breyer's applications, because the claims of representative government acting collectively (through legislation) in the face of counterclaims anchored in private right are common in questions coming before the Supreme Court.⁷⁰ But Constant was concerned chiefly with questions involving the fundamental framework of constitutional government—such as should we have an executive, or should we have an elected legislature, or should criminal defendants be tried before a judge alone, or with the assistance of a citizen jury? Constant was not concerned with the sorts of interpretive questions that Breyer wishes to discuss, such as closely contested questions of the meaning of highly technical provisions of

⁶⁷ Id (“Individual and minority rights did constitute a motif of the Bill of Rights—but not the sole, or even the dominant, motif.”).

⁶⁸ Holmes, *Benjamin Constant* at 54, 73 (cited in note 42) (“[Constant] drew the distinction [between ancient and modern liberty] sharply in order to emphasize the tight interdependence of public influence and private security.”). Aurelian Craiutu argues, however (in disagreement with Holmes), that Constant's thought emphasizes liberalism more than democracy. Craiutu argues that Holmes tends to gloss over the attendant tensions between liberalism and democracy. See Aurelian Craiutu, *Liberalism under Siege* at 17 (cited in note 56) (“[T]he history of nineteenth-century French liberalism invites us to reflect on the uneasy alliance between liberalism and democracy.”).

⁶⁹ Holmes, *Benjamin Constant* at 49 (cited in note 42) (describing Constant's attraction to the American Revolutionaries because they did not require that individuals subordinate their desires to the needs of the state).

⁷⁰ See, for example, *Minersville School District v Gobitis*, 310 US 586, 591 (1940) (“A grave responsibility confronts this Court whenever in course of litigation it must reconcile the conflicting claims of liberty and authority.”). See also *West Virginia State Board of Education v Barnette*, 319 US 624, 646–47 (1943) (Frankfurter dissenting) (noting that the conflict between individual rights and state power creates very personal stakes, even for the justices deciding the case).

the McCain-Feingold Act.⁷¹ As Justice Breyer recognizes, moreover, Constant argued for the importance (as Breyer himself does) of both the liberty of the moderns and the liberty of the ancients. As such, appealing to Constant's concepts—other than rhetorically, which is, really, what Justice Breyer does in this book—is of little help to a judge in calibrating what particular blend and balance of them is appropriate in arriving at a decision in each particular case.

There is little obvious harm done by Justice Breyer's call for an animating focus on purposes and consequences in the service of active liberty when he applies them to the sorts of legal problems that for many people, specialists aside, will matter least.⁷² Most prominent amongst these are the sorts of complex and seemingly apolitical regulatory cases that most interested the original legal process scholars and—not coincidentally—Justice Breyer himself.⁷³ The inadequacy—and, indeed, the harm—of Justice Breyer's focus on purposes and consequences, by contrast, is thrown into high relief the moment he ventures into the contentious territory of high profile constitutional law that, for many people, will matter most.

1. Affirmative action.

Justice Breyer's efforts in this book to situate affirmative action within his "active liberty" framework are particularly revealing and will serve as my main illustration. In the twin decisions coming out of disputes over the University of Michigan's affirmative action programs, Justice Breyer aligned himself with Justice O'Connor at the Court's ostensibly "moderate" center.⁷⁴ If we look at "activism" as a numerical proposition—did the justice vote to void a governmental law or practice, or did he or she "defer" to the government?—he was 50 percent

⁷¹ See *McConnell v FEC*, 540 US 93, 233–34 (2003) (addressing three highly technical provisions of a statute regulating election advertising in an opinion so long that four justices collaborated to write parts of the majority).

⁷² See Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *Intl Org* 1, 5 (Winter 1992) (noting that epistemic agreement among policy experts is "possible only in those areas removed from the political whirl"). This is not to say that there is not a good deal of nonobvious harm in these cases inherent in a "purposive" approach. These statutes typically have many, often conflicting, purposes. The decision to identify one as paramount and overriding is commonly a highly political act. Where an overriding purpose can be identified, it can be at such a high level of abstraction as to be useless in resolving with any definitiveness any concrete legal question. R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 53–54, 84–92, 207–16 (Brookings 1994).

⁷³ Kersch, *Synthetic Progressivism* at 247–48 (cited in note 1).

⁷⁴ Breyer joined O'Connor's majority opinion and Ginsburg's concurring opinion in *Grutter v Bollinger*, 539 US 306, 310 (2003). He also concurred in the Court's judgment in *Gratz v Bollinger*, 539 US 244 (2003), where he joined O'Connor's opinion except where it joined that of the Court. See *id.* at 281–82 (2003) (Breyer concurring).

activist and 50 percent restrained in the Michigan cases. Breyer and O'Connor both voted to strike down the affirmative action plan adopted by the undergraduate admissions office, which awarded numerical bonus points to applicants from specified minority races,⁷⁵ but to uphold the affirmative action plan adopted by the law school's admissions office, which took race into account as a more nebulous "plus factor."⁷⁶ Both admissions offices sought to justify their plans on the grounds that they were aimed at the "compelling state interest" of creating a racially diverse campus environment. Justices O'Connor and Breyer both accepted this rationale.⁷⁷

In his discussion applying an attitude mindful of the claims of active liberty to affirmative action programs, Justice Breyer draws a clear line between Justice Thomas's "color-blind" approach to interpreting the Fourteenth Amendment's Equal Protection Clause, as it applied to these admissions schemes, and his own "more narrowly purposive" interpretation of the same constitutional clause (p 77). As Justice Thomas sees it, "the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society."⁷⁸ Breyer's own approach is less categorical, and more narrowly focused on the achievement of a sensible result (p 77). When one approaches the question from such a perspective, he argues, one is freer to draw a practical distinction between the classifications aimed at achieving a socially desirable result, and classifications aimed at thwarting one (pp 78–79). The decision of governments to classify persons on the basis of race, he tells us, may be undertaken in some cases with "malign" purposes—that is, with the objective of "exclusion" rather than "inclu[sion]" (p 83). This "malign" purpose would be impermissible because it is not aimed at achieving the right result. The decision of governments to classify persons on the basis of race in other circumstances, however, has a "benign" purpose (pp 78–79)—that is, it is aimed at the objective of "inclu[sion]" rather than "exclusion." This is constitutionally permissible (if narrowly tailored in service of a compelling government interest) because it is aimed at a desirable result (pp 83–84).

Breyer lays out two possible justifications for holding racial classifications permissible in cases involving benign discrimination aimed at achieving the right result (both of which are offered by Supreme

⁷⁵ *Gratz*, 539 US at 276–79 (invalidating an affirmative action program because the set-asides and bonus structures were rigid, not flexible).

⁷⁶ *Grutter*, 539 US at 338 (upholding an affirmative action plan that considered a "broad range of qualities and experiences").

⁷⁷ See *id.* at 325.

⁷⁸ *Id.* at 353 (Thomas dissenting).

Court justices in earlier rulings on affirmative action). He then, in turn, offers his own “active liberty” justification for this and touts his own approach’s special virtues. The first justification—a staple of Justice Brennan’s (that is traced back here to earlier rulings by federal Judge John Minor Wisdom)—would be to hold that, under a principle of equality, the “Constitution is color conscious to prevent discrimination being perpetuated and to undo the effects of past discrimination” (pp 79–80).⁷⁹ The second justification—the grounding of Justice Powell’s opinion (speaking for himself only) in *Regents of the University of California v Bakke*⁸⁰—is to hold that, under a principle of liberty, “the Constitution grants universities especially broad authority to determine for themselves the composition of their student bodies” (p 80).⁸¹ Justice Breyer argues, however, that a close reading of the University of Michigan cases demonstrates that neither of these considerations—but instead his own—were determinative (pp 80–81).

The Rehnquist Court’s decisions, he argues—quoting Justice O’Connor’s opinion at length—are grounded not primarily in either liberty or equality principles, but, instead, in “practical considerations” (p 81). In *Gratz v Bollinger*⁸² and *Grutter v Bollinger*,⁸³ the meaning of the Equal Protection Clause, as applied, derived chiefly from the fact that:

[H]igh ranking retired officers and civilian leaders of the United States military assert that “based on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principal mission to provide national security.” . . .

Student body diversity . . . better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals. . . . [E]ducation [is] pivotal to sustaining our political and cultural heritage [and plays] a fundamental role in maintaining the fabric of society. . . .

[N]owhere is the importance of . . . openness more acute than in the context of higher education. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be real-

⁷⁹ Citing *United States v Jefferson County Board of Education*, 372 F2d 836, 876 (5th Cir 1966) (“The criterion is the relevancy of color to a legitimate governmental purpose.”).

⁸⁰ 438 US 265 (1978).

⁸¹ *Id.* at 271–72 (striking down a medical school’s quota-based affirmative action plan but allowing race to be used as a factor in admissions).

⁸² 539 US 244 (2003).

⁸³ 539 US 306 (2003).

ized. . . [Indeed,] the path to leadership [must] be *visibly* open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . [And] all [must] participate (pp 81–82).⁸⁴

This evidence and these arguments count for a great deal. But Justice Breyer is apparently not content to leave these arguments to rest on foundations of practicality alone. “What are these arguments,” he asks in turn, “but an appeal [not to liberty, not to equality, but] to principles of solidarity, to principles of *fraternity*?” (p 82).⁸⁵

But, to be fair, Justice Breyer doesn't rest his constitutional approval of racial preference programs too deeply on the principle of *fraternity*.⁸⁶ For, immediately after that, he adds “to principles of *active liberty*” (p 82). But he doesn't rely too deeply on “*active liberty*” either (id). Immediately after that (on the road, we might say, from Paris to Port Huron) he adds, “[or] to maintain a well-functioning participatory democracy” (id). The ease with which Breyer moves with equivalence between these terms is troubling. For it suggests that the bottom line in these cases for this Justice is that affirmative action is constitutional because a lot of people say it “work[s]” and is “helpful” (p 83). And if they say it is helpful, he seems to imply, there must be some useful principle to justify it. It seems not to matter, really, to Justice

⁸⁴ Citing id at 330–32.

⁸⁵ Some readers may find Justice Breyer's appeal to the principles of the French Revolution, rather than our own, to be jarring, and possibly inadvertent. It is far from unprecedented in his writings, though. In encouraging an increasing engagement by American lawyers and judges with the case law, legal concepts, and political and institutional arrangements of other countries, Breyer has cited Wordsworth's paean to the French Revolution. See Stephen Breyer, *Keynote Address*, Symposium on Democracy (cited in note 14) (“[W]hat could be more exciting for an academic, practitioner, or judge, than the ‘global’ legal enterprise that is now upon us? Wordsworth's words, written about the French Revolution, will, I hope, still ring true: ‘Bliss was it in that dawn to be alive/But to be young was very heaven.’”). And he has expressly considered the relevance of the principle of fraternity to contemporary American jurisprudence. In light of this, his references here to fraternity could be read as a subtle gesture towards increasing transnational dialogue or deliberation in American law. See Stephen Breyer, *Réflexions Relatives au Principe de Fraternité*, Remarks Addressed to the Troisième Congrès de l'Association des Cours Constitutionnelles Ayant en Partage l'Usage du Français, Ottawa, Canada (June 20, 2003), online at http://www.supremecourtus.gov/publicinfo/speeches/sp_06-20-03.html (visited Apr 4, 2006) (stating that judges everywhere face the same types of problems and have the same types of legal instruments to fix them, and that to solve these problems, the differences in language do not matter).

⁸⁶ I would note here that, in a failed opportunity for some useful cosmopolitanism, Justice Breyer neglects to note that France itself (until very recently) strenuously rejected racial preference programs as the necessary implication of these very same principles (applied more appropriately in that case). See Thomas Sowell, *Affirmative Action around the World* 167 (Yale 2004) (“France has passed a law [around 2001] requiring political parties to have equal numbers of male and female candidates.”).

Breyer whether we call that principle fraternity, participatory democracy, or active liberty.

So how does Justice Breyer know that racial preferences are helpful, or that they work? Here, looking to the “butterfly effect” logic that Justice Breyer deployed most famously in his dissent in *United States v Lopez*⁸⁷ might prove unexpectedly illuminating.⁸⁸ There, Justice Breyer arrived at the conclusion that the possession of a gun in a school zone had a “significant effect” on interstate commerce because the possession of guns in school zones is upsetting to kids in school, which throws off their concentration, which hurts their grades, which affects their job prospects, which lowers their productivity, which hurts the economy’s total productivity, which lowers GNP, which depresses commerce, both domestically and internationally, which puts Americans at a distinct economic disadvantage, vis-à-vis the Japanese.⁸⁹ If

⁸⁷ 514 US 549 (1995).

⁸⁸ See *id.* at 616 (Breyer dissenting) (“[I]n determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances.”).

⁸⁹ See *id.* at 618–25 (claiming that allowing the law to stand “would not expand the scope of [the Commerce] Clause” but “simply would apply pre-existing law to changing economic circumstances”). Justice Breyer, of course, did not introduce these sorts of arguments into American constitutional law. They were a defining feature of New Deal constitutional thought, and were, in many respects, the consequence of the insinuation into constitutional reasoning of the social sciences, which emphasize the significance of the interconnectedness of a broad array of social phenomena. See Willrich, *City of Courts* at 86 (cited in note 28) (noting that social scientists’ somewhat undertheorized claims of interconnectedness blended “hereditarian and environmentalist explanations” while soundly rejecting “formalist conception[s]”); Haskell, *Emergence of Professional Social Science* at 252–53 (cited in note 28) (noting that by the early twentieth century, politicians, philosophers, sociologists, and economists had all employed themes of interconnectedness in their work). See also *Wickard v Filburn*, 317 US 111, 125 (1942) (drawing wheat production for personal consumption under the Commerce Clause because it exerts a “‘direct’ or ‘indirect’” “economic effect on interstate commerce”); *NLRB v Jones & Laughlin Steel Corp.*, 301 US 1, 37 (1937) (expanding the federal government’s power under the Commerce Clause to include all activities with “such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions”). Justice Breyer, however, in holding that, for all intents and purposes, there are *no* limits to interconnectivity arguments, and, hence (so long as a fundamental right is not trampled upon), there are no limits to the police power of the national central state that draws upon them, citing ostensibly collective purposes, follows an approach that is common among contemporary constitutional liberals. See, for example, *Lopez*, 514 US at 618–25 (Breyer dissenting). For this reason, Cass Sunstein classifies Breyer as being within the mainstream of moderate, minimalist constitutional thought. Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong for America* 237, 239 (Basic 2005). On the rise and spreading influence of the social sciences in the United States in the late nineteenth and early twentieth centuries, see Daniel T. Rodgers, *Atlantic Crossings* 97 (Belknap 1998) (describing the flow of social science knowledge from European-trained American students to America); Dorothy Ross, *The Origins of American Social Science* xiii (Cambridge 1991) (“[The] liberal values, practical bent, shallow historical vision, and technocratic confidence [of social science] are recognizable features of twentieth-century America.”). Justice Breyer plays this same game, incidentally, in his application concern-

patterns of logic like this are acceptable in determining constitutionality, then, of course, it should be no trouble at all to argue, in line with the butterfly effect, that racial preferences have a significant effect on the achievement of participatory democracy and active liberty. Justice O'Connor draws these connections in *Grutter* with no great difficulty.⁹⁰ And Justice Breyer breezily assents.

Justice Breyer was able to defend himself against charges of importing butterfly effect logic into the marrow of constitutional law by arguing that these relevant factual findings and extended logical chains, however fanciful, were not his, but the legislature's, and, as such, were arrived at after extensive study and the collection of vast amounts of testimony and empirical evidence after extensive public hearings and debates.⁹¹ But this was certainly not the case in the University of Michigan cases. There, the empirical evidence, such as it was, was offered not by the legislature (as had been true in the New Deal cases using similar logic⁹²), but by the defendant and the "many knowledgeable groups" that submitted amicus briefs to the Supreme Court (p 83). What did this "evidence" show? Without granting admissions preferences on the basis of race:

Too many individuals of all races would lack experience with a racially diverse educational environment helpful for their later effective participation in today's diverse civil society. Too many individuals of minority race would find the doors of higher education closed; those closed doors would shut them out of positions of leadership in the armed forces, in business, and in government as well; and too many would conclude that the nation and its governmental processes are *theirs*, not *ours* (id).

"If these are the likely consequences," Justice Breyer asks earnestly, "as many knowledgeable groups told the Court they were—could our democratic form of government then function as the Fram-

ing the constitutionality of campaign finance regulations challenged on the grounds of the freedom of speech. There, he argues that if the regulations were invalidated on the grounds of the freedom of speech, the nation's commitment to democracy could be called into question as a matter of appearance, undermining confidence in the political system, and, hence, undermining our actual democracy in fact (that is, appearance would become reality). See *McConnell*, 540 US at 237 (Breyer). If the regulations are well-intentioned and helpful, there must be a principle to explain why this is the case (let's say "active liberty"). And if it is helpful and principled, it must be constitutional.

⁹⁰ See *Grutter*, 539 US at 331 (noting that the Court has "repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society").

⁹¹ See, for example, *Jones & Laughlin Steel*, 301 US at 22–23, 23 n 2 (describing and quoting the government's empirical findings on the National Labor Relations Act).

⁹² See *Grutter*, 539 US at 310–14; *Gratz*, 539 US at 248–51.

ers intended?” (id). Justice Breyer’s more critically minded readers will note that this empirically minded Justice, with a deep and long-standing interest in rigorous economic analysis and complex questions of the relationship of science and the law,⁹³ seems here to have a great deal of difficulty in distinguishing between genuine data and multiculturalist cant. The notion that, today, in the absence of racial preference schemes, “[t]oo many individuals of minority race would find the doors of higher education closed,” and be barred from positions of leadership is, of course, not a fact at all (p 83). It is an assertion, wrapped in a highly politicized normative assessment, that no amount of rhetorical appeal to empiricism can conceal. How many, after all, is “too many”?

Justice Breyer has been consistently praised for sticking closely to the facts and refusing to make unwarranted generalizations and logical leaps. But here, as he writes about affirmative action in *Active Liberty*, he does not trouble to distinguish the effects of racial preferences at a tiny sliver of elite schools from those at the great mass of other colleges and universities, from which few, black or white, are excluded.⁹⁴ For those who parse things more carefully, however, the most likely effect of racial preference schemes in university admissions is to trigger a “pervasive shifting effect,” in which blacks (and other preferred groups receiving preferences in admissions) are simply bumped up one or two or three levels from the schools to which they would normally be admitted. The likely *consequence* of this being that those who avail themselves of these preferences—understandably, under the circumstances—are put in a position where they feel (and, in many respects, are) underqualified, and desperately struggling to catch up, to demonstrate that they “deserve” to be there.⁹⁵ To be sure, there has

⁹³ See Stephen Breyer, *The Interdependence of Science and Law*, 82 *Judicature* 24, 27 (1998).

⁹⁴ Stephan Thernstrom and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* 421 (Simon and Schuster 1997) (“Sign up [for college] and you can go. And if you do well, even at virtually unknown places, the doors to jobs and further education will have been opened.”). See also Sowell, *Affirmative Action* at 155 (cited in note 86) (noting that the University of Colorado at Denver admits 68 percent of black applicants and 82 percent of white applicants, and both applicant groups have similar test scores and six-year college graduation rates).

⁹⁵ See Sowell, *Affirmative Action* at 145–50 (cited in note 86) (“[P]referential admissions, beginning at the top elite institutions, would create a nationwide mismatching of minority students and the institutions they attended, all up and down the academic pecking order.”). See also Ron Suskind, *A Hope in the Unseen: An American Odyssey from the Inner City to the Ivy League* 362–65 (Broadway 1998) (narrating the academic and social tribulations of a black man who attended high school in inner-city Washington, D.C., and then matriculated at Brown University).

There is a live dispute over whether, in specific empirical contexts (such as undergraduates, graduate, and law schools) affirmative action actually leads minority students to either fail to graduate or to fail key professional qualifying exams. I make no such claim here. Compare, for example, Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law*

been intense debate amongst scholars about whether increasing the number of blacks at the very highest reaches of the elite universities is helpful to their career prospects. (If a “credentialing” effect exists, and they graduate after having been shoehorned into an especially difficult environment it is, indeed, likely to be effective, but such an effect would apply to whites as well.⁹⁶) But there is no evidence presented here that in the absence of these preferences, blacks would be largely shut out of American higher education and potential leadership positions in society, as Justice Breyer boldly asserts.

The more devastating the consequences that “many knowledgeable groups” allege will flow from the elimination of racial preferences in university admissions, the more the advocates of those preferences are forced to acknowledge that, far from being a “plus factor” that simply tips the scales, the more the applicant’s race must have been decisive in the admissions decision (see pp 76, 83). And, if this is the case, then the distinction that Justice Breyer (and other liberal “radicals in robes”⁹⁷) draws between “benign” and “malign” discrimination becomes all the shakier. The logic here is tight enough, and recourse to butterfly effects are unnecessary. The number of students admitted to a university’s entering class constitutes 100 percent of the students admitted to the entering class. When a student is admitted because he is black, another student is denied admission because he is not. When universities celebrate their accomplishment of increasing the percentage of students who are black in their incoming class, they are simultaneously celebrating their accomplishment in reducing the percentage of students who are not black in that class. (When they celebrate their success in increasing the percentage of students of

Schools, 57 Stan L Rev 367, 481 (2004) (“The programs set blacks up for failure in school, aggravate attrition rates, turn the bar exam into a major hurdle, disadvantage most blacks in the job market, and depress the overall production of black lawyers.”), with David L. Chambers, et al, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 Stan L Rev 1855, 1857 (2005) (arguing that Sander “has significantly overestimated the costs of affirmative action and failed to demonstrate benefits from ending it”). See also Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 236–37 (Harvard 2003) (“[H]aving low levels of academic achievement [even when coupled with high levels of undergraduate admission] will keep down the number of students who decide to become college professors.”).

⁹⁶ See William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 276 (Princeton 1998) (“[O]ur data show that the overall record of accomplishment by black students after graduation has been impressive.”). Consider Thernstrom and Thernstrom, *America in Black and White* at 422 (cited in note 94) (“[N]othing under the sun except hard work will bring about that parity [in educational and economic opportunities].”).

⁹⁷ Consider Sunstein, *Radicals in Robes* at xiii–xiv (cited in note 89) (portraying the subjects of the book’s title as rigid and ideologically resolute—a categorization that could fit Breyer as well as the conservative judges that Sunstein describes).

color, they celebrate their success in reducing the percentage of students who are white.) It would be interesting to have university presidents pledged to the use of racial preferences in university admissions spend a year publicly advocating their position by speaking frankly about this from the flip side, that is, by celebrating their sustained campaign to *reduce* the percentage of white (or, in some cases, Asian) students in their incoming class. But, of course, they could never do that. For that would be “malign” discrimination. If they do the exact same thing, for the exact same reason, and talk about it instead as increasing the percentage of black students in their incoming class, that, however, is “benign” discrimination. In light of that, it is worth taking Justice Breyer’s assertions that he looks to “substance,” and not “forms,” and to “real world” consequences, as opposed to verbal labels, in deciding cases—a constant refrain of this “pragmatist”—with more than a grain of salt.

It is worth noting that Justice Breyer’s jurisprudence in affirmative action cases is thus, in its fundamentals, not that different from the judicial maximalist Justice Brennan’s. What is different about Justice Brennan is that he was an open advocate of a government-sponsored, group-based redistribution scheme justified by a (general) history of oppression.⁹⁸ The humble, minimalist Justice Breyer, by contrast—as his split vote in the Michigan cases shows—insists that universities conceal what they are doing by calling it a “plus factor” rather than being so *déclassé* as to attach a number to it in public (even if, as a practical matter, the real world consequences between the two approaches are all but indistinguishable).⁹⁹

Which brings us to the depths of Justice Breyer’s commitment to democracy. The virtue—and drawback—of Justice Brennan’s approach to affirmative action is that, because it is that of a maximalist with clear ideological views, it is obvious what the Court is doing. This, in turn, can spark democratic deliberation of a very unruly, and even combustible, kind.¹⁰⁰ It can motivate candidates and political parties, and turn congressional and presidential elections. It can even lead presidents to pledge that, if elected, they will appoint the sort of judges who will reject Justice Brennan’s approach and in the process invite the charge of “radical” “fundamentalism” from the academic tribunes of judicial

⁹⁸ See *Bakke*, 438 US at 335–38 (Brennan, White, Marshall, and Blackmun concurring in part and dissenting in part) (arguing that the Constitution and the Congress that enacted the 1964 Civil Rights Act intended for institutions to take positive action to mitigate prior racial discrimination).

⁹⁹ See *Gratz*, 539 US at 295; *Grutter*, 539 US at 337.

¹⁰⁰ See Christopher L. Eisgruber, *Constitutional Self-Government* 86 (Harvard 2001).

“minimalism.”¹⁰¹ Justice Breyer’s “minimalist” approach—which (like that of most other justices of the Rehnquist Court) upholds and works to institutionalize the “maximalism” of the Warren (and, in many cases, Burger) eras, and (unlike that of many of the Rehnquist Court’s conservatives) endeavors to extend it¹⁰²—by contrast, encourages opacity and duplicity by governmental institutions like the University of Michigan. It abandons Brennan’s approach in favor of actively according new constitutional recognition to a novel government purpose—“diversity”—which Breyer holds to be compelling, under the guise of humility. Its *modus operandi*, as illustrated by these cases, is to permit the worldview of an insulated elite to trump a clear constitutional value. This policymaking elite knows exactly what is going on but—crucially, as a matter of law—has no obligation to tell us what that is. This may be consistent with “active liberty” as Justice Breyer sees it. It is not, however, consistent with basic principles of American democracy.

Justice Breyer then reads this newly compelling purpose—“diversity”—back not only into the Constitution but also into the nation’s civil rights statutes. For, in addition to the Fourteenth Amendment’s Equal Protection Clause, affirmative action schemes also commonly implicate the Civil Rights Act of 1964.¹⁰³ And Justice Breyer says a good deal in *Active Liberty* about his approach to statutory interpretation, which, as a Hart and Sacks protégé, is his natural intellectual home (pp 86–87).¹⁰⁴ Breyer spends a considerable amount of time in this book thoughtfully explaining the way in which statutes are best interpreted by the Court, and provides helpful demonstrations of the way he has approached difficult interpretive questions arising out of the Foreign Sovereign Immuni-

¹⁰¹ See Sunstein, *Radicals in Robes* at xiv–xv (cited in note 89) (“It is not at all pleasant to challenge, as wrong, dangerous, radical, and occasionally hypocritical, the many people of honor and good faith who have come to embrace fundamentalism.”).

¹⁰² For this reason, if history matters (as indeed it does), we can see that minimalism and perfectionism are not functionally separate categories. In their substance, they are better viewed as a tag team. See *id.* at 33 (acknowledging that the Warren Court behaved as perfectionists and were succeeded by the present minimalist Court). On the extension, see *Lawrence v Texas*, 539 US 558, 564–66 (2003) (invalidating a Texas criminal statute criminalizing homosexual sodomy, based on Warren Court and Burger Court precedents); *Stenberg v Carhart*, 530 US 914, 920–21 (2000) (“We shall not revisit those legal principles [that grant the right to an abortion]. Rather, we apply them to the circumstances of the case.”).

¹⁰³ Paul Frymer and John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 Conn L Rev 677, 683–84 (2004) (noting that affirmative action both stems from and can be a violation of Title VII).

¹⁰⁴ As an administrative law scholar, Justice Breyer’s first interest was in questions of statutory construction. His interest in constitutional construction came later. It seems that he rather straightforwardly transferred the “purposive” approach he followed in the former unchanged to the latter. See Kersch, *Synthetic Progressivism* at 257 (cited in note 1) (noting Breyer’s reticence to engage constitutional issues without well-developed “empirical evidence relied on by legislatures”).

ties Act, the Federal Arbitration Act, and the federal habeas corpus statute (pp 88–98). In these discussions, Justice Breyer explains that “the interpretive process [in statutory cases is] an effort to locate, and remain faithful to, the human purposes embodied in a statute” (p 95). The pragmatist Justice Breyer sees statutes as aimed at solving particular problems. And he understands the effort to solve that problem as the statute’s underlying purpose. In discerning a statute’s purpose, Justice Breyer (unlike, for example, Justice Scalia), is willing to avail himself of all “logically relevant” materials, including legislative history (pp 18, 87–88). In approaching the Federal Arbitration Act, for example, he looks around, and finds “[t]he only direct evidence available—I would say the *only* evidence available—indicates that, at the time of the statute’s enactment, members of Congress saw a problem ... [and t]hey tried to attack that problem with a statute tailored to the problem’s scope” (p 95).

Justice Breyer does not bring up the 1964 Civil Rights Act (or other civil rights statutes) in his discussion of racial preference schemes. By refusing to apply the law to bar these schemes, of course, Justice Breyer is able to sidestep an inquiry into its “purpose.”¹⁰⁵

The “purpose” of that Act was to end the prevailing system of racial segregation and subordination in America.¹⁰⁶ Such a “purpose” (like Ronald Dworkin’s understanding of constitutional “concepts”—in contradistinction from the more narrowly defined “conceptions”) is potentially quite broad.¹⁰⁷ But Congress specifically set out certain means that it had voted were appropriate for achieving those purposes—namely, the categorical prohibitions on the forms of racial discrimination that were stipulated in the Civil Right Act’s text. Moreover, as both the text itself and the legislative history of the text—that, in other contexts, Justice Breyer has held to be important—made very clear, Congress precluded the use of racial preferences to achieve the Civil Rights Act’s purpose, to the point of opining that such preferences were not only not envisaged as appropriate instruments for the achievement of the statute’s goals, but amounted to violations of the

¹⁰⁵ Justice O’Connor, whose opinion Justice Breyer joins, mentions, but dismisses out of hand, and without discussion, the statutory argument appealing to Title VII of the Civil Rights Act. See *Grutter*, 539 US at 343.

¹⁰⁶ Consider Thernstrom and Thernstrom, *America in Black and White* at 138 (cited in note 94) (“The great principle at stake was that every American should be able ‘to enjoy the privileges of being an American without regard for his race or color.’”).

¹⁰⁷ Ronald Dworkin, *Law’s Empire* 71 (Belknap 1986) (“At the [level of concept,] agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the [level of conception,] the controversy latent in this abstraction is identified and taken up.”).

core provisions of the Act itself, which barred discrimination on account of race.¹⁰⁸

The Congress that enacted the Civil Rights Act of 1964 certainly (to borrow Justice Breyer's words) "attack[ed] that problem with a statute tailored to the problem's scope" (p 95): it banned all forms of race discrimination, including those stemming from racial preferences. To avoid these difficulties, however, Justice Breyer is driven to, in effect, argue that the enacting Congress did not fully understand the nature of the problem, or its scope. And for that reason, their prohibition on certain instrumental means of addressing that problem is no longer binding on him as a results-oriented, problemsolving judge. By the time of the University of Michigan cases, the problem has been newly defined in part as involving the creation of a racially diverse polity, where all feel welcome (pp 78–79). The only way to fulfill this "purpos[e]" or achieve this "objective," is to give government bodies wide latitude to engage in racial discrimination, when it is said to be benign, to achieve the desired consequences in service of the objective (id). The racial preferences plan adopted by the University of Michigan Law School "works" in this regard. And, because it works, it must be legal (see id).

By the lights of some common definitions of "judicial activism"—whether a judge votes to uphold or strike down a law (or, as here, a practice)¹⁰⁹—Justice Breyer's vote in *Grutter* and other such cases can be read as a textbook case of judicial restraint. By more thoughtful standards, however, it is a textbook case of activist judging, a case, that is, in which a judge has clearly substituted his own understanding of what the statute's purpose was, what its scope should be, and what

¹⁰⁸ See Sowell, *Affirmative Action* at 126 (cited in note 86) (citing legislative history to demonstrate that legislators intended the Civil Rights Act of 1964 to be colorblind); John D. Skrentny, *The Minority Rights Revolution* 88 (Belknap 2002) ("Congress created a weak EEOC [with enforcement powers based on difference-blindness] to make Title VII palatable enough for passage."); Andrew Kull, *The Color-Blind Constitution* 200 (Harvard 1992) ("The initiative of the civil rights agencies would have been substantially frustrated had the courts . . . enforced the Civil Rights Act of 1964 as written."); Hugh Davis Graham, *The Civil Rights Era: Origins and Development of National Policy, 1960–1972* 140 (Oxford 1990) (observing that an AFL-CIO lobbyist "insisted" that the 1964 Civil Rights Act not include quotas); Thomas Sowell, *Civil Rights: Rhetoric or Reality?* 37 (Morrow 1984) ("Initially, civil rights meant, quite simply, that all individuals should be treated the same under the law, regardless of their race, religion, sex or other such social categories.").

¹⁰⁹ See, for example Keck, *The Most Activist Supreme Court* at 1 (cited in note 15) (defining "judicial restraint" as "a relative unwillingness to declare constitutional limitations on government"); Gewirtz and Golder, *So Who Are the Activists?*, NY Times at A19 (cited in note 6) ("[A] marked pattern of invalidating Congressional laws certainly seems like one reasonable definition of judicial activism.").

instruments are appropriate (that is, legal) for the achievement of that objective.¹¹⁰

This speaks directly to the democratic bona fides of Justice Breyer's interpretive "attitude" (p 19). Although there is a fair amount of evidence that the "color-blind" interpretation of the Fourteenth Amendment's Equal Protection Clause held by Justices Scalia and Thomas is not, in fact, a reflection of the clause's original meaning (p 77),¹¹¹ there is no doubt whatsoever that colorblindness was part of the original intent, original understanding, and original meaning of the Civil Rights Act of 1964. Public opinion polls ever since, moreover, have continued to support that understanding.¹¹² Under these circumstances, can Justice Breyer plausibly argue that an interpretation of the 1964 Civil Rights Act rejecting a "colorblind" understanding is more "democratic" than a more faithful reading of the Act's meaning (pp 77–83)?

Well, sure he can. People do this all the time. But doing so would require that they engage in some elaborate and highly creative democratic theorizing. One could similarly argue, for example, that abortion rights are indispensable in a truly "democratic" polity, for, without them, women cannot be full participants in the polity's public life.¹¹³ Crafting such theories is the stock and trade of our more venturesome political philosophers. It is not—and should not be—the stock and trade of Article III judges.

Justice Breyer's discussion of affirmative action also provides a useful perspective on the ostensible narrowness of his rulings.¹¹⁴ A key part of Justice Breyer's judicial toolkit in many cases is the emphasis

¹¹⁰ For a critique of this kind of willful "purposivism," see Eskridge, *Dynamic Statutory Interpretation* at 25–34 (cited in note 72). See also R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 *Georgetown L J* 91, 97 (1995).

¹¹¹ See, for example, Kull, *The Color-Blind Constitution* at 5 (cited in note 108) ("[T]he idea of color blindness stands in radical contradistinction to a constitutional orthodoxy that at every stage of our history has permitted the government to classify by race so long as—by contemporary standards—it classified reasonably.").

¹¹² See *id.* at 1 ("The moral and political attractiveness of a rule of nondiscrimination made it for approximately 125 years the ultimate legal objective of the American civil rights movement."). On public opinion regarding these matters, see, for example, Melnick, 84 *Georgetown L J* at 108 (cited in note 110).

¹¹³ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

¹¹⁴ See Sunstein, *One Case at a Time* at xiv (cited in note 12) ("[C]ertain minimalist steps promote rather than undermine democratic processes and catalyze rather than preempt democratic deliberation."). See also Sunstein, *Radicals in Robes* at 27 (cited in note 89) ("[M]inimalists do not want to take sides in large-scale social controversies."). There are many affinities between Breyer's thought and Sunstein's in a whole array of areas, including their interest in risk assessment, democratic theory, and minimalism. See *id.* at 237 (approving of Breyer's deference to legislative expertise in areas of regulation such as gun control).

he places on the fit between the asserted government purpose that implicates a constitutional right, and the least restrictive means of achieving that purpose (pp 97–98). But Breyer never actually insists upon a meaningful least restrictive means test in affirmative action cases. Instead, he simply redefines the scope of the purpose to expand the scope of the permissible means.

This is a failing, incidentally, that is not shared by Justices Clarence Thomas and Antonin Scalia, who insist in affirmative action cases on a close fit between ends and means (see p 77). The Court's "fundamentalist" conservatives, for instance, argue that racial preference schemes (which Breyer, like other liberals, concedes trench on a fundamental right), are permissible only when they are narrowly tailored to the objective of making up for past discrimination.¹¹⁵ For them, the paradigmatic case holding such preferences constitutional would involve remedial racial preference plans adopted by particular institutions with a demonstrable history of impermissible, intentional discrimination.¹¹⁶ These ostensibly formalist judges, who insist, so it is said, on broad, sweeping rules, would not accept the granting of racial preferences to Aleuts and Pacific Islanders by an institution with no history of racial discrimination at all, or a history of racial discrimination that targeted only blacks.¹¹⁷ These are highly relevant distinctions. Justice Breyer, however, does not draw them.

This is not simply the case when we compare Justice Breyer's approach to that of anti-affirmative action conservatives. The same is true when we compare him to liberals with a penchant for issuing rulings grounded in sweeping articulations of principle, like Justice Brennan. As Justice Breyer notes in *Active Liberty*, Justice Brennan repeatedly justified the constitutionality of racial preference plans on the socially transformative grounds that they are legitimate, society-wide responses to the legacy of slavery (pp 79–80).¹¹⁸ To be sure, Justice Brennan was never wholly consistent about this—he upheld racial preference schemes as a matter of course no matter what (minority)

¹¹⁵ But see p 79 (approving *Grutter* because the law school's affirmative action plan was "narrowly tailored").

¹¹⁶ See *City of Richmond v J.A. Croson Co.*, 488 US 469, 520 (1989) (Scalia concurring) ("The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.").

¹¹⁷ See, for example, *id.* at 498–99 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.").

¹¹⁸ Citing *Wygant v Jackson Board of Education*, 476 US 267, 278 n 5 (1986) (criticizing Marshall's dissenting opinion that grounds affirmative action programs in an amorphous "legitimate factual predicate").

racial group (or majority sex) was involved, without bothering to distinguish the members of those groups from those who were the descendants of slaves.¹¹⁹ But Brennan's formulation was at least, in theory, potentially limiting: to those who took it seriously, it invited some form of least restrictive means test.¹²⁰

Justice Breyer, however, makes a least restrictive means test pointless in affirmative action cases through the sleight of hand of holding a view that was once held by a single Supreme Court justice in *Bakke* (and a view that was foisted upon him chiefly by an appeal to the authority of the Harvard admissions office), that is, as a matter of binding constitutional law, "diversity" is a "compelling state interest."¹²¹ For if "diversity" is now the interest (or, to adopt Justice's Breyer's preferred nomenclature, the "purpose" or "objective"), a sweeping range of racial groups is now covered automatically by the terms of the formula itself. This was not the case under the approaches of Justices Scalia, Thomas—or Brennan.¹²²

¹¹⁹ See *Metro Broadcasting v FCC*, 497 US 547, 593 (1990) (Brennan) (upholding "minority ownership policies [that] are aimed directly at the barriers that minorities face in entering the broadcast industry"); *United Steelworkers of America v Weber*, 443 US 193, 197 (1989) (Brennan) (holding that Congress "left employers and unions in the private sector free to take such race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories"). See also *Croson*, 588 US at 539 (Marshall dissenting) (arguing that a municipality's finding that it discriminated in the past—making affirmative action programs remedial—should be accepted by the Court). On the tendency of racial preference plans around the world targeted at particular groups to expand, as a matter of political and institutional dynamics, almost ineluctably to other groups, see Sowell, *Affirmative Action* at 10–11 (in India and the United States), 121 (in the United States), 132–38 (generally) (cited in note 86) ("The spread of benefits from group to group not only dilutes those benefits . . . it can also make the initial beneficiaries worse off after the terms of the competition are altered.").

¹²⁰ *Metro Broadcasting*, 497 US at 594 (Brennan) ("The [FCC's] choice of minority ownership policies thus addressed the very factors it had isolated as being responsible for minority underrepresentation in the broadcast industry.").

¹²¹ See Thomas M. Keck, *From Bakke to Grutter: The Rise of Rights-Based Conservatism*, in Ronald Kahn and Ken I. Kersch, eds., *The Supreme Court and American Political Development* (forthcoming 2006). See also *Bakke*, 438 US at 311–12 (plurality) (stating, in a section joined by no other justice, that "the attainment of a diverse student body . . . is clearly a constitutionally permissible goal").

¹²² Indeed, if we add to these quiet shifts of categories the resolutely ahistorical character of Cass Sunstein's judicial minimalism (it, for example, defends the continued viability of past maximalist holdings, such as those of the Warren Court, on the grounds of contemporary minimalism; it is also quite easy, on the other side of the political spectrum, to imagine Clarence Thomas as an early nineteenth century minimalist; Sunstein's minimalism is really nothing more than a brief against historical transitions), we can see how the idea of minimalism works as a clever shell game aimed at institutionalizing the agenda of mid-twentieth century American constitutional liberalism. But see Sunstein, *The Partial Constitution* at 68 (cited in note 41) ("Much of modern constitutional law is based on status quo neutrality, and indeed on the understandings of the pre-New Deal period.").

A better name for Justice Breyer's approach in these cases would be the "least transparent means" test.¹²³ Namely, he permits the state to redefine the purpose of its conduct in a way that has the broadest possible effect, deems that purpose newly "compelling," and then, in turn, insists that the means the state uses to achieve that purpose be veiled from public view. This is not minimalist. It is not transparent. It is not democratic. And (as I see it) it is not constitutional either.

2. Privacy.

For more than a generation now, the most heated controversy in all of constitutional law has been about whether the Constitution guarantees a "right [to] privacy."¹²⁴ Although its antecedents are said to trace back to a seminal 1890 law review article by Samuel Warren and Louis Brandeis,¹²⁵ the Court counted the "right to privacy" as a fundamental constitutional right only in the mid 1960s in a case striking down a Connecticut law banning the use of birth control by married couples.¹²⁶ The right was quickly expanded to apply, first, to the use of birth control by unmarried couples, and subsequently, to a woman's decision to have an abortion.¹²⁷ These decisions ignited controversy on a broad array of fronts. Politically, the Court's decision to declare abortion to be a national right served as a catalyst for the Right to Life movement. That movement, in turn, played a major role in realigning the party loyalties of millions of Americans, with, over time, the Democrats becoming *Roe v Wade*'s¹²⁸ chief champions, and the Republicans its most ardent critics.¹²⁹ Many have alleged that the Court's decision in

¹²³ For a comparative perspective, see Sowell, *Affirmative Action* at 50–51 (cited in note 86) ("Where courts or officials have balked at various double standards, those double standards have often gone underground, rather than going away. Objective standards have been offset by an increase in non-objective standards, used clearly as counterweights to produce the same group representation results produced by explicit double standards.").

¹²⁴ See, for example, *Roe v Wade*, 410 US 113 (1973) (finding a "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action").

¹²⁵ See Samuel D. Warren and Louis D. Brandeis, *The Right To Privacy*, 4 Harv L Rev 193 (1890). But see Ken I. Kersch, *Constructing Civil Liberties* 57 (Cambridge 2004) ("Warren and Brandeis certainly were straining toward a sort of privacy in penning their famous article, but the civil libertarian implications of that sort of privacy were dubious at best.").

¹²⁶ See *Griswold v Connecticut*, 381 US 479, 485–86 (1965) (holding that doctors dispensing birth control fall within a constitutionally protected "zone of privacy").

¹²⁷ See *Eisenstadt v Baird*, 405 US 438, 443 (1972) (abrogating a statute banning the distribution of birth control by nondoctors on equal protection grounds); *Roe*, 410 US at 152–53 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

¹²⁸ 410 US 113 (1973).

¹²⁹ See Greg D. Adams, *Abortion: Evidence of Issue Evolution*, 41 Am J Pol Sci 718, 727, 733–35 (1997). See also Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 NC L Rev 375, 381 (1984–85).

Roe—in conjunction with issues of crime, race, the campus revolts, and the often anti-American, anti-Vietnam War movement—precipitated the movement of large swathes of the working classes out of the Democratic Party and into the arms of the Republicans.¹³⁰

The Court's identification of a "right to privacy" also stirred up a hornet's nest among constitutional theorists. To liberal and conservative theorists alike, the newly declared privacy right looked very much like the sort of nontextual "substantive due process" rights that, it was thought, had been largely discredited after the *Lochner* era¹³¹—a manifestation of judicial power run amok—and paradigmatically antidemocratic.¹³² As their divergent views on *Roe* came to split the country's two political parties, appointments to the Supreme Court itself came to turn, in significant part, on the nominee's position on whether a constitutional right to privacy existed. When one of President Reagan's nominees to the Court, Robert Bork, frankly rejected the notion that the Constitution contained any "right to privacy" (Bork had made it clear that he saw the right, and the ruling, as a new form of *Lochner*-ism),¹³³ it set off a political firestorm, and Bork's appointment was re-

¹³⁰ For a contemporaneous identification of this, see Peter Skerry, *The Class Conflict over Abortion*, Pub Int 69, 70 (Summer 1978) ("Abortion is part of a larger cultural conflict between certain strata of the upper-middle class . . . and the mass of Americans who comprise the working and lower-middle classes."). See also Thomas Frank, *What's the Matter with Kansas?: How Conservatives Won the Heart of America* 199 (Metropolitan 2004) ("[*Roe*] cemented forever a stereotype of liberalism as a doctrine of a tiny clique of experts, an unholy combination of doctors and lawyers, of bureaucrats and professionals, securing their 'reforms' by judicial command rather than by democratic consensus."). The claim that *Roe* split the working class from the upper-middle class, and drove the former into the Republican Party, is now becoming subjected to increasing empirical dispute, however. See, for example, Larry M. Bartels, *What's the Matter with What's the Matter with Kansas?*, Presented at the Annual Meeting of the American Political Science Association 30 (Sept 1–4, 2005), online at <http://www.princeton.edu/%7ebartels/kansas.pdf> (visited Apr 4, 2006) ("[T]he result [of the political shift motivated by *Roe*] is not (certainly not yet) the new 'dominant political coalition' conjured up by Frank and other liberal hand-wringers.").

¹³¹ See *Lochner v New York*, 198 US 45 (1905) (declaring a state maximum-hours statute unconstitutional under the Fourteenth Amendment).

¹³² See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920, 920 (1973); Louis B. Boudin, 1 *Government by Judiciary* vi (William Godwin 1932) (writing that "[t]he actual practice of the courts is to declare any law unconstitutional of which they strongly disapprove"); William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890–1937* 20 (Princeton 1994) ("While decisions such as *Lochner v. New York* in 1905 created only limited and temporary setbacks for advocates of reform legislation, they became symbols of judicial intransigence and provided lightning rods for progressive criticism of the courts."). In *Active Liberty*, Justice Breyer himself warns of the lessons he has learned from a study of the willful activist judging of the *Lochner* era. See p 10 (describing the *Lochner* Court as having "overly emphasized the Constitution's protection of private property" at the expense of "the basic objectives of the Civil War amendments").

¹³³ See, for example, Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 290–91 (Free 1990).

jected by the Senate.¹³⁴ No nominee to the Court since Bork has ever been so frank. Today, the Supreme Court appointment process is, to a large extent, centered on the question of whether the judge believes the Constitution contains a right to privacy, and whether the judge believes that right applies to a woman's decision to terminate her pregnancy.¹³⁵

Justice Breyer's progenitors, Hart and Sacks, never mentioned *Brown v Board of Education*,¹³⁶ the most important and politically contentious case of their time, in *The Legal Process*, though both men were liberals who supported the decision.¹³⁷ And, in his own contemporary reiteration of their purposive approach to legal interpretation, Justice Breyer, true to the spirit of the original textbook itself, never once mentions *Roe*. This omission is all the more striking because Justice Breyer has specifically included an extended discussion in his applications section on "privacy." He begins that portion of the book, however, by announcing to his readers that "[b]y privacy, I mean a person's power to control what others can come to know about him or her" (p 66). He then reduces this definition to questions raised by the "uncertainty brought about by rapid changes in technology" (id). "[M]ost of our privacy-related legal challenges," he writes, "lie at the intersection of a legal circumstance and a technological circumstance" (p 67).¹³⁸

Needless to say, as a regulatory scholar with a longstanding interest in the relationship between science, technology, and the law, this is the sort of territory on which Justice Breyer feels most at home. His examples here involve the collection of data by businesses to create detailed customer profiles, the privacy of medical records, and the interception of cell-phone conversations (pp 69–70). Today, the critical questions concerning privacy, he tells us, are the following:

¹³⁴ Morton J. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U Pitt L Rev 655, 656 (1989) (citing Bork's "positivist attack on modern rights theory" as the factor that "eventually led to his defeat").

¹³⁵ See Green, 27 Natl L J at 23 (cited in note 16) (listing abortion first among critical issues on which John Roberts was to be evaluated during his confirmation hearings).

¹³⁶ 347 US 483 (1954). See Powe, *The Warren Court* at 50–51 (cited in note 31) (describing *Brown* as creating a revolution in doctrine and a crisis in implementation).

¹³⁷ Eskridge and Frickey, *An Historical and Critical Introduction* at cvii (cited in note 26) ("The co-authors' neglect of issues involving racial justice not only deprived their materials of potentially fascinating problems but made the process of updating increasingly intractable.").

¹³⁸ It is, of course, possible that Breyer does not see abortion as a privacy issue, but rather as an issue of personal autonomy (liberty) or equality that cannot be explained fully on privacy grounds. Nonetheless, he has upheld the right on privacy grounds as a matter of precedent. See *Stenberg v Carhart*, 530 US 914, 920 (2000) (Breyer) ("We shall not revisit those legal principles [set out in *Roe*]. Rather, we apply them to the circumstances of this case.").

Should the law require programming video cameras on public streets to turn off at certain times? When? Should the law require software that instructs computers to delete certain kinds of information? Which? Should the law require encrypted cell phones? Should the law impose upon certain Web sites a requirement that they permit users with certain privacy preferences to negotiate access-related privacy conditions? How? When will the software be available (p 70)?

These are all very important matters, and are likely to become even more important in the future.¹³⁹ But they are distinctive in being very difficult to discuss other than on fine-tuned empirical grounds (pp 66–67).¹⁴⁰ They are essentially regulatory questions.

Interestingly, it is this cascade of highly technical regulatory questions that spurs Justice Breyer to one of his most spirited articulations of his understanding of the role of the Court in a democracy. “It is difficult even to begin to understand the legal, technological, and value-balancing complexity involved in trying to resolve the legal aspects of the personal privacy problem,” he writes (p 70):

I cannot offer solutions. But I can suggest how twenty-first-century Americans go about finding solutions. . . .

Ideally, in America, the lawmaking process does not involve legislators, administrators, or judges imposing law from above. Rather, it involves changes that bubble up from below. Serious complex legal change is often made in the context of a national conversation involving, among others, scientists, engineers, businessmen and women, the media, along with legislators, judges, and many ordinary citizens whose lives the new technology will affect. That conversation takes place through meetings, symposia, and discussions, through journal articles and media reports, through administrative and legislative hearings, and through court cases. Lawyers participate in this discussion, translating specialized knowl-

¹³⁹ See, for example, Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 7 (Random House 2000) (describing how advances in technology make people’s personal lives less secure from intrusions); Jeffrey Rosen, *Total Information Awareness*, NY Times E116–17 (Dec 15, 2002) (describing a “sweeping” Department of Defense effort to “monitor the activity of Americans”); Jeffrey Rosen, *Silicon Valley’s Spy Game*, NY Times F46 (Apr 14, 2002) (describing how the CIA invested millions in dot-com startups in order to develop new spying technologies).

¹⁴⁰ See Jeffrey Rosen, *Roberts v. The Future*, NY Times sec 6 at 24 (Aug 28, 2005) (noting the Fourth Amendment problems that new surveillance technology may generate). Although Breyer mentions the Fourth Amendment in passing on the chapter’s last full page, the lion’s share of the discussion proceeds solely under the (nontextual) guise of addressing “the privacy-related legal problem” (pp 66, 73).

edge into ordinary English, defining issues, often creating consensus. Typically administrators and legislators make decisions only after the conversation is well underway. Courts participate later in the process, determining whether, say, the legal result reached through this “bubbling up” is consistent with basic constitutional norms (pp 70–71).

The way this happens, Justice Breyer opines—in a remarkable characterization of a process that is akin to a public policy seminar—is “best described as a form of participatory democracy” (p 70). “This conversation,” he continues, “is the ‘tumult,’ the ‘clamor . . . raised on all sides’ that, Tocqueville said, ‘you find yourself in the midst of’ when ‘you descend . . . on the soil of America.’ It is the democratic process in action” (p 71). Justice Breyer’s argument here is that, in a changing regulatory environment characterized by complex questions of technological change, judges should be relatively deferential to “scientists, engineers” and others who are in the process of working out a sensible regulatory regime (pp 70–71).¹⁴¹ In this context, it is best to rule narrowly in these cases, “focus[ing] upon the particular circumstances present in the case” (p 72). He explains:

The narrowness of the holding itself serves a constitutional purpose. The democratic “conversation” about privacy is ongoing. In those circumstances, a Court decision that mentions its concerns without creating a binding rule could lead Congress to rewrite eavesdropping statutes, tailoring them to take account of current technological facts, such as the widespread availability of scanners and the possibility of protecting conversations through encryption. A broader constitutional rule might itself limit legislative options in ways now unforeseeable (p 72).

Whatever the merits of this approach in this type of case—and they are considerable—to identify this managed, elite-inflected openness with the more unruly forms of democracy associated with democracy in its “participatory” form, and that Tocqueville was describing in his account of Jacksonian America, is quite an audacious move.¹⁴²

In passages like this, Justice Breyer betrays his deep—indeed, his deepest—intellectual roots in pre-New Deal, early twentieth century progressivism, an outlook with an animating faith in government by expert, acting as stand-ins for the (uninformed) people at large.¹⁴³ De-

¹⁴¹ Note that “many ordinary citizens” come last in Breyer’s list (p 71).

¹⁴² See Amar, *The Bill of Rights* at 88 (cited in note 50) (noting that Tocqueville found American institutions, such as the jury system, to be “fundamentally populist and majoritarian”).

¹⁴³ See Eldon J. Eisenach, *The Lost Promise of Progressivism* 46 (Kansas 1994) (describing the authority of the Progressives as resting on “the language of social science, social control,

spite his appeals to “participatory democracy” (p 70), anyone with a passing familiarity with the history of democratic politics in America will see much more the “attitude” of Clark Kerr than Tom Hayden in the “democratic” process as limned by Justice Breyer.¹⁴⁴

All of this discussion about the challenges to privacy in a constantly changing technological environment, of course, usefully distracts the reader from the question of the “right to privacy” as found by the Court in *Roe*. This is a good thing, because if Justice Breyer were to actually take that up in his book, where “purposiveness” and “active liberty” are the essential touchstones, he would be forced to tie the Court’s ruling in *Roe* to the “purpose” of the Due Process Clause of the Fourteenth Amendment, and to the cause of “participatory democracy” (see p 18). In the butterfly-effect world of contemporary constitutional liberalism (as noted in the discussion of Justice Breyer’s take on racial preferences above), that would be far from impossible.¹⁴⁵ But it would force Justice Breyer to engage nakedly in the sort of highly creative democratic theorizing that would be much more difficult for him to conceal than it was for him in the affirmative action

[and] systems of knowledge”); Kersch, *Synthetic Progressivism* at 248 (cited in note 1) (noting Breyer’s “affinity with rationalist, scientific, antiformalist systems-regarding progressivism of the early twentieth century”). See also Karl N. Llewellyn, *The Constitution as an Institution*, 34 Colum L Rev 1, 22 (1934) (arguing that constitutional “amendment occurs typically by action of the relevant [administrative] specialists alone”) (emphasis omitted).

¹⁴⁴ See *The Port Huron Statement*, in James Miller, “*Democracy Is in the Streets*”: *From Port Huron to the Siege of Chicago* 329, 336 (Simon and Schuster 1987) (criticizing those who see the “national doldrums as a sign of healthy approval of the established order,” and who “think the national quietude is a necessary consequence of the need for elites to resolve complex and specialized problems of modern industrial society”). See also Miller, “*Democracy Is in the Streets*” at 16 (finding the crux of early New Left politics in the Port Huron Statement’s Deweyan vision of participatory democracy). Clark Kerr, the President of the University of California system from 1958 to 1967, was a liberal labor economist and exemplar of the postwar, managerial and technocratic “new administrative liberalism” that was targeted in *The Port Huron Statement*. Jeff Lustig wrote:

For despite its claims of openness and tolerance [it was liberal, and not conservative], it was, and remains, ill equipped for real argument and debate. It is not set up for such things. It requires standardized procedures and coded phrases for its operation, and regards the acceptance of such procedures and newspeak as the precondition for its functioning, not the outcome of debate.

Jeff Lustig, *The Mixed Legacy of Clark Kerr: A Personal View*, 90 *Academe* 51, 52 (July–Aug 2004). According to Lustig, Kerr was “the chief prophet and ornament” of postwar managerialism. As Kerr came to see, his approach worked better in the consensus fifties than in the subsequent period of fundamental disagreement. See *id.* at 51 (noting Kerr’s “late recognition of the growing crisis” of the free speech movement at Berkeley).

¹⁴⁵ See, for example, *Casey*, 505 US at 844–46 (invalidating a statute restricting abortion by expansively reading *Roe*); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 NYU L Rev 1185, 1198–99 (1992) (arguing that “[d]octrinal limbs too swiftly shaped . . . may prove unstable” and criticizing *Roe* as one such “limb”); Ginsburg, 63 NC L Rev at 385 (cited in note 129) (“*Roe*, I believe, would have been more acceptable as a judicial decision if it had not gone beyond a ruling on the extreme statute before the Court.”).

cases. Here, he simply puts the purpose to the side, helps himself to the maximalist activism of the late 1960s and early 1970s, in the form of stare decisis, and decides that (in his “Applications” section on privacy) it is more prudent to turn to something completely different (pp 73–74).¹⁴⁶

III. THE LIMITS OF PURPOSE

In their earlier incarnations, “purposive” legal process approaches to interpretation of the sort Justice Breyer seeks to reintroduce in *Active Liberty* have already been extensively critiqued. In commenting on Hart and Sacks, Eskridge and Frickey have summarized the virtues and drawbacks of the purposive legal posture:

The strengths of the legal process vision were its insistence that law is accountable to reason and not just fiat, its claim that institutional architecture and procedure are both critical to law’s operation and can be analyzed systematically, and its consideration of legal doctrine in light of law’s purposes and the polity’s underlying principles. Its main weaknesses were its polarized categorizations (e.g., substance/procedure), its undue optimism about the competence and public-spiritedness of state institutions, and its failure to recognize the ideological and non-neutral nature of its own positions.¹⁴⁷

Indeed, the pretense by practitioners of the purposive approach that they were neutral and nonideological professionals (forged in the spirit of the consensus, managerial 1950s) was, in its earlier incarnation, critiqued most extensively from the Left, by Critical Legal Scholars, who were shaped by the New Left of the 1960s.¹⁴⁸ The superimposing of a rhetorical appeal to “active liberty” does not make any of these criticisms less valid today than they were then.

Although Hart and Sacks said it, today it is Justice Breyer who argues (adding a few humble caveats to signal our movement beyond

¹⁴⁶ See *Stenberg*, 530 US at 929–30 (invalidating as unconstitutional on the basis of *Roe* a Nebraska statute restricting abortion).

¹⁴⁷ Eskridge and Frickey, *An Historical and Critical Introduction* at civ (cited in note 26) (noting that these strengths and weaknesses reflect the intellectual influence of Warren Court jurisprudence).

¹⁴⁸ See Eskridge, Frickey, and Garrett, *Cases and Materials on Legislation* at 728 (cited in note 26) (“Critical scholars argue that legal process judges are making unarticulated value choices under the auspices of neutral craft.”). See also Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 Yale L J 1037, 1038 (1980) (criticizing John Hart Ely’s new legal process approach as incoherent and destructive of other preexisting theories).

the unalloyed confidence of the liberal heyday of the 1950s) (see p 85) that:

Because “every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective” ambiguities can be objectively and predictably resolved, first by identifying that purpose and the policy or principle it embodies and, then, by deducing which result is most consistent with that principle or policy.¹⁴⁹

Today, the main challenge to this interpretive posture, as Eskridge and Frickey describe it, comes from “formalists” like Justice Scalia:

The formalist doctrine was that when interpreting a statute all the Court is doing is divining the historical “will” of the legislature—the answer it “intended” to create the day it passed the statute. . . . The legal process insight is that statutes change over time, and an interpretation which might be defensible enough when made can become severely out-of-place years later. There ought to be greater judicial flexibility to fine-tune its interpretations by looking at related legal developments and re-examining prior decisions.¹⁵⁰

The danger with this insight is, of course, that judges will take the part of the process involving the identification of purposes and principles, and wield it creatively and aggressively in light of their own ideologies and policy preferences. Eskridge and Frickey note that a purposive approach to interpretation proved no barrier to the highly creative and activist judging of the Warren era. They tell us that “[t]he [Warren] Court seized upon the law-as-purpose features of legal process” and “deemphasiz[ed] the philosophy’s attention to rule-of-law values, procedural regularity, and the limited institutional competence of courts” in order to “liberalize [a wide array of areas of law].”¹⁵¹ “Most of these opinions,” they note, “were extraordinarily dynamic interpretations of the statutes they were construing (often going against as well as beyond original legislative expectations).”¹⁵²

Positioned as he is in time, as a Justice serving in the Warren Court’s wake, in an era when its legacy has been under sustained po-

¹⁴⁹ Eskridge and Frickey, *Cases and Materials on Legislation* at 245–46 (cited in note 35) (describing legal process theory as a purposive approach to statutory—but not necessarily constitutional—interpretation).

¹⁵⁰ *Id.* at 264.

¹⁵¹ Eskridge and Frickey, *Critical Introduction* at cv–cvi (cited in note 26).

¹⁵² *Id.* at cvi (noting that “the Hart and Sacks materials provided a detailed defense of [the Warren Court’s] approach and probably contributed to its general acceptability in the legal culture”).

litical challenge, Justice Breyer does not need to choose between seizing on the law-as-purpose features of legal process and its rule-of-law values emphasizing stability. He is free to seize on law-as-purpose themes when he wants to liberalize the law (see, for example, pp 78–79). But, because he is able to draw upon the liberal precedents of this earlier period, and sustain them, he is freer to appeal to the ostensibly apolitical “rule of law” and stability themes—including the importance of stare decisis—to sustain the viability of earlier, highly aggressive law-as-purpose readings made by the Warren Court (see p 119).¹⁵³ This position in time permits Justice Breyer to be much more attentive (than Justice Brennan was, for example) to the limits of judicial power, the importance of judicial humility, and the position of the judiciary as only one—and not necessarily the most important—institution of government (pp 31–32, 37). In an earlier stage of the New Deal/Warren Court liberal constitutional regime, Justice Brennan felt that it was both important (and politically plausible) to describe the reform-minded liberal constitutional project as a commitment to “living constitutionalism.” As the Warren years receded into the background, Justice Brennan was increasingly called upon to defend his living constitutionalism against a set of rising intellectual and political challenges.¹⁵⁴ Today, Justice Breyer is essentially carrying on Justice Brennan’s legacy by jettisoning the language of living constitutionalism in favor of a more process-oriented form of “dynamic constitutional construction”—a variant of the purposive, legal process-inspired “dynamic” approach to statutory interpretation, now applied not simply to statutes, but to the interpretation of the Constitution itself (pp 118–20). One question Justice Breyer’s book raises is whether the spirit of an ostensibly “living constitutionalism” is any more palatable in this new guise inspired by theories of proper approaches to statutory construction than it was in its previous incarnation.¹⁵⁵ Justice Breyer’s gambit here, looking to the opportunities and limitations provided in an increasingly conservative age, is to change the nomenclature.

¹⁵³ See *id.* at civ–cv.

¹⁵⁴ See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* 23, 33 (Northeastern 1990) (“[T]he unique interpretive role of the Supreme Court with respect to the Constitution demands some flexibility with respect to the call of stare decisis.”); Edwin Meese III, *Interpreting the Constitution*, in Rakove, ed., *Interpreting the Constitution* 13, 20 (“[A]n activist jurisprudence, one which anchors the Constitution only in the consciences of jurists, is a chameleon jurisprudence.”); Jack N. Rakove, *Mr. Meese, Meet Mr. Madison*, in Rakove, ed., *Interpreting the Constitution* 179, 180–81 (“Justice Brennan . . . dismissed Mr. Meese’s ‘doctrinaire’ position [on original intent] as ‘arrogance cloaked in humility.’”).

¹⁵⁵ See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1481 (1987).

A. Does Active Liberty Save Us?

Does Justice Breyer's decision to superimpose an appeal to "active liberty" on top of a classic legal process approach to statutory construction (now transferred to the project of constitutional interpretation) save him from being, fundamentally, just another living constitutionalist? It does not. The way that Justice Breyer uses the concept of active liberty in this book differs not at all from the way that the Progressive Era progenitors of a living, evolving Constitution that focused not simply on the protection of rights in their negative form (which, admittedly, Justice Breyer defends more aggressively than they did) but on the collective, democratic rights of the people.

Justice Breyer chooses to call this "active liberty" (p 6). But, at least as he describes it here, he could just as easily have called it the "New Freedom[]"—a Liberty widened and deepened to match the broadened life of man in modern America, restoring to him in very truth the control of his government."¹⁵⁶ That, after all, is what Woodrow Wilson called it in his critique of the predominant constitutional thought of his time (and, prior to running for public office, in his sustained attack on the contemporary relevance of the Constitution itself, as written and understood by the Founders).¹⁵⁷ "We are in the presence of a new organization of society," he wrote:¹⁵⁸

Our life has broken away from the past. . . . The life of the nation has grown infinitely varied. It does not centre now upon questions of governmental structure or of the distribution of governmental powers. It centres upon questions of the very structure and operation of society itself, of which government is only the instrument. Our development has run so fast and so far along the lines sketched in the earlier day of constitutional definition, has so crossed and interlaced those lines, has piled upon them such novel structures of trust and combination, has elaborated within them a life so manifold, so full of forces which transcend the boundaries of the country itself and fill the eyes of the world, that a new nation seems to have been created which the old formulas do not fit or afford a vital interpretation of.¹⁵⁹

¹⁵⁶ Woodrow Wilson, *The New Freedom: A Call for the Emancipation of the Generous Energies of a People* 294 (Doubleday 1913) (calling this "New Freedom" a "deep[er]" freedom than that at the Founding).

¹⁵⁷ See Haskell, *The Emergence of Professional Social Science* at 252 (cited in note 28) (noting that Wilson premised *The New Freedom* on ideals of interdependence that contravened the *Lochner* Court's focus on individual rights).

¹⁵⁸ Wilson, *The New Freedom* at 3–5 (cited in note 156).

¹⁵⁹ *Id.* at 3–5.

Under these new conditions, it is wrong to overemphasize “negative” or “modern” liberty, Wilson explained:

We used to think in the old-fashioned days when life was very simple that all that government had to do was to put on a policeman's uniform, and say, “Now don't anybody hurt anybody else.” We used to say that the ideal of government was for every man to be left alone and not interfered with, except when he interfered with somebody else; and that the best government was the government that did as little governing as possible. . . . But we are coming now to realize that life is so complicated that we are not dealing with the old conditions . . . under which we many live, the conditions which will make it tolerable for us to live.¹⁶⁰

“Freedom to-day is something more than being let alone,” Wilson emphasized. “The program of a government of freedom must in these days be positive, not negative merely.”¹⁶¹

Although speaking specifically here of the Declaration of Independence, Wilson may just as well have been speaking of the Constitution itself when he wrote that:

The Declaration of Independence [does] not mention the questions of our day. It is of no consequence to us unless we can translate its general terms into examples of the present day and substitute them in some vital way for the examples it itself gives, so concrete, so intimately involved in the circumstances of the day in which it was conceived and written. It is an eminently practical document, meant for the use of practical men. . . . Unless we can translate it into the questions of our own day, we are not worthy of it, we are not the sons of the sires who acted in response to its challenge.

. . .

[W]e are architects in our time, and our architects are also engineers.¹⁶²

We could just as easily call what Justice Breyer calls “active liberty” an interpretive approach aimed at fulfilling “The Promise of American Life.” That's what the progressive intellectual Herbert Croly called it.¹⁶³ To achieve the full promise of America, Croly called

¹⁶⁰ Id at 19–20.

¹⁶¹ Id at 284.

¹⁶² Id at 48–51 (calling for citizens to throw off the yoke of big business).

¹⁶³ Herbert Croly, *The Promise of American Life* 1–2 (Macmillan 1910) (describing the Whiggish “Promise” of the “Land of Democracy”).

on Americans to move beyond their traditional constitutional understandings, and their overemphasis on negative, private-oriented rights. Americans, Croly argued, needed to stop thinking in their usual formalistic categories made for a bygone age, and reconceive of government as a national-level problemsolving endeavor.¹⁶⁴

Unlike Breyer, Croly argued openly that thinking about things this way would be “revolutionary,” and that his proposals would “seem fantastic and obnoxious to the great majority of Americans,” and involve “a radical transformation of the traditional national policy and democratic creed.”¹⁶⁵ Because Justice Breyer is a lawyer and a judge, and not a freelance political and intellectual activist, he cannot say openly, as Croly does, that “[t]he values placed upon many political ideas, tendencies, and achievements [that he advocates] differ radically from the values placed upon them either by their originators and partisans or in some cases by the majority of American historians.”¹⁶⁶

“The security of private property and personal liberty, and a proper distribution of activity between the local and the central governments [traditionally] demanded . . . and within limits still demand, adequate legal guarantees,” Croly wrote. “It remains none the less true, however, that every popular government should in the end, and after a necessarily prolonged deliberation, possess the power of taking any action, which, in the opinion of a decisive majority of the people, is demanded by the public welfare.” He added, “Such is not the case with the government organized under the Federal Constitution.”¹⁶⁷ “[I]t may be,” he added, “that the Constitution . . . is itself partly responsible for some of the existing abuses, evils, and problems” facing the country.¹⁶⁸ Again, as a judge, Breyer cannot add a similar statement. And he doesn’t.

Like Breyer, Croly appeals to an ideal of democratic “solidarity,” and popular sovereignty at the national level. Croly explained:

The phrase popular Sovereignty is . . . equivalent to the phrase “national Sovereignty.” The people are not Sovereign as individuals. They are not Sovereign in reason and morals even when united into a majority. They become Sovereign only in so far as they succeed in reaching and expressing a collective purpose.¹⁶⁹

¹⁶⁴ See *id.* at 274.

¹⁶⁵ *Id.* at 24–25.

¹⁶⁶ *Id.* at 27.

¹⁶⁷ *Id.* at 35–36.

¹⁶⁸ *Id.* at 137.

¹⁶⁹ *Id.* at 280 (noting that “there is no royal and unimpeachable road to the attainment of such a collective will”).

This, for Croly, as for Breyer, is “democracy” (see pp 3, 6).

Constitutional theory, as engaged in here by Justice Breyer (and, more systematically, by contemporary legal academics) is an odd endeavor. The task of engaging in ambitious interpretations of the American past, with highly creative appeals to key figures in the American political tradition such as Jefferson, Hamilton, and Lincoln, in discerning the meaning and future trajectory of American freedom, was at one time the chief province of intellectuals, journalists, activists, and candidates for public office.¹⁷⁰ Today, we assume that its leading practitioners will be law professors—and intellectually ambitious judges like Justice Breyer. This change is closely related to the rise of judicial supremacy as the sustaining buttress of Warren Era constitutional liberalism.¹⁷¹ Ostensible humility aside, the nature of the appeals Justice Breyer makes in *Active Liberty* mark him as very much a part of that endeavor.¹⁷²

B. The Search for a Liberal Interpretive Process That “Works”

If the process of judging is, in part, an effort to find workable solutions to contemporary political problems, so too is contemporary constitutional theory. Constitutional theory, as practiced by contemporary law professors, exists in what we might call a “constitutional time,” in which distinctive problems ostensibly in need of solutions, existing within distinctive political regimes, present themselves, and altering political circumstances makes certain solutions to those problems appear more intellectually and politically plausible than others.¹⁷³ In this book, Justice Breyer alludes to the active liberty bona fides of the New Deal/Warren Era liberal political regime (pp 10–11).¹⁷⁴ He was appointed to the Court, however, by a Democratic president during a Republican era, in which that form of liberalism was—and had

¹⁷⁰ See *id* at 28–29.

¹⁷¹ See Powe, *The Warren Court* at 485–86 (cited in note 31).

¹⁷² See Keith E. Whittington, “To Support This Constitution”: Judicial Supremacy in the Twentieth Century, in Mark A. Graber and Michael Perhac, eds, *Marbury versus Madison: Documents and Commentary* 101, 120 (CQ 2002).

¹⁷³ See Kersch, *Constructing Civil Liberties* at 1 (cited in note 125). See also *id* at 1–27 (describing “the paths of constitutional development” through the 1960s and 1970s).

¹⁷⁴ Recent work emphasizing the relationship between the Supreme Court, constitutional law, and the ambient political regime includes Powe, *The Warren Court* at xiii (cited in note 31); Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in Kahn and Kersch, eds, *The Supreme Court* (cited in note 121); Howard Gillman, *Party Politics and Constitutional Change: The Political Origins of Liberal Judicial Activism*, in Kahn and Kersch, eds, *The Supreme Court* (cited in note 121); Cornell W. Clayton and J. Mitchell Pickerill, *Guess What Happened on the Way to Revolution?: Precursors to the Supreme Court's Federalism Revolution*, 34 *Publius* 85, 87 (Summer 2004).

long been—under challenge.¹⁷⁵ This was true both as a general matter and as a matter of constitutional interpretation. The Republican Party, and the Reagan Revolution, rose to power in part through mounting a sustained criticism of the Warren Court and its activist judges, who, it was argued, acted as if they were writing a constitution rather than interpreting one.¹⁷⁶ Before the legal academy had fully assimilated the reality of Republican rule, many constitutional theorists were content to argue blissfully that the Constitution's meaning was radically indeterminate. Noninterpretivists explained that, in approaching constitutional questions, judges were not in any real way tied to the provisions of the constitutional text.¹⁷⁷ Some continued to argue that, in light of this, the text should be interpreted in a way that transformed society in a radically egalitarian direction. Rejecting originalism, and often textualism, others celebrated the Constitution as a “living” document.¹⁷⁸ By the time Justice Breyer was appointed to the Court in 1994, by a “triangulating” President seeking the “third way” to return the Democrats to power, however, the legal academy had belatedly begun to assimilate the reality of an altered political context, and these approaches—at least in their less cautious forms—were understood to be a weak grounding, in this altered context, on which to sustain (and, perhaps, develop) New Deal and Warren Court liberalism, in the face of sustained political challenge.¹⁷⁹ Since that time, constitutional liberals have set themselves to the task of building new foundations to sustain this beleaguered political regime.¹⁸⁰

Broadly speaking, there have been several contenders for pre-eminence in this problemsolving endeavor. The first joins conservative originalism by venerating the Founders. But it then goes on, as many conservative originalists do not, to take up the whole of American history sequentially, multiplying the number of “foundings” in the American constitutional tradition, and arguing that the contemporary Supreme Court must interpret the Constitution in light of some sort of

¹⁷⁵ See Kersch, *Synthetic Progressivism* at 241 (cited in note 1) (“Breyer’s nomination came in the immediate wake of a succession of bitter political struggles between ideologically polarized political parties.”).

¹⁷⁶ See Kersch, *Constructing Civil Liberties* at 7 (cited in note 125) (describing how the Reagan Revolution challenged “statist liberalism” in the federal judiciary, among other places).

¹⁷⁷ See, for example, Thomas Grey, *Do We Have an Unwritten Constitution?* 27 *Stan L Rev* 703, 705 (1975); Michael Perry, *The Constitution, the Courts, and Human Rights* (Yale 1982). See also Ely, *Democracy and Distrust* 73–75 (cited in note 39).

¹⁷⁸ See Horwitz, *The Warren Court* at 112–13 (cited in note 17) (describing threads of Warren Court “activism” that survived into the Burger and Rehnquist eras).

¹⁷⁹ See Kersch, *Synthetic Progressivism* at 241 (cited in note 1) (positing that this political climate made Breyer a viable nomination for Clinton to make).

¹⁸⁰ See, for example, Sunstein, *One Case at a Time* at xi (cited in note 12) (disavowing “theory” in favor of “close encounters with particular cases” when interpreting the Constitution).

synthesis of these multiple foundings, which are tied to the theme of democracy as an expression (like the original Founding) of popular sovereignty as exercised by “We the People.”¹⁸¹ Akhil Amar’s version of this approach forges a second line of commonality with conservatives by supplementing its originalism with a consistent textualism. In his first book-length iteration, Amar emphasized what were essentially two foundings: one in 1789 and one brought about by the Civil War Amendments.¹⁸² As he has recently developed this, while still placing the lion’s share of the emphasis on these two foundings, he reinforced a theme of an ever-more-democratizing constitutional text by a focus on the subsequent addition of the Progressive Era and Kennedy-Johnson Era amendments.¹⁸³ Bruce Ackerman’s version of this approach emphasizes the same first two foundings as Amar, but adds a nontextual third Founding to the mix—that of Franklin Roosevelt’s New Deal.¹⁸⁴ We might call these theorists “multiple origins originalists.”

A second major category of arguments on behalf of sustaining (and, perhaps, expanding) New Deal and Warren Court liberalism in a conservative political and constitutional age are those grounded in so-called “welfare” or “positive rights” constitutionalism. These scholars—who are also (in their way) originalists—have argued for a sweeping scope of governmental powers (and, indeed, governmental duties and responsibilities) to pursue (and enforce) the collective social good in the face of countervailing, more “formalistic” arguments

¹⁸¹ See Bruce Ackerman, 1 *We the People: Foundations* 5 (Belknap 1991) (urging that “a rediscovered Constitution [be] the subject of an ongoing dialogue amongst scholars, professionals, and people at large”); Bruce Ackerman, 2 *We the People: Transformations* 418–19 (Belknap 1991) (urging judges to abandon pure legal realism for a more principled jurisprudence); Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* 3 (Belknap 2005).

¹⁸² See Amar, *The Bill of Rights* at xii–xiii (cited in note 50) (arguing that each “founding” dictates a different mode of constitutional interpretation).

¹⁸³ See *id.* at xv (elaborating a theory of the Founders’ understanding of the Bill of Rights and examining the effects of the Fourteenth Amendment on the Bill); Amar, *America’s Constitution* at 433 (cited in note 17) (finding constitutional change during the Progressive Era, the Great Depression, and the “Kennedy-Johnson-Vietnam years” that increased individuals’ “rights of democratic participation”).

¹⁸⁴ See Ackerman, 2 *We the People: Foundations* at 6–7 (cited in note 181) (arguing that the Constitution provides for two levels of lawmaking, a lower level comprised of the three branches of government and a higher level comprised of the people acting as a deliberative body). In his latest book, Ackerman—apoplectic, it seems, over any constitutional system that could lead to the election of George W. Bush—seems considerably less enamored of the eighteenth-century Founders. He has also added the election of 1800 as, in effect, a new constitutional moment. Ackerman, *The Failure of the Founding Fathers* at 247–49 (cited in note 181) (“We have never recovered from the early republic’s failure [in 1800] to undertake a thoroughgoing redesign of presidential selection.”).

about textually stipulated powers and their limitations.¹⁸⁵ Welfare constitutionalists typically emphasize the Constitution's character as a charter of not only "negative" but also of "positive" rights.¹⁸⁶ As was the case with multiple origins originalism, welfare or positive rights constitutionalism comes in more- and less-textualist versions. The more-textualist welfare constitutionalists, like Sotirios Barber, derive their understandings from readings of the Constitution's broadly worded provisions, like the Preamble, and its assertion that the text was designed to "promote the general welfare" (along with similar statements from an array of Founders and subsequent touchstone figures acceptable to conservatives, such as Abraham Lincoln—but not Franklin Roosevelt).¹⁸⁷ Barber argues that the particular provisions of the Constitution must be interpreted in light of the document's overarching objective, which is to promote "the general Welfare" or to advance the collective public good.¹⁸⁸ Other welfare constitutionalists, like Cass Sunstein, are less fully textualist in placing emphasis on the (nontextual) New Deal transformation. Sunstein, for example, has argued for a positive rights vision by appealing to FDR's "Four Freedoms" speech as a significant constitutional touchstone.¹⁸⁹ In a relatively creative bid to turn constitutional reasoning in a new (or old) direction for the twenty-first century, some welfare constitutionalists—including Sunstein—have added a "globalist" argument to increase its appeal to liberals, who tend to see the United States, and its underdeveloped welfare state, as perpetually lagging behind the welfare states of Western Europe. Sunstein specifically linked FDR's positive rights vision to an understanding of a just political order simultaneously being developed in European social welfare states and elaborated in interna-

¹⁸⁵ See Sotirios A. Barber, *Welfare and the Constitution* 1–2 (Princeton 2003) (advocating "a forthrightly substantive theory of 'the general welfare'").

¹⁸⁶ See *id.* at xiv.

¹⁸⁷ See *id.* at 3 (citing Lincoln's statement that government should "elevate the condition of men").

¹⁸⁸ See *id.* at 1 (arguing that the recognition of positive rights comprises a critical part of constitutional fidelity). See also Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 15 (Norton 1999) ("When structured constitutionally and made (relatively speaking) democratically responsive, government is an indispensable device for mobilizing and channeling effectively the diffuse resources of the community.").

¹⁸⁹ See generally Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More than Ever* (Basic 2004). The *bête noire* of "positive rights" constitutionalists is less *Lochner v. New York* than the Rehnquist Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 US 189 (1989) (holding a county not liable to a boy repeatedly beaten by his father when county social service providers knew of the beatings but failed to respond), which is anathematized in this literature. See also Ruth Bader Ginsburg and Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 Cardozo L. Rev. 253, 256–57 (1999) ("[Not] all will share equally, but . . . there are minimum levels of employment, education, and subsistence all should have.").

tional treaties and declarations.¹⁹⁰ The appeal of this turn has been enhanced only in recent years, as the Democrats have argued on behalf of a revived multilateralism in the face of the ostensibly disastrous “unilateralism” of the much despised Bush Administration.¹⁹¹

A third category of arguments on behalf of preserving constitutional liberalism (but not expanding it) are arguments for minimalism and judicial restraint, most prominently advanced by Sunstein and discussed above. This approach, of course, appropriates not conservative originalism, but rather the conservative critique of the Warren Court’s judicial activism with the aim of preserving the outcomes arrived at by that activism by restraint.¹⁹² Needless to say, *Active Liberty* will strike many liberal constitutional theorists as a brilliant, short synthesis of many of these themes, and, as such, as a possible answer to justices like Thomas and Scalia, and a plausible hope for the future of constitutional liberalism.

C. How Democratic Is Justice Breyer?

It is becoming something of a rallying cry for liberals, in response to conservatives complaining about liberal activist judges, that Justice Breyer is actually the most restrained, and, by implication, the most democratic justice on the Supreme Court.¹⁹³ Although a much-alluded-to op-ed in the *New York Times* reported this, it may nevertheless not be true. But we can at least meet the *Times* op-ed half way and concede that Justice Breyer was at least near the middle of the Rehnquist Court in this score: he is clearly no William Brennan, a frank ideologically liberal defender of a highly aggressive Court.

For many of these desperate liberals, this book will arrive in the nick of time. In it, Justice Breyer—positioning himself against “activist” conservatives like Clarence Thomas and Antonin Scalia—explains at length how he came to believe in judicial restraint, and his core con-

¹⁹⁰ Sunstein, *The Second Bill of Rights* at 129–30 (cited in note 189) (noting that European “self-styled socialist movements have often not been radical” but instead “in line with . . . the [American] political left”).

¹⁹¹ See Ken I. Kersch, *Multilateralism Comes to the Courts*, Pub Int 3, 4–5 (Winter 2004) (arguing that the Court’s use of “multilateralism” represents “a vast and ongoing intellectual project” to internationalize the Constitution).

¹⁹² See Sunstein, *One Case at a Time* at 4–5 (cited in note 12) (describing “judicial minimalism” as staying close to precedent without hewing too closely to its weight). On David Souter as embodying this Harlan-esque approach, see Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* 130 (Oxford 2005).

¹⁹³ See Gewirtz and Golder, *So Who Are the Activists?*, NY Times at A19 (cited in note 6) (alleging that Breyer invalidates less than three-quarters as many statutes as the next most “activist” judge).

victions about the centrality of democracy to the American political tradition.

But for anyone who has read through the corpus of Justice Breyer's work—and the substantive and theoretical matters that seem (before this book) to most spark his interest—his bid in the past few years to seize the mantle of “the people themselves” will seem very odd indeed.¹⁹⁴ For Justice Breyer is, at heart, not a tribune of the people, but a mandarin: he is self-evidently most at home (and most illuminating) when parsing arcane scientific and regulatory questions, especially in the company of academics, scientists, bureaucrats, and (transnational) judicial and regulatory elites (see, for example, pp 85–101).

Statistically speaking, and given the distinctive sorts of statutory provisions that happen to have come before the Court in the past fifteen years, Justice Breyer may be less likely to void a federal statute than Justices Thomas and Scalia. We might say that this “proves” that today's judicial liberals like Breyer are the country's true democrats. But recent empirical work on the Court has shown that this incessant back and forth in the law reviews about whether liberals or conservatives are the “true” believers in judicial restraint is something of a parlor game. Both liberals and conservatives have evinced skewed affinities vis-à-vis their ideological adversaries for voiding federal (and state) laws on constitutional grounds in different historical periods.¹⁹⁵ Moreover, political scientist Christopher Zorn has shown that “the more extreme the Court's aggregate ideology—either liberal or conservative—the more willing it is to strike down acts of Congress.”¹⁹⁶

The rather simple equations between statistics of this sort and a commitment to “democracy” that remains in common currency today were forged in the late nineteenth and early twentieth centuries when the Court's decision to void a large number of federal (and state) laws, such as minimum-wage and maximum-hours laws, stood at the very heart of the politics of its day (see pp 10–11). This was the period in which scholars like James Bradley Thayer were able to argue that the decision by the Court to void a law on constitutional grounds outside of very clear cases represented a serious affront to democracy. In that time, and in that context, that argument was quite plausible and, to

¹⁹⁴ See Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 8 (Oxford 2004) (discerning a “popular constitutionalism” “over most of American history” that gave “[f]inal interpretive authority [to] the people themselves”) (internal quotation marks omitted).

¹⁹⁵ See Sunstein, *Radicals in Robes* at xii–xiii (cited in note 89) (describing four different traditions in judicial decisionmaking and aligning each tradition with particular political ideologies and time periods).

¹⁹⁶ Christopher Zorn, *Liberal Justices* at 4 (cited in note 6) (noting peaks of “activism” during the Warren and Rehnquist Courts).

many, understandably convincing.¹⁹⁷ As Justice Breyer explicitly acknowledges, however, in a post-*Carolene Products*,¹⁹⁸ post-Warren Court era, we no longer, in the last analysis, assess judges by their willingness, except in the clearest of cases, to defer to legislatures (p 101). We insist, rather, that they defer where deference is appropriate, and not defer where it isn't (id). Justice Breyer argues here that he is being democratic—that he looks to active liberty—both when he votes to void statutes, and when he does not (pp 98–99). The test, then, is whether he was right to do so in either case.

Active Liberty does not really contain the sort of rigorous analysis from principle—leading to precise results in concrete cases about when a law should be voided and when it should not—that we find in fully developed scholarly works.¹⁹⁹ Rather, Breyer uses concrete examples illustratively in this book. As such, the book comes across in many respects as a brief for an “attitude” or a “mood” with which to confront the interpretation of legal texts (pp 18–19). It seems to me that Justice Breyer is really only as democratic in attitude as the statistics about his willingness to defer to the legislative branch (and administrative agencies) suggest. Key aspects of the substance of his thought reinforce his status as our nation's leading jurisprudential mandarin.

General readers, I think, will sense this right away the moment Justice Breyer begins discussing his applications, which (and very much in contrast to Justice Scalia's essay in *A Matter of Interpretation*²⁰⁰) will come across, in choice of topics to be studied and in style of exposition,

¹⁹⁷ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv L Rev 129, 132 (1893) (noting that even soon after *Marbury*, judicial review “was not universally assented to”); Boudin, *Government by Judiciary* at 24 (cited in note 132) (claiming that if the courts have judicial review, a power “implied” by the Constitution, Congress should also be able to claim expansive, implicit powers). See also Ross, *A Muted Fury* at 1 (cited in note 132) (“Between 1890 and 1937, populists, progressives, and labor leaders subjected both state and federal courts to vigorous and persistent criticism and proposed numerous plans to abridge judicial power.”).

¹⁹⁸ *United States v Carolene Products Co*, 304 US 144 (1938) (expanding the Commerce Clause to cover dairy production).

¹⁹⁹ See Ely, *Democracy and Distrust* at 181 (cited in note 39) (“elaborat[ing] a representation-reinforcing theory of judicial review” that represents only one possible solution among many). But see Bickel, *The Least Dangerous Branch* at 244 (cited in note 39) (“I have suggested that the rule of principle in our society is neither precipitate nor uncompromising, that principle may be a universal guide but not a universal constraint, that leeway is provided to expediency along the path to, and alongside the path of, principle.”); Ronald Dworkin, *Taking Rights Seriously* xiv (Harvard 1978) (“It is no part of my theory . . . that any mechanical procedure exists for demonstrating what political rights, either background or legal, a particular individual has . . . [T]here are hard cases, both in politics and law, in which reasonable lawyers will disagree about rights, and neither will have available any argument that must necessarily convince the other.”).

²⁰⁰ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed, *A Matter of Interpretation* 3, 44–47 (Princeton 1997).

as highly technocratic and dry. General readers looking over Justice Breyer's shoulder as he thinks through legal cases will begin to suspect rather quickly that his real devotion is less to the people, in any broad sense, than to high-level conversations and consultations taking place among policy intellectuals (see, for example, pp 102–08). There are very strong premonitions of this throughout the broader corpus of his work. Breyer first came to academic prominence by arguing that the people are not particularly rational in the way that they think about risk, and, accordingly, that decisions about risk regulation are best placed in the hands of administrative experts (as they are, he noted, in continental European social welfare states).²⁰¹ Justice Breyer is also the Court's most sophisticated and influential proponent of greater transnational consultation amongst the world's judges—a consultation that he has encouraged with a hope that international contact will provide judges ruling within their domestic constitutional systems with the knowledge and empirical data they need to solve the problems at home raised by statutory and constitutional questions.²⁰²

It is notable that Breyer barely discusses his “comparativist” inclinations in *Active Liberty* because, elsewhere, he has described the move by American lawyers and judges in a “comparativist” direction as representing “a modern revolution in the law.” Indeed, in an effort to situate this “modern revolution,” Breyer has asked that we “think of the Marshall Court [and issues of] constitutional structure; the Warren Court and the protection of fundamental human liberty; Labor law in the 1930s and again in the 1960s; Civil procedure and the Federal Rules. [Then] think of . . . the role of judges in a globalized legal system.” A key part of this revolution will involve an aggressive “interchange of substantive legal views, not simply among academics and practitioners, but also among judges from the courts of different nations.”²⁰³ The typically understated Justice Breyer, the judicial minimalist, seems quite excited by the prospect of this interchange. Indeed, he has ended several speeches on this topic with these words:

[W]hat could be more exciting for an academic, practitioner, or judge, than the “global” legal enterprise that is now upon us? Wordsworth's words, written about the French Revolution, will, I

²⁰¹ See Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 55–56, 70 (Harvard 1993) (describing “the regulatory link” as the problem in informing the public of risks, and citing France as a country that has a “powerful coordinating mechanism[]”).

²⁰² See, for example, Kersch, *Synthetic Progressivism* at 266 (cited in note 1) (describing Breyer's judicial philosophy as “the jurisprudential adjunct to . . . elite progressive globalism”).

²⁰³ Breyer, *Keynote Address*, Symposium on Democracy (cited in note 14) (noting that judges “increasingly turn to the experience of other nations when deciding difficult open questions of substantive law”).

hope, still ring true: "Bliss was it in that dawn to be alive/
But to be young was very heaven."²⁰⁴

How are we to reconcile this outsized enthusiasm for transnational consultation with Justice Breyer's profile as an unassuming and measured minimalist? The key is that, as he sees it, this impending revolution represents the prospect that the "national conversation involving, among others, scientists, engineers, businessmen and women, the media, along with legislators, judges, and many ordinary citizens" that Justice Breyer defended in *Active Liberty* as the essence of "participatory democracy . . . bubbl[ing] up from below" (p 70–71) is on the verge of being taken up at the worldwide level. If this is right, we would do very well to stop and reflect about what it says about Justice Breyer's democratic "attitude" (p 19). To be sure, in this vision "now everyone, or at least potentially everyone, is [] seen as a participant in the collective decision-making process."²⁰⁵ This may seem democratic, until we realize that there is no essential link in it between this conversation and the polity itself: it is a conversation amongst problemsolvers—more on the model of a seminar than a demos.²⁰⁶

Active Liberty contains a few tantalizing—but subtle—gestures towards this expanding "global conversation"—though Breyer is much more explicit about these things elsewhere. One such gesture—lest we overlook what is in plain view—is Breyer's decision to anchor his jurisprudential vision in the thought of a Frenchman (pp 3–5). Another, as mentioned above, is his appeal to principles of fraternité in the affirmative action example. Yet another is his rather odd decision to describe the American constitutional system several times in *Active Liberty* as a system of "delegated democracy" (pp 23, 24, 85). Because by this he seems pretty clearly to mean what ordinary Americans call "representative democracy," one explanation for adopting this locution might be to afford him an opportunity to extend a hand in friendship (with the hope of fruitful further dialogue?) to the Chief Justice of the Israeli Supreme Court, Aharon Barak, who has himself prominently employed that locution.²⁰⁷

²⁰⁴ Id (contending "that there is more than a generation's worth of fundamental legal and institutional work to be done").

²⁰⁵ Martin Shapiro, *Administrative Law Unbounded: Reflections on Government and Governance*, 8 Ind J Global Legal Stud 369, 369 (2001) ("This change in vocabulary [from 'government' to 'governance'] announces a significant erosion of the boundaries separating what lies inside a government . . . and what lies outside.").

²⁰⁶ See id at 369–70 (listing the wide array of special interest groups that participate in contemporary governance and blur "the very distinction between governmental and nongovernmental").

²⁰⁷ Justice Breyer cites Barak twice in this book (see pp 139 n 2, 146 n 1). Like Breyer, Barak, significantly, has also recently published a book advocating a "purposive" approach to the interpretation of legal texts. See generally Aharon Barak, *Purposive Interpretation in Law* (Princeton 2005) (Sari Bashi, trans).

But Justice Breyer's decision to adopt a focus on "delegation" as opposed to "representation" is potentially of even deeper conceptual significance than that. The cognoscenti will recognize that the preference for conceptualizing an increasing array of dynamics as involving "delegation" as opposed to "representation" is one of the touchstones of the movement by contemporary cosmopolitan academics away from discussing "governments" in preference for discussing "governance."²⁰⁸ A choice to turn to delegation over representation, of course, retains the functional aspect of the relationship between principal and agent, while severing the connection between that relationship and any normative claim to democratic legitimacy.²⁰⁹ Indeed, Justice Breyer himself seems to acknowledge this.²¹⁰ Partisans of governance argue

²⁰⁸ See Gerry Stoker, *Governance as Theory: Five Propositions*, 155 Intl Soc Sci J 17, 19 (1998) (noting that "governance" refers to a broader web of institutional actors); Shapiro, *Administrative Law Unbounded*, 8 Ind J Global Legal Stud at 369–70 (cited in note 205) (arguing that participation in the governmental decisionmaking process is broad and crosses traditional public and private lines).

²⁰⁹ See Stoker, *Governance as Theory* at 21 (cited in note 208) ("Governance lacks the simplifying legitimating 'myths' of traditional [constitutional] perspectives, such as the British Westminster Model."). On delegation generally, see Alberto Alesina and Guido Tabellini, *Why Do Politicians Delegate?* 2–3 (Harvard Institute of Economic Research Discussion Paper 2079, July 2005), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=764430 (visited Apr 4, 2006) (enumerating three situations in which elected politicians should want to delegate to administrative bureaucrats). Justice Ginsburg's nomenclature has also been affected by global dynamics in odd but subtle ways. In her appeal to international standards in *Grutter*, Ginsburg (or someone working for her), possibly inadvertently, slipped a foreign locution into the opinion, writing that a race-conscious effort of the sort adopted by the University of Michigan Law School "accords with the international understanding of the office of affirmative action." 539 US at 344 (Ginsburg concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination, which endorses positive means to end discrimination). In a subsequent speech in which she quoted this portion of her opinion in *Grutter*, she replaced the foreign idiom ("the international understanding of the office of affirmative action") with "the international understanding of the [purpose and propriety] of affirmative action" (the brackets are hers). Readers will note that she substituted an approach similar to Justice Breyer's focus on purposes and consequences for the foreign locution. Ruth Bader Ginsburg, Speech, "A Decent Respect to the Opinions of [Human]Kind": The Value of a Comparative Perspective in Constitutional Adjudication (Apr 1, 2005), online at <http://www.asil.org/events/AM05/ginsburg050401.html> (visited Apr 4, 2006) (using *Grutter* as an example of the Court's "attentiveness to legal developments in the rest of the world").

²¹⁰ In his debate with Antonin Scalia on the Supreme Court's citation of foreign precedents and practices, Breyer observed: "It's sometimes very hard for—say for Europeans, to understand why Americans sometimes react negatively, so negatively to the thought that some foreign judges would be able to tell Americans what to do. . . . [T]here is something deep in this reaction, and not entirely bad. And it comes back to our being a democracy." *Constitutional Relevance of Foreign Court Decisions*, Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan 13, 2005), online at <http://domino.american.edu/AU/media/mediaref.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument> (visited Apr 4, 2006) ("At bottom, there is reflected a very strong American belief that all power has to flow from the people and we have to maintain a check. That's a good thing.").

that to improve our governance—that is, to solve our problems—we need to lodge the power and authority in the place most conducive to yielding the right solution.²¹¹ And who “we” is doesn’t really matter all that much. What matters, ultimately, is that there is “governance,” and that the problem gets solved.

What are we to make of all this? Well, in *Active Liberty*, Justice Breyer certainly avoids the snare for judges identified by Justice Brandeis, that “we must be ever on our guard, lest we erect our prejudices into legal principles.”²¹² It is far from clear, however, that the crux of the problem is avoided by enacting prejudices instead into a set of stipulated “purposes” and “objectives” informed by extensive, and transnational, consultation with members of an elite political class.²¹³ The one function that a focus on purposes and objectives serves, though, is—as the affirmative action illustration makes clear—to obscure these prejudices behind a cloud of empirical policy-speak (in which Justice Breyer, who rarely simply defers to legislatures and agencies without “undertak[ing] a detailed reevaluation and reweighing of the factors that produced [another’s judgment],” is proficient).²¹⁴

Let’s be clear: Justice Breyer’s understanding of regulatory policy and administrative law still probably bests any current member of the Supreme Court. But his efforts to start from that thinking and forge it into a palatable “attitude” towards constitutional interpretation fail to convince. There is too much of the spirit of the elite regulator—with a new, governance-beyond-borders twist—in Justice Breyer the consti-

²¹¹ See Stoker, *Governance as Theory* at 21 (cited in note 208) (“The governance perspective [entails] a stepping back of the state and a concern to push responsibilities onto the private and voluntary sectors and, more broadly, the citizen.”).

²¹² *New State Ice Co v Liebmann*, 285 US 262, 311 (1932).

²¹³ For an apt criticism of the way that Justice Breyer’s prejudices, obscured by the language of “purposes” and “consequences,” trumpet his ostensible commitment to policy experimentation in the school vouchers case, *Zelman v Simmons-Harris*, 536 US 639 (2002), see Richard A. Posner, *A Political Court*, 119 Harv L Rev 31, 90–92, 99–102 (2005). See also, for example, pp 120–22. Justice Breyer gave a remarkable description of how law is created in his debate with Justice Scalia at American University:

[L]aw is not really handed down from on high, even from the Supreme Court. Rather, it emerges. And we’re part of it, the clerks are part of it, but only part. And what really survives every time is the result, I tend to think of a conversation[: a] conversation among judges, among professors, among law students, among members of the bar, because you need people to put things together, you need people to decide cases, you need people to tell you how it works out in practice. And out of this giant, messy, unbelievably messy conversation emerges law.

Constitutional Relevance of Foreign Court Decisions (cited in note 210).

²¹⁴ See Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 Minn L Rev 1280, 1312 (2005) (claiming that “Justice Breyer’s proportionality approach appears on its face to be the opposite of a genuine commitment to defer to other branches”).

tutionalist. Part of that elitist spirit consists of failing to recognize the deep nature of the ideological assumptions, be they in matters of substance or process, upon which his ostensibly purely technical judgments and procedural affinities seem to rest. Appeals to a vague rhetoric of “active liberty” or “participatory democracy,” in the end, do not conceal this spirit.

Appeals to finding commonsensical or “sound” results when faced with practical problems, and appeals to the problemsolving payoffs (and the authority) of colloquies amongst policy professionals, are most convincing in eras, and in areas, where there are few ideological divisions, and the main problems of law are taken to be technical problems. We do not live in such an era.²¹⁵ Justice Breyer’s commonsense pragmatism is suffused, self-evidently, by current political conditions, with a manifestly liberal (and cosmopolitan liberal) ideology.

To date, Justice Scalia has been the most effective Justice on the Court at unmasking the ideological assumptions of the Supreme Court’s liberals, Justice Breyer included. Given that Scalia and Breyer both relish a lively intellectual give and take, we might assume that the intellectual challenge to the plausibility of Justice Breyer’s purposive and consequentialist pragmatism is most likely to continue to come from Justice Scalia.²¹⁶

One wonders, however, if the next step in the deconstruction of constitutional liberalism as a political ideology may come less from the more (and more uniformly) categorical, rules-based conservatives than from conservatives like Chief Justice John Roberts, and (perhaps) Justice Samuel Alito. Justice Scalia doubtless will continue to unmask liberal political ideology wherever he finds it and hoist the banner of a hard-edged constitutional originalism. But, although they will no doubt side with Justices Scalia and Thomas in many disputes, Justices Roberts and Alito—so far as we can tell at this relatively early stage of their careers on the Supreme Court—are also, in their general approach, nonformalist and nonoriginalist eclectic pluralists. It is quite likely that, in cases where they find it appropriate, they will also end up reasoning, to a fair extent, from purposes and consequences. They are likely to do so, however, starting not from a background in regulatory policy, with an itch for transnationalism, but from the perspective of legal craftsmanship (both have noted their admiration for the second Justice John Marshall Harlan), and a commitment to popular sov-

²¹⁵ See Sunstein, *Radicals in Robes* at xi–xv (cited in note 89) (describing four ideological divisions in today’s judiciary and denigrating those judicial ideologies that look to create policy).

²¹⁶ See, for example, Scalia, *Common-Law Courts* at 3 (cited in note 200).

ereignty.²¹⁷ As Roberts and Alito look to the purposes and consequences in statutes and constitutional provisions, they are likely to do so in ways newly free of the ideological baggage that Breyer, with his reflexive ideological commitment to mid-twentieth century liberalism, and his enthusiasm for a globetrotting cosmopolitanism, inevitably brings to the task. Justices Roberts and Alito, for instance, are less likely to reflexively raise the specter of the outbreak of religious war in Establishment Clause cases, a specter that, for a variety of time-bound reasons, assumed a privileged place in the mid-twentieth century liberal constitutional imagination.²¹⁸ Because they are less beholden to the statist-managerialist worldview that became an important strain of post-New Deal administrative liberalism, Justices Roberts and Alito may be less inclined to dispatch with free speech concerns when presented with the “purposive” application of that vision in speech-restrictive campaign finance regulations.²¹⁹ Similarly, Justices Roberts and Alito may be more inclined to draw the sorts of fine, craftsmanlike distinctions in affirmative action cases—distinguishing, for instance, a compelling interest in having a racially diverse police force in the context of a racially diverse city of neighborhoods, from the desire of the administrators of a very small set of elite universities to use race discrimination to serve the cause of “diversity” more generally—that Justice Breyer, a quintessential Cambridge, Massachusetts, liberal (“minimalism” notwithstanding)—would not even think to draw.²²⁰ And Justice Roberts and Alito will likely be less awestruck by the prospects of turning the task of constitutional interpretation

²¹⁷ See Copley News Service, *Editorial Weekly Feature* (Nov 15, 2005) (describing Roberts and Alito as eschewing “judicial overreaching” in a way similar to the second Justice Harlan). Justice Scalia also came to the Court from a background in administrative law. But his approach to the subject, in stark contradistinction to Justice Breyer’s policy-oriented vision, is thoroughly constitutional. See generally Ralph A. Rossum, *Antonin Scalia’s Jurisprudence: Text and Tradition* (Kansas 2006).

²¹⁸ See *Simmons-Harris*, 536 US at 728–29 (Breyer dissenting) (arguing for school vouchers because they do not threaten the Establishment Clause’s purpose to foster “social concord”); pp 46–50; pp 120–22. See also Kersch, *Constructing Civil Liberties* at 235–325 (cited in note 125) (discussing the intellectual origins of the Supreme Court’s mid-twentieth century’s “strict separationism” in Establishment Clause cases).

²¹⁹ On the links between the defense of speech-restrictive campaign finance regulations with the broader New Deal managerialism (particularly as it involved labor law), see Ken I. Kersch, *How Conduct Became Speech and Speech Became Conduct: A Political Development Case Study in Labor Law and the Freedom of Speech*, U Penn J Const L (forthcoming 2006) (discussing the origins of contemporary regulations of political speech during elections in managerial approaches to labor union elections forged in the 1930s and 1940s).

²²⁰ See, for example, *Antol v Perry*, 82 F3d 1291, 1303 (3d Circuit 1996) (Alito concurring) (holding that evidence that an employer violated an affirmative action plan sufficed to create an issue of material fact but acknowledging that such evidence has “very little probative value for the purpose of proving intentional discrimination”).

towards a model anchored in deracinated, functionalist theories of “governance” and more firmly committed to the traditional understandings of popular sovereignty on which the American constitutional “government” is based.

As such, if constitutional liberalism continues its decline, the real interpretive debate may end up being between conservatives Scalia and Thomas, on the one hand, and Roberts and Alito on the other (just as, in an earlier liberal era, it was between fellow New Deal liberals Frankfurter and Black).

Justice Breyer’s decision in this book to recycle Hart and Sacks’s approach to the interpretation of statutes and to repackage it as an approach to construing the Constitution, when married to his advocacy for a greater “comparativism” in constitutional interpretation and the consolidation of a networked “global community of courts,” a subject he took up (as a matter of substance and practice) in his previous book—co-edited with the former president of the French Conseil Constitutionnel—certainly marks a significant contribution to liberal constitutional thought. The ways in which these two sides of Justice Breyer’s outlook may be mutually constitutive are especially interesting.²²¹ That American democracy would be advanced—and, for that matter, the power of judges properly cabined—should Justice Breyer’s mandarin vision prevail, though, seems exceedingly doubtful indeed. Far from evincing a commitment to “participatory democracy” as that concept has been understood in American political life, Justice Breyer’s vision will doubtless appeal to a certain sort of contemporary liberal—a sort many have argued is too predominant in the Democratic Party for its own good. Whether this mandarin spirit will fare any better as law than it has in politics is an open question.

²²¹ Consider Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv Intl L J 191, 192 (2003) (“This community of courts is constituted above all by the self-awareness of the national and international judges who play a part.”); Anne-Marie Slaughter, *A New World Order* 34 (Princeton 2004) (“Suppos[ing] sovereignty itself could be disaggregated . . . , the core characteristic of sovereignty would shift from autonomy from outside interference to the capacity to participate in transgovernmental networks of all types. . . . [D]isaggregated sovereignty would empower government institutions around the world to engage with each other in networks that would strengthen them.”); Badinter and Breyer, eds, *Judges in Contemporary Democracy* at 4–5 (cited in note 2) (discussing judicial activism, the “secular papacy” of the judiciary, judicial intervention into the political process, international criminal justice, the judiciary and the media, and judges’ conceptions of their own social roles).