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Book Review

"ACTIVE LIBERTY" AND JUDICIAL POWER: WHAT SHOULD COURTS DO TO PROMOTE DEMOCRACY?

ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION by Stephen Breyer (Alfred A. Knopf, New York 2005).

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INTRODUCTION

Justice Stephen Breyer's book, *Active Liberty: Interpreting Our Democratic Constitution*, is an important contribution to the longstanding debate over the relationship between democracy and judicial review. Justice Breyer argues that judicial power should be used to facilitate citizen engagement in the democratic process rather than undermine it. While such

[*] Assistant Professor, George Mason University School of Law. For helpful suggestions and comments, I would like to thank Jonathan Adler, David Bernstein, Sandy Levinson, Guido Pincione, Horacio Spector, Fernando Teson, workshop participants at the Torcuato Di Tella University of Buenos Aires, Argentina, and the editors of the *Northwestern University Law Review*. Haidee Schwartz provided invaluable research assistance. The research for this Review was partially funded by the George Mason University Law and Economics Center.

"representation-reinforcement" defenses of judicial review are not new,[1] Justice Breyer's book provides an interesting version of the theory, as well as applications to particular areas of constitutional law. Moreover, the book is significant because it is the first work on the subject published by a sitting Supreme Court justice.

Justice Breyer contends that the promotion of democracy justifies important recent Supreme Court decisions in the fields of affirmative action,[2] the right to privacy,[3] and free speech,[4] among others. He further argues that his consequentialist approach to constitutional interpretation is superior to both textualism and originalism and better able to promote democracy.[5]

Obviously, Justice Breyer's status contributes to his work's significance. Perhaps the leading liberal jurist on the Supreme Court, Justice Breyer is a distinguished former Harvard Law School professor and author of important works on regulation and administrative law.[6] His argument that judicial power can and should be used to promote democracy comes at a time when many scholars on both the right[7] and the left[8] have reinvigorated the old claim that judicial power undermines democratic self-government. Such claims have been made not only in the United States but also in many other democracies that have adopted judicial review.[9] It is, therefore, not surprising that *Active Liberty* has already been reviewed by a variety of prominent legal scholars and political commentators, including

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[1] The term, of course, comes from JOHN HART ELY, DEMOCRACY AND DISTRUST 73–104 (1980), which famously argues that the "countermajoritarian difficulty" caused by judicial review is minimized and even reversed in situations where judicial overruling of statutes actually promotes democratic participation in government.

[2] STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 75–84 (2005).

[3] *Id.* at 71–74.

[4] *Id.* at 50–55.

[5] *Id.* at 131–32.

[6] For important previous works by Justice Breyer, see, for example, STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE (1993) [hereinafter BREYER, VICIOUS CIRCLE]; STEPHEN BREYER, REGULATION AND ITS REFORM (1982) [hereinafter BREYER, REGULATION].

[7] *See, e.g.*, ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH 117 (1996) (arguing for abolition of judicial review in order to protect democracy); Lino Graglia, *Revitalizing Democracy*, 24 HARV. J.L. & PUB. POL'Y 165, 171–77 (2000) (arguing on the same basis for very tight constraints on the institution).

[8] *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50–99, 169–210 (2004) (arguing that judicial review is primarily a tool used by political elites to curtail the political power of the masses); LARRY KRAMER, THE PEOPLE THEMSELVES (2004) (arguing that judicial power should be curtailed in favor of "popular constitutionalism"); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999) (arguing for abolition of judicial review).

[9] *See, e.g.*, HIRSCHL, *supra* note 8, at 17–30 (arguing that judicial power has been used to curtail democracy in Canada, Israel, New Zealand, and South Africa); *see also* ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 16, 85–92, 117–23 (2003) (making the same argument with respect to Israel, Canada, and international courts).

Sanford Levinson,[10] Jeffrey Rosen,[11] Kathleen Sullivan,[12] Cass Sunstein,[13] Jeffrey Toobin,[14] Mark Tushnet,[15] and George Will.[16] Numerous other writers, both conservative and liberal, have also joined the debate sparked by the book.[17]

This Review focuses on Justice Breyer's vision of the relationship between democracy and judicial power. Justice Breyer's contribution to the debate is important and occasionally convincing, particularly in his critique of some forms of originalism. However, the Justice is far less persuasive in defending his own approach to the connection between democracy and judicial review. Unfortunately, that relationship is considerably more complex than *Active Liberty* lets on. In some instances, a more nuanced understanding of it tends to undermine Justice Breyer's conclusions.

Part I briefly summarizes the main arguments of *Active Liberty*, paying special attention to Justice Breyer's theory of the relationship between democracy and judicial power. Part II identifies some key shortcomings of Justice Breyer's approach to democracy and the judiciary. In particular, Breyer's claim that judges should explicitly weigh consequentialist considerations in making decisions may lead the judiciary well beyond its field of competence. This point is dramatically illustrated by the somewhat superficial treatment of democracy in Justice Breyer's own book, which ignores tensions between different conceptions of democracy, sometimes fails to consider relevant empirical evidence, and does not provide an adequate account of the tradeoff between democracy and other constitutional values.

I also contend that a sounder approach to democracy would look more favorably upon judicial limits on the power of the federal government. Such efforts could, at least at the margin, strengthen the federal govern-

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[10] Sanford Levinson, *Trial by Breyer*, AUSTIN AM. STATESMAN, Sept. 4, 2005, at K5 (book review).

[11] Jeffrey Rosen, *Two Kinds of Pragmatist*, L.A. TIMES BOOK REV., Oct. 23, 2005, at R3 (book review).

[12] Kathleen M. Sullivan, *Consent of the Governed*, N.Y. TIMES BOOK REV., Feb. 5, 2006, at 20 (book review).

[13] Cass R. Sunstein, *The Philosopher-Justice*, NEW REPUBLIC, Sept. 19, 2005, at 29 (book review).

[14] Jeffrey Toobin, *Breyer's Big Idea: The Justice's Vision for a Progressive Revival on the Supreme Court*, NEW YORKER, Oct. 31, 2005, at 36 (book review).

[15] Mark Tushnet, *Give Me Liberty, the Active Kind: Breyer's Judicious Response to the Originalists*, LEGAL TIMES, Nov. 28, 2005, at 23 (book review).

[16] George F. Will, *Mr. Breyer's "Modesty,"* NEWSWEEK, Sept. 26, 2005, at 72 (book review).

[17] For other reviews of *Active Liberty*, see, for example, Peter Berkowitz, *Democratizing the Constitution*, POL'Y REV., Dec. 1, 2005, at 87 (book review); James E. Ryan, *Does it Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. (forthcoming 2006) (book review); Adam Cohen, *Justice Breyer Proposes a New Path for the Post-Rehnquist Court*, N.Y. TIMES, Sept. 26, 2005, at 16 (book review); John O'Sullivan, *Judicial Activism Encounter*, WASH. TIMES, Oct. 26, 2005, at A17 (book review); Benjamin F. Wittes, *Memo to John Roberts: Stephen Breyer, a Cautious, Liberal, Supreme Court Justice, Explains his View of the Law*, WASH. POST BOOK WORLD, Sept. 25, 2005, at T5 (book review); Emily Bazelon, *Take That, Nino*, SLATE, Sept. 12, 2005 (book review), http://www.slate.com/id/2125479/.

ment's accountability to voters by limiting the impact of political ignorance. They could also impose accountability on government by reinforcing citizens' ability to "vote with their feet" instead of just at the ballot box.

Part III assesses Justice Breyer's critique of originalism. While the Justice is right to point out some key flaws in originalist jurisprudence, the force of his critique is weakened by his failure to make distinctions. Justice Breyer's analysis conflates textualism and originalism. Yet these two modes of interpretation are distinct, and one could coherently embrace one while rejecting the other. Many of Justice Breyer's criticisms of originalism do not necessarily apply to textualism.

Even within the ambit of originalism properly defined, Justice Breyer focuses primarily on what scholars call "original intent originalism," which seeks to divine the specific intentions of the Framers. He largely ignores the more compelling (and today more widely accepted) approach of "original meaning originalism," which argues that judicial interpretation should be based on the generally understood public meaning of the Constitution's words at the time of enactment.[18] Finally, Justice Breyer fails to consider some important ways in which the combination of textualism and original meaning originalism might advance democracy better than his own consequentialist approach. While both Justice Breyer's theory and its originalist and textualist alternatives have flaws, ultimately we must decide between them on the basis of comparative rather than absolute merit. On that basis, Justice Breyer fails to make a sufficiently compelling case.

I. ACTIVE LIBERTY AND JUDICIAL REVIEW

The main thesis of Justice Breyer's book is the claim that judges should use their power to promote democracy. Using terminology borrowed from nineteenth-century French political philosopher Benjamin Constant, Breyer distinguishes "active liberty"—the right to participate in government through the democratic process—from "modern" or "civil" liberty—the right of individuals to be free from government oppression.[19] Although Justice Breyer contends that the ultimate goal must be a "balance" between the two types of liberty, he believes that modern jurisprudence has unduly neglected "active liberty." Therefore, "courts should take greater account of the Constitution's democratic nature when they interpret consti-

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[18] For a good explanation of the distinction between these two forms of originalism, see Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999).

[19] BREYER, *supra* note 2, at 4–5. Justice Breyer may have misinterpreted Constant, who defined "modern" liberty to include "everyone's right to exercise some influence on the administration of the government, either by electing all or particular officials, or through representations, petitions, demands to which the authorities are more or less compelled to pay heed." Benjamin Constant, *The Liberty of Ancients Compared with that of Moderns* (1816), *available at* http://www.uark.edu/depts/comminfo/cambridge/ancients.html. This would seem to include most of what Justice Breyer means by "active liberty."

tutional and statutory texts."[20] Such increased emphasis, he contends, "will yield better law."[21]

Unlike some conservative judges and legal scholars, who believe that a proper respect for democracy entails judicial passivity in all or most cases,[22] Justice Breyer contends that democratic values can sometimes be advanced by judicial intervention. In any particular case, judges should determine whether a given outcome furthers democracy and other "constitutional purposes" by "considering practical consequences."[23] Often—but by no means always—due consideration for such consequences entails "judicial modesty."[24] In this respect, Justice Breyer's work builds on the earlier arguments of legal scholars such as John Hart Ely, who contend that an active judicial role is justified when it furthers "representation-reinforcement"—using judicial power to strengthen the ability of citizens to participate in the political process on an equal basis.[25] Breyer at one point suggests that he is "not arguing for a new theory of constitutional law" because his argument is situated within a preexisting "professional framework" of judicial decisionmaking.[26] But there is no question that he advocates "increased emphasis on the Constitution's democratic objective,"[27] an increase that is to be achieved by means of explicit judicial resort to consequentialist analysis.[28]

Justice Breyer seeks to limit the scope of judicial discretion implied by his theory by suggesting that judges are not free to consider any and all potential consequences of their decisions, but only those that are "related to the particular [constitutional] provision at issue" and are connected to the Constitution's "value or purpose."[29] If the judge consciously acknowledges the need to consider consequences, but limits his analysis to those that are "constitutionally relevant," he is "more likely" to avoid simply imposing

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[20] BREYER, *supra* note 2, at 5.

[21] *Id.* at 6.

[22] *See supra* note 7.

[23] BREYER, *supra* note 2, at 6.

[24] *Id.* at 5.

[25] ELY, *supra* note 1, at 77–88. For numerous citations to the literature on the countermajoritarian difficulty, see Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290 n.4 (2004).

[26] BREYER, *supra* note 2, at 110.

[27] *Id.*

[28] Ultimately, whether or not Justice Breyer's position should be considered a "new theory" is a semantic question. In my view, it is sufficiently original and systematic that the term "theory" is appropriate, and I therefore use it at various points throughout the Review. Moreover, it would not be accurate to interpret Justice Breyer's methodology as merely adding consequentialist considerations to a wide range of others, since he specifically argues for the superiority of consequentialist judicial decisionmaking over any approach that emphasizes "text, . . . the Framer's original historical expectations, narrowly conceived, and . . . tradition." *Id.* at 116. Thus, while not completely rejecting other methods of interpretation, Justice Breyer certainly seems to conclude that his should be preferred in the event of conflict.

[29] *Id.* at 120.

"his own subjectively held values."[30] Therefore, "a focus on consequences will itself constrain subjectivity."[31] Justice Breyer briefly illustrates these arguments by reference to his own opinions on school vouchers[32] and religious displays on public property.[33] Throughout, Justice Breyer emphasizes that consequentialist judges should foster and defend "active liberty." Ultimately, Breyer's approach stands or falls on the strength of his argument that judges should use consequentialist analysis to promote democracy. However, as discussed below, this stricture still leaves enormous scope for the exercise of judicial power on consequentialist grounds.[34]

Much of Justice Breyer's book is devoted to an application of his thesis to major recent Supreme Court decisions in the fields of free speech, affirmative action, federalism, the Establishment Clause, privacy, administrative law, and statutory interpretation. In each case, he contends that the constitutional value of "active liberty" provides guidelines for determining the right answer. The details of his analysis of free speech, affirmative action, religion, and federalism are considered later in this Review.[35]

The final part of *Active Liberty* is devoted to Justice Breyer's critique of originalism.[36] There, the Justice asserts that his approach to constitutional interpretation both promotes democracy better than originalism does and provides stronger constraints on judicial discretion. He contends that originalism is defective because the Framers themselves disagreed on the meaning of the Constitution, and in any event, there is no proof that they wanted later generations to follow originalist methods of interpretation.[37] For this reason, originalism can only be justified on the basis of "consequences," much like Breyer's own theory.[38]

Justice Breyer is particularly concerned with refuting originalist claims that explicit judicial consideration of consequences leads to judicial "activism" and usurpation of policymaking functions. He contends that the constraints imposed by originalism are often illusory because the text, language, history, and structure of the Constitution often fail to provide

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[30] *Id.*

[31] *Id.*

[32] *Id.* at 120–22 (discussing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2000) (Breyer, J., dissenting)).

[33] *Id.* at 122–24 (discussing Van Orden v. Perry, 125 S. Ct. 2854 (2005)).

[34] *See infra* Part III.D.

[35] *See infra* Part II.B.2, III.D.

[36] BREYER, *supra* note 2, at 115–32.

[37] *Id.* at 117–18. This argument recapitulates a classic criticism of originalism articulated by Paul Brest and H. Jefferson Powell. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221–22 (1980) (arguing that it is impossible to determine an original intent because of disagreement among the framers); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 902–24 (1985) (arguing that the Framers were opposed to requiring judges to follow an originalist methodology).

[38] BREYER, *supra* note 2, at 118.

clear answers in "truly difficult cases."[39] Thus, the originalist judge cannot free herself from the need to exercise discretion nor from the temptations of imposing her own policy preferences.[40]

II. PROMOTING DEMOCRACY: WHAT CAN JUDGES DO?

In this Part, I consider several important limitations of Justice Breyer's theory of judicial promotion of democracy. While I accept his conclusion that promoting democratic participation is, at least in some cases, a legitimate function of the judiciary, I take issue with several of his prescriptions for achieving this goal. First and foremost, Justice Breyer's argument that judges can best promote democracy by explicitly considering consequences is likely to lead judges well past the legitimate range of their competence. The shortcomings of some of Breyer's own consequentialist analyses in *Active Liberty* illustrate the ways in which even a highly intelligent and academically sophisticated jurist can go wrong in this field.

Second, Justice Breyer ignores the ways in which judicial limitation of federal power and protection of federalism—both of which he has consistently rejected in *Active Liberty* and in his judicial opinions—might facilitate stronger democratic control of public policy. Ironically, the democracy promotion argument for judicial intervention is based in part on the existence of widespread political ignorance, a theme Justice Breyer himself has emphasized in *Active Liberty* and in his previous academic work on risk regulation. The problem of political ignorance provides an important justification for judicial restriction of federal power.

A. Active Liberty and the Limits of Judicial Competence

While Justice Breyer often emphasizes the need for judicial modesty, caution, and humility,[41] his approach in fact places an enormous burden on the judiciary. Judges often lack the expertise necessary to determine whether striking down a particular law will promote democratic participation, reduce it, or have little effect either way.

Breyer's analysis ignores the fact that democratic participation is a contested concept. There are many competing theories of participation, ranging from the minimalist approach of Joseph Schumpeter (under which the only role of voters is to periodically remove incumbents they dislike)[42] to extremely demanding theories of "deliberative democracy," which require extensive philosophical sophistication on the part of the electorate. These theories may well support opposing results in any given case.

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[39] *Id.* at 124.
[40] *Id.* at 125–27.
[41] *See, e.g.*, *id.* at 5–7, 73–74.
[42] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 272 (3d ed. 1942).

Even if judges are able to divine the "ideal" theory of democratic participation, they may not be able to determine which case outcome is more likely to promote it. Often, they are likely to be unaware of relevant empirical evidence or unable to evaluate it competently. In *Active Liberty*, this problem shows up repeatedly when Justice Breyer fails to consider arguments and evidence that cut against his contention that a particular decision that he favors promotes democratic participation.

1. Judicial Review and Competing Visions of Democratic Participation.—Debates over the nature of political participation have bedeviled democratic theory since the origins of democracy in ancient Greece.[43] Modern legal scholars and political theorists have advocated a wide range of normative theories of democratic participation. At one extreme are comparatively minimalist theories such as Joseph Schumpeter's.[44] In Schumpeter's view, the value of democratic participation is fully realized so long as voters have regular opportunities to replace one set of political leaders with another, thereby ensuring that the leaders cannot adopt policies radically at odds with public opinion without being subject to political punishment.[45] At the other end of the spectrum are theories of "deliberative democracy," which contend that citizens must not only be able to vote, but also should "deliberate" about public policy at a fairly high level of sophistication.[46] In some versions of the theory, citizens are expected to accept complex restrictions on modes of deliberation of a sort that are normally the province of professional political philosophers. For example, some leading advocates of deliberative democracy claim that the deliberative process must be limited to arguments based on "impartiality" between citizens and incorporating the "mutual recognition of competent subjects."[47] Others contend that "citizens" should only be allowed to "appeal to reasons that are recognizably moral in form and mutually acceptable in content" and only make such empirical claims as "are consistent with relatively reliable methods of inquiry."[48]

In between the extremes of Schumpeterianism and deliberative democracy lie more moderate options, such as retrospective voting (the ability of voters to punish incumbents for poor performance and reward them for suc-

[43] *See* JENNIFER TOLBERT ROBERTS, ATHENS ON TRIAL: THE ANTIDEMOCRATIC TRADITION IN WESTERN THOUGHT 25–96 (1994).

[44] SCHUMPETER, *supra* note 42, at 272. For a recent defense of the Schumpeterian theory of democracy, see RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 178–88 (2003).

[45] *See* POSNER, *supra* note 44 at 178–82; SCHUMPETER, *supra* note 42.

[46] For a recent defense of deliberative democracy, see AMY GUTMANN & DENNIS F. THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004). For citations to other literature in this area, see Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 CRITICAL REV. 413, 438–40 (1998) [hereinafter Somin, *Voter Ignorance*]; Somin, *supra* note 25, at 1303–06.

[47] JÜRGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 75–76, 100 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990).

[48] AMY GUTMANN & DENNIS F. THOMPSON, DEMOCRACY AND DISAGREEMENT 57–58 (1996).

cess), Burkean trusteeship (an approach under which voters ignore the details of policy, but are able to select the most capable and virtuous leaders to make decisions), and an intuitive notion of democracy under which the electorate can force politicians to obey majority preferences on policy issues.[49] To make things even more complicated, some theories of participation focus less on the nature of public deliberation and the ability of the electorate to govern policy outcomes and more on participation as an intrinsic value in its own right.[50] Scholars sympathetic to this approach often advocate the maximum possible amount of citizen involvement in politics and are sympathetic to direct democracy.[51]

The choice between these various normative theories of democratic participation has tremendous significance for any theory that, like Justice Breyer's, urges judges to promote democracy by analyzing the "consequences" of their decisions.[52] After all, "consequences" that advance deliberative democracy might very well undermine Schumpeterian democracy and vice versa.

Judicial decisions striking down anti-flag-burning statutes[53] offer a powerful example of this tension. On the one hand, the Court's decisions run counter to theories of democratic participation that emphasize majoritarian control of public policy: public opinion strongly supported anti-flag-burning laws at the time the Court struck them down.[54] On the other hand, protecting flag burning might be required by other theories of democracy that emphasize deliberation or untrammeled individual rights to express views on political issues. Unfortunately, Justice Breyer largely ignores the conflict between opposing theories of democracy and its implications for his approach to judicial review. Indeed, at different points in the book he seems to rely on substantially different conceptions of democracy without acknowledging any change.[55] Perhaps we should not fault him too greatly for this, as the same shortcoming appears in many scholarly works on the

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[49] For more detailed discussion of these theories and citations to the literature, see Somin, *supra* note 25, at 1296–1303.

[50] *See, e.g.*, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE 117–38 (1984); CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (1970).

[51] *See, e.g.*, BARBER, *supra* note 50, at 281–89.

[52] BREYER, *supra* note 2, at 6.

[53] *See* United States v. Eichman, 496 U.S. 310, 312 (1990) (striking down federal anti-flag-burning law); Texas v. Johnson, 491 U.S. 397, 397 (1989) (striking down Texas state law prohibiting flag burning).

[54] *See* Somin, *supra* note 25, at 1333–34 n.213 (citing poll data).

[55] For example, in his chapter on privacy, Justice Breyer seems to rely on a simple majoritarian-will approach. BREYER, *supra* note 2, at 66–74. By contrast, the section on the Establishment Clause emphasizes the need to avoid religious conflict, even at the expense of striking down laws (such as school-voucher programs and religious displays on public property) that may have strong majoritarian support. *Id.* at 120–24. This is consistent with the views of some political theorists who argue for the exclusion of religious views from influencing public policy, but seems inconsistent with Justice Breyer's own arguments elsewhere in the book.

countermajoritarian difficulty.[56] Nonetheless, it is vital to recognize that the need to choose between theories of democracy is an important difficulty for judges who adopt Justice Breyer's approach. They cannot know whether the consequences of a given decision will further democracy or not without first deciding which theory of participation is the right one for judges to advance.

To be sure, judges could choose to rely on their own intuitive notions of democracy rather than on any formal theory. As Judge Richard Posner—another prominent advocate of consequentialist judicial reasoning—notes, judges could "fall back on hunch, intuition, and personal experience."[57] However, Posner also concedes that such seat-of-the-pants consequentialism could easily "be misleading," because intuition and personal experience are often poor guides to decisionmaking on complex public policy issues.[58] The same is also likely to be true of seat-of-the-pants theorizing about democracy.[59] Few judges are experts in the complexities of democratic theory. This reality is an important obstacle to the effective implementation of Justice Breyer's agenda of judicial promotion of democracy.[60]

2. Judicial Prediction of Consequences.—Even if judges successfully identify the "correct" theory of democratic participation, they might lack the expertise necessary to determine whether a given decision is likely to advance or inhibit that theory's realization. Judicial decisions can affect democratic participation in a wide variety of ways, some of them nonobvious or counterintuitive. Judges who lack knowledge of the empirical evidence in the relevant field are likely to make mistakes in their efforts to predict the impact of their decisions. Even if they do know the evidence, they might lack the social scientific skills necessary to assess it properly. As Sanford Levinson points out, Justice Breyer's "approach requires that judges in fact possess a great deal of knowledge about how society really

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[56] *See* Somin, *supra* note 25, at 1290 n.1 (citing relevant literature on the countermajoritarian difficulty that largely ignores these issues). For an important exception, see POSNER, *supra* note 44, at 143–88 (defending a conception of judicial review modeled on Schumpeterian democracy and rejecting deliberative democracy).

[57] POSNER, *supra* note 44, at 76.

[58] *Id.*

[59] For further criticism of Posner's position, see Ilya Somin, *Richard Posner's Democratic Pragmatism*, 16 CRITICAL REV. 1, 17–18 (2004) [hereinafter Somin, *Richard Posner's Democratic Pragmatism*]; Ilya Somin, *Pragmatism, Democracy, and Judicial Review: Rejoinder to Posner*, 16 CRITICAL REV. 473 (2004). *But see* Richard A. Posner, *Law, Pragmatism, and Democracy: Reply to Somin*, 16 CRITICAL REV. 465 (2004) (responding to my argument).

[60] Even in the unlikely event that the President and the Senate were to emphasize sophistication in this field in their decisions on judicial appointments, the resulting judiciary might still not be able to implement Justice Breyer's approach effectively. After all, increased knowledge of democratic theory might come at the expense of other qualities that make for good judging and accurate predictions of the consequences of decisions. For example, judges who have devoted much of their careers to studying democratic theory might not have the background in practical politics and empirical social science necessary to make accurate predictions about the likely results of their actions.

works."[61] Yet they are "rarely well-trained in the sophisticated public policy analysis that Breyer's approach ultimately calls for."[62]

Active Liberty includes several instances in which Justice Breyer tries to defend particular legal outcomes on the basis of their likely consequences, while failing to consider empirical evidence that runs counter to his predictions. Here, I critique Justice Breyer's consequentialist analyses of campaign finance regulation, affirmative action, and school choice programs that include religious schools. In each case, he not only foregoes mention of opposing evidence, but also fails to cite any data to support his own conclusions.

a. Campaign finance.—In a section devoted to First Amendment law, Justice Breyer argues that the Supreme Court's 2003 decision upholding the McCain-Feingold campaign finance statute against a First Amendment challenge can be justified based on the need to limit inequality in political participation resulting from "the vast disparity in ability to make a campaign contribution."[63]

Despite Justice Breyer's assertions, there is a strong case that restrictions on campaign finance actually *reduce* equality in two major ways: by protecting incumbent office-holders and by exacerbating the impact of political resources other than money.[64] Given that campaign finance laws must, by definition, be voted on by incumbent legislators, it is highly unlikely that any laws that actually increase electoral competition (and thereby imperil incumbents) will pass. On the other hand, legislators have every incentive to enact laws that entrench their position against challengers.[65] It is worth noting that Justice Breyer foregoes any consideration of the consequences of the McCain-Feingold law after it was upheld. There is little evidence that it has indeed reduced participatory inequality and at least some reason to believe that it has resulted in significant restrictions on political speech.[66] While Justice Breyer could perhaps try to justify his position by claiming that increasing incumbency advantages does not really reduce participatory equality, such a response would be misguided. If campaign finance laws are structured to benefit incumbents, this necessarily in-

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[61] Levinson, *supra* note 10, at K7.

[62] *Id.*

[63] BREYER, *supra* note 2, at 43. The case at issue is, of course, *McConnell v. FEC*, 540 U.S. 93 (2003).

[64] *See, e.g.*, JOHN SAMPLES, THE FOLLY OF CAMPAIGN FINANCE REFORM (forthcoming 2006) (tracing history of campaign finance law and arguing that most of it can be explained by efforts to entrench incumbents).

[65] *See McConnell*, 540 U.S. at 305–08 (Kennedy, J., dissenting) (explaining several ways in which campaign finance regulations upheld by the Court in *McConnell* function as an "incumbency protection plan"). *See generally* JAMES C. MILLER III, MONOPOLY POLITICS 88–101 (1999) (arguing that campaign finance laws are designed to benefit incumbents); SAMPLES, *supra* note 64 (same).

[66] This point has been noted by other reviewers. *See* Levinson, *supra* note 10, at K7; Rosen, *supra* note 11, at R4.

creases the political leverage of their supporters and reduces that of their opponents, thereby accentuating participatory inequality by making it easier for one side to have a political impact and harder for the other.

Campaign finance laws may further undermine participatory equality by increasing the impact of politically valuable resources other than money. Many of these alternative tools of participation—which include fame, free media access, campaign management skills, and political sophistication—may be even more unequally distributed than monetary income.[67] For example, only a tiny portion of the population can influence voters because of their fame as celebrities or because they have the kinds of skills possessed by professional pundits or political operatives. While Justice Breyer worries that a failure to restrict large financial contributions to campaigns could "create [an] appearance of undue influence" that might "crowd out" small contributions and diminish public "confidence" in the political system,[68] there is no reason to believe that the same result will not occur if campaign finance laws increase the relative importance of other unequally distributed sources of political influence. Furthermore, even if Justice Breyer is right to assume that monetary contributions uniquely depress public "confidence" in the political system, diminished confidence may well increase participation rather than decrease it. After all, many if not most efforts to influence public policy are driven by a perception that there is something wrong with the status quo.[69]

These arguments do not definitively refute Justice Breyer's predictions about the consequences of campaign finance regulation; obviously, many scholars and activists believe that the consequences of regulation are likely to be highly beneficial.[70] Any definitive refutation is beyond the scope of this Review. However, Justice Breyer's failure to even consider most of the relevant arguments and evidence indicates a serious limitation of his approach to the issue.[71]

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[67] *See* BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 79–83 (2001) (explaining how limiting the influence of money on campaigns may not increase equality, but may instead simply increase the relative influence of "nonmonetary elites").

[68] BREYER, *supra* note 2, at 44.

[69] For example, it is probably no accident that decline of public confidence in government from the 1960s to the late 1990s coincided with a major increase in citizen participation in activist citizen groups. *See* Jeffrey M. Berry, *The Rise of Citizen Groups*, *in* CIVIC ENGAGEMENT IN AMERICAN DEMOCRACY 367 (Theda Skocpol & Morris P. Fiorina eds., 1999) (documenting increasing role of citizen groups during the same timeframe); Robert J. Blendon et al., *Changing Attitudes in America*, *in* WHY PEOPLE DON'T TRUST GOVERNMENT 205 (Joseph S. Nye, Jr. et al. eds., 1999) (documenting increasing distrust of government during this period).

[70] *See, e.g.*, BURT NEUBORNE, CAMPAIGN FINANCE REFORM AND THE CONSTITUTION: A CRITICAL LOOK AT *BUCKLEY V. VALEO* (1997) (arguing that regulation is necessary to ensure participatory equality and should be given wide latitude by courts); JAMIN B. RASKIN, OVERRULING DEMOCRACY 186–94, 234–38 (2003) (same).

[71] Justice Breyer does briefly note the possibility that Congress might adopt "reform legislation that will defeat the participatory self-government objective itself." BREYER, *supra* note 2, at 49. However,

Justice Breyer does cite evidence indicating that campaign expenditures are higher in the United States than in some other democracies and that contributions come disproportionately from a small number of donors.[72] However, these facts do little to settle the questions of whether or not it is desirable to reduce expenditures and whether campaign finance regulation is likely to reduce participatory inequality or actually increase it.

b. Affirmative action in law school admissions.—Justice Breyer also sidesteps several complex empirical debates in his defense of his vote in *Grutter v. Bollinger* to uphold the constitutionality of affirmative action in public law school admissions.[73] Justice Breyer contends that racial preferences in law schools promote the goal of establishing a "well-functioning participatory democracy" because they provide for necessary minority representation within the nation's political elite and enable future leaders to get experience that will help them succeed in "diverse" environments.[74] This conclusion assumes that the ability of minorities to enter the political elite is likely to be seriously impaired if their representation in top law schools is diminished as a result of eliminating affirmative action. The validity of this assumption is far from obvious, given that minorities (and others) can also enter the elite through a variety of other pathways, such as experience in business, the military and, of course, political activism itself. Moreover, the argument also assumes that the interests of minority groups cannot be adequately represented in the political process unless they are represented by leaders of their own ethnic group. While intuitively plausible, the validity of this assumption is far from unchallenged.[75]

Justice Breyer's argument, which echoes that of Justice O'Connor's opinion for the Court,[76] also implies that affirmative action in law schools increases minority representation in the legal profession. A controversial recent study by Professor Richard Sander finds that it may in fact decrease it by creating an academic "mismatch" between black students and the schools they attend, thereby ensuring that more African-American students

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he does not consider the implications of this danger for his defense of *McConnell* or for his judicial review theory more generally.

[72] *Id.* at 43–44.

[73] 539 U.S. 306 (2003).

[74] BREYER, *supra* note 2, at 82–83.

[75] *See, e.g.*, CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 13–19, 145–89 (1993) (presenting evidence that non-African-American politicians can represent the interests of African-American constituents no less effectively than African-American political leaders do).

[76] *See* BREYER, *supra* note 2, at 82–83 (quoting *Grutter*, 539 U.S. at 331–32).

either fail to graduate or don't pass the bar.[77] Sander's study has been attacked by many critics,[78] and the issue remains open.

Even some scholars otherwise supportive of affirmative action in law schools point out that a high proportion of African-American students do not benefit from legal education because they either drop out or do not pass the bar. For example, an analysis by affirmative action supporters Ian Ayres and Richard Brooks finds that 50% of African-American law students from a 1991 Law School Admissions Council sample either fail to graduate within five years of admission (41%) or graduate but do not take the bar (9%).[79] The comparable rate for white students is 24%, with 17% failing to graduate and 7% failing to take the bar.[80] While Ayres and Brooks reject Sander's claim that such disparities are the result of academic "mismatching" of institutions and students caused by affirmative action, they do contend that the disparities arise in part because many law schools, seeking to maximize diversity, admit "high risk" black students without informing them of the high probability that they might fail to complete their studies.[81] In the absence of affirmative action, or if properly informed of the true risks, a substantial number of these students might have chosen other alternatives instead of attending law school.[82]

This conclusion is highly relevant to Justice Breyer's political participation-based defense of affirmative action. If many of the students admitted to law school as a result of affirmative action will fail to graduate or enter the legal profession, the contribution of such programs to minority representation in the nation's political elite is likely to be greatly reduced. Furthermore, to the extent that affirmative action diverts African-American students who might have had greater success in other careers to law school, it might prevent them from pursuing career paths that are more likely to lead them to become effective defenders of African-American interests in the political process. Ayres and Brooks's argument that affirmative action in admissions should be retained, but with more accurate information provided to admittees, may well be more persuasive than Sander's conclusion that affirmative action in law school admissions should simply be abolished. Nonetheless, their evidence still undercuts Justice Breyer's claim that affirmative action in law school admissions plays a key role in ensuring

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[77] *See* Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 425–54 (2004).

[78] For criticism of Sander, see, for example, Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); 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 (2005); Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997 (2005).

[79] Ayres & Brooks, *supra* note 78, at 1844.

[80] *Id.*

[81] *Id.* at 1844–53.

[82] *Id.*

that minorities do not encounter "closed doors [in higher education that] would shut them out of positions of leadership."[83]

Justice Breyer's assertion that affirmative action "diminishes the risk of serious racial division"[84] is equally questionable. It ignores longstanding evidence of strong hostility to racial preferences for minorities among the overwhelming majority of whites.[85] Indeed, the mere mention of racial preferences in one part of an opinion survey has the effect of greatly increasing white respondents' expressions of hostility toward blacks on unrelated questions.[86] Justice Breyer may be right that affirmative action reduces racial tension by partially alleviating a sense of exclusion among African-Americans,[87] but he provides little evidence to support this claim. Moreover, any such gains may come at the cost of inflaming white hostility toward blacks, thereby heightening "racial division" by means of policies intended to diminish it.

On balance, I would agree that Justice Breyer reached the right conclusion in *Grutter*, at least to the extent that the Equal Protection Clause does not mandate a categorical ban on affirmative action programs in education. Whatever the merits of the policy, the text and original meaning of the Equal Protection Clause do not, in my view, justify a complete ban on affirmative action programs.[88] The objection to Justice Breyer's argument advanced here is therefore less to his conclusions than to his methodology. By sidestepping important empirical debates and relying on dubious and contestable assumptions without analyzing the relevant evidence, Justice Breyer's argument does more to expose the weaknesses of his theory than highlight its strengths.

c. School choice and religious schools.—Similar problems arise in Justice Breyer's efforts to defend his vote, in *Zelman v. Simmons-Harris*, against the constitutionality of school choice programs that include religious schools.[89] Breyer tries to defend this conclusion on consequentialist grounds by claiming that allowing public funding of religious schools is likely to create "the potential for religious strife."[90] Setting aside the fact that the peaceful resolution of "strife" over controversial issues is one of the traditional arguments for leaving issues to the democratic process, Justice

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[83] BREYER, *supra* note 2, at 83.

[84] *Id.* at 83–84.

[85] For extensive evidence, see HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 170–83 (rev. ed. 1997).

[86] PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 102–04 (1993).

[87] BREYER, *supra* note 2, at 83.

[88] *See, e.g.*, Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–32 (1997) (presenting evidence that affirmative action programs do not go against the original intent of the Clause).

[89] BREYER, *supra* note 2, at 120–24 (discussing Zelman v. Simmons-Harris, 536 U.S. 639, 717–29 (2000) (Breyer, J., dissenting)).

[90] *Id.* at 122.

Breyer fails to even consider the possibility that requiring the exclusion of religious schools from school choice programs open to comparable secular schools may itself create "religious strife."

The real and alleged exclusion of religious values from public schools and the consequent "discrimination" against religion is one of the major grievances of religious conservatives and certainly has been a source of considerable political strife over the last several decades.[91] Barring public funding of religious schools while simultaneously allowing the use of vouchers in secular private schools and continuing government funding of public schools that teach values abhorrent to religious conservatives may well increase the overall amount of anger and frustration over church-state relations. As a result, Justice Breyer's approach could well stimulate strife rather than dampen it.

Furthermore, Breyer's emphasis on participatory equality, so prominent in his analysis of campaign finance regulation and affirmative action, is strangely absent from his discussion of school choice. He fails to consider extensive social science evidence showing that school choice programs that include religious schools provide major educational benefits to poor and minority children,[92] thereby increasing their civic competence and ability to participate in politics. This omission could perhaps be defended on the ground that increasing political participation is not part of the "purpose" served by the Establishment Clause of the First Amendment, while reducing "strife" is.[93] However, Justice Breyer himself emphasizes that the Constitution as a whole is "centrally focused upon active liberty, upon the right of individuals to participate in democratic self-governmen[t]."[94] Thus, Breyer's failure to consider the extensive empirical evidence indicating that school choice programs promote participatory equality for poor and minority students is—from the standpoint of his own theory—an important omission in his consequentialist analysis of *Zelman*.

The point is not that Justice Breyer reached the wrong conclusion in *Zelman*, though I believe that he did. After all, school choice programs that include religious schools might be unconstitutional even if they do provide valuable benefits to students. Rather, to the extent that Justice Breyer reached his decision on consequentialist grounds, it should have been based on a far more thorough weighing of the relevant evidence on the impact of school choice programs on both the likelihood of religious strife and the promotion of participatory equality.

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[91] *See* JAMES DAVIDSON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 201–06 (1991) (describing longstanding religious conservative grievances in this area).

[92] *See, e.g.*, WILLIAM G. HOWELL & PAUL E. PETERSON, THE EDUCATION GAP: VOUCHERS AND URBAN SCHOOLS 185–87 (2002) (providing evidence on these points from studies of four prominent school choice programs).

[93] BREYER, *supra* note 2, at 120 (arguing that judges should "examine the consequences through the lens of the relevant constitutional value or purpose").

[94] *Id.* at 21.

3. Process vs. Substance: Balancing Democratic Participation Against Other Values.—Justice Breyer's theory of "active liberty" is a notable example of a "process-based" theory of constitutional law. Instead of justifying constitutional decisions purely on the basis of substantive values, he argues that they should often be assessed based on the degree to which they strengthen or weaken the democratic process. However, Breyer's position differs from that of scholars who would like to abolish judicial review in order to strengthen popular participation in government,[95] and those who would like to limit judicial intervention mostly to cases where democratic process values are imperiled.[96] Unlike these writers, Justice Breyer contends that judicial review must also promote other values, such as "modern liberty," the protection of certain individual rights against government oppression.[97] This sets up a difficult dilemma for Justice Breyer's consequentialist approach: how are judges to balance democracy against other important constitutional values when the two conflict? Unfortunately, Breyer's book provides remarkably little guidance on this issue, a crucial one for his theory.

It is surprising that, in this context, Justice Breyer does not even mention what is perhaps his best-known majority opinion: *Stenberg v. Carhart*, where the Court struck down a Nebraska law banning "partial birth" abortion.[98] The Court's abortion jurisprudence is a classic example of a line of cases where an important, vigorously contested issue has been removed from the democratic process. Yet, Justice Breyer does not even attempt to reconcile his abortion jurisprudence with his emphasis on the value of "active liberty." Nor does he try to reconcile it with his argument that judges should not "short circuit" the efforts of the democratic process to address complex and controversial policy issues.[99] Certainly the abortion issue is a classic example of a hotly contested policy debate where the Court "short-circuit[ed]" "active liberty," by removing the matter from the political arena. As Mark Tushnet points out, "Breyer does not mention the abortion issue anywhere in *Active Liberty*. His silence is interesting because, on the face of it, there's no connection between enforcing active liberty, as he defines it, and protecting abortion rights in a case like the Nebraska partial-birth abortion decision."[100]

It is certainly possible that Justice Breyer could find a way to square his opinion in *Stenberg* with the theory advanced in *Active Liberty*. Perhaps

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[95] *See, e.g.*, BORK, *supra* note 7; Graglia, *supra* note 7; *see also* KRAMER, *supra* note 8; TUSHNET, *supra* note 8 (advocating abolition of judicial review to strengthen democracy).

[96] *See, e.g.*, ELY, *supra* note 1.

[97] BREYER, *supra* note 2, at 4–5.

[98] 530 U.S. 914 (2000).

[99] BREYER, *supra* note 2, at 71–73.

[100] Tushnet, *supra* note 15. Other reviewers noting the omission include Berkowitz, *supra* note 17, and Rosen, *supra* note 11.

the right to abortion is so important that it outweighs deference to democratic processes in Justice Breyer's consequentialist framework. Alternatively, one could argue that some defect in the Nebraska political process prevented women who are likely to seek late-term abortions from obtaining adequate representation of their interests. If so, *Stenberg* could be justified on Ely-esque "representation-reinforcement" grounds.[101] Unfortunately, Justice Breyer does not address the issue, and therefore an important component of his theory of judicial review remains undefined.

Justice Breyer's failure to address the abortion issue—and even more importantly, his failure to address the more general question of how to balance democracy against competing values—renders his theory indeterminate. Because Breyer fails to address tradeoffs between competing values, it is difficult or even impossible to discern his argument's implications for real-world judicial decisionmaking. We do not know where the boundary between process-based "active liberty" and substantive "modern liberty" lies. More broadly, as Laurence Tribe argued in his widely cited critique of Ely's representation-reinforcement theory, no approach to constitutional interpretation can be process-based all the way down.[102] Ultimately, the process itself has to be justified in terms of its tendency to promote desirable substantive outcomes. Justice Breyer's *Active Liberty* sidesteps this challenge, but does not succeed in overcoming it.

4. Implications.—The point of enumerating these weaknesses in Justice Breyer's consequentialist analysis is less to dwell on them for their own sake than to make a more general point: Breyer's consequentialist approach to judicial promotion of democracy may require more of the judiciary than it is able to give. Like Justice Breyer himself, most judges are unlikely to be familiar with the wide range of empirical evidence that needs to be evaluated in order to make intelligent case-by-case decisions of the sort he advocates. Thus, jurists who adopt his methodology are likely to make significant mistakes in predicting the consequences of their decisions. Such mistakes will arise both from failure to properly evaluate relevant evidence and from the contestable nature of democratic participation itself.

B. Representation-Reinforcement and Limits on Federal Government Power

Both in *Active Liberty* and in his judicial opinions, Justice Breyer has been a leading critic of judicial enforcement of limits on government power other than those mandated by the "individual rights" provisions of the Con-

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[101] ELY, *supra* note 1. It should be noted that Ely himself famously denied that judicial protection of abortion rights could be justified. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

[102] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 89 YALE L.J. 1063 (1980).

stitution.[103] Justice Breyer argues that democratic values require that the judiciary not intervene in the political process to protect federalism and limit the powers of Congress.[104] He claims that judicial intervention to limit congressional power might undermine "cooperative federalism," in which the state and federal governments work together to address common problems.[105] Justice Breyer contends that, if it is to be enforced by the judiciary at all, federalism is best promoted by "clear statement" rules that require Congress to take a "hard look" when it infringes on the traditional autonomy of the states, rather than by categorical limits on congressional power.[106]

While Justice Breyer makes some good points, he ignores three important ways in which judicially enforced federalism can strengthen democratic accountability in government. First, by incrementally reducing the size and scope of federal government, judicial limits on federal power can enable greater democratic control of public policy by reducing the information burden on the electorate. Second, judicial promotion of decentralized federalism can strengthen citizens' ability to control government policy by "voting with their feet." Finally, decentralized federalism enables greater political responsiveness to the preferences of a diverse population.

1. Political Ignorance, Democratic Control, and Federal Power.—A major obstacle to democratic control of modern government is its size, scope, and complexity. These make it virtually impossible for the average voter to keep track of government policy.[107] By reducing the size and scope of government, judicial enforcement of limits on federal power could help cut down on the voters' knowledge burden, and thereby increase democratic control of public policy.

Decades of social science research has established that most citizens have very little knowledge of politics and public policy.[108] For example,

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[103] Over the last ten years, Justice Breyer has consistently voted against every effort to limit the power of the federal government on the basis of constitutional federalism. *See, e.g.*, Gonzalez v. Raich, 125 S. Ct. 2195, 2204–05 (2005) (voting with the majority); U.S. v. Morrison, 529 U.S. 598, 656 (2000) (Breyer, J., dissenting); Printz v. United States, 521 U.S. 898, 976–78 (1997) (Breyer, J., dissenting) (agreeing with Justice Stevens' argument that Congress has the power to "commandeer" state government agencies and employees); U.S. v. Lopez, 514 U.S. 549, 615–17, 631 (1995) (Breyer, J., dissenting) (arguing that Congress has virtually unlimited power under the Commerce Clause).

[104] BREYER, *supra* note 2, at 56–65.

[105] *Id.* at 58–60.

[106] *Id.* at 64–65. For a recent academic defense of a similar argument, see Thomas M. Merrill, *Rescuing Federalism after* Raich*: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823 (2005).

[107] For more detailed statements of this argument, see Somin, *supra* note 25, at 1336–38, and Somin, *Voter Ignorance*, *supra* note 46.

[108] For citations to the literature and additional data, see Somin, *supra* note 25, at 1304–14. *See also* SCOTT L. ALTHAUS, COLLECTIVE PREFERENCES IN DEMOCRATIC POLITICS: OPINION SURVEYS AND THE WILL OF THE PEOPLE (2003); MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT

surveys conducted around the time of the closely contested 2004 presidential election showed that some 70% of the public was unaware that the Bush Administration's prescription drug plan had been adopted—even though it was the largest and most expensive new domestic program in decades.[109] Similarly, 58% admitted that they had heard "little" or "nothing" about the controversial USA Patriot Act.[110]

Such widespread ignorance is not the result of irrationality or "stupidity." Since the 1950s,[111] many scholars have recognized that voters are "rationally ignorant" about politics. Because of the low significance of any single vote,[112] even voters who make the tremendous effort to become highly informed have almost no chance to swing the electoral outcome in favor of the "better" candidate or party.[113] The acquisition of political information is a classic collective action problem, a situation in which a valuable product (in this case, information) is undersupplied because any one individual's possible contribution to its production is insignificant. Those who choose not to contribute will still get to enjoy the benefits of the good if it is successfully provided through the efforts of others.[114] Obviously, some voters acquire political knowledge for reasons unrelated to casting a "better" ballot; for example, for entertainment value. However, as decades worth of evidence indicating that most citizens have very low knowledge levels shows, whatever the reason for people's decision to acquire political knowledge, too few acquire it to decrease the prevalence of political ignorance.

The size and scope of modern government make it difficult or impossible for voters to meaningfully keep track of its numerous activities. Federal spending alone has now risen to an estimated 20.8% of gross domestic product,[115] with state and local government expenditures accounting for another 13.7%.[116] While these figures give a sense of the overwhelming size of government, they fail to convey the parallel expansion of its scope; to-

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AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS (1996) (documenting widespread voter ignorance and explaining the importance of political knowledge to the democratic process).

[109] Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, CATO INST. POL'Y ANALYSIS, Sept. 22, 2004, at 5–6.

[110] *Id.*

[111] For the pioneering early work on this subject, see ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 238–76 (1957).

[112] *See* William H. Riker & Peter Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25 (1968) (demonstrating that the chance of any one vote determining the outcome of a presidential election is roughly one in one hundred million).

[113] *Id.* at 25.

[114] For a general discussion of collective action theory, see the classic work by MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION (1965). *See generally* RUSSELL HARDIN, COLLECTIVE ACTION (1982) (extending Olson's argument with various applications to political participation).

[115] COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 376 tbl. B-79 (2006).

[116] *See id.* at 375 tbl. B-78, 382 tbl. B-85.

day, government regulation impacts almost every aspect of modern life.[117] It would be difficult for even highly attentive voters to keep track of more than a small fraction of all this government activity. Therefore, a high percentage of public policy is necessarily made with little or no popular participation of the kind Justice Breyer advocates.[118] In sum, judicial enforcement of limits on the size and scope of federal government might reduce the knowledge burden on voters and thereby encourage greater democratic participation in the making of public policy.[119] This consideration is ignored in Justice Breyer's critique of judicially enforced limits on the powers of the federal government.

Justice Breyer's failure to address the relevance of political ignorance to the relationship between democracy and judicial review is in line with nearly all the academic literature on the subject.[120] However, Justice Breyer's omission is particularly interesting in light of the fact that he has emphasized the importance of ignorance in other contexts. In *Active Liberty,* he cites poll data indicating that "more students know the names of the Three Stooges than the three branches of government," and argues that this evidence suggests the need for greater encouragement of popular participation in politics.[121]

In his excellent 1993 book on risk regulation, *Breaking the Vicious Circle*, Justice Breyer contended that voter ignorance of regulatory policy and the relative dangers posed by various environmental and safety hazards often contributes to irrational policy decisions in which vast resources are expended on the elimination of minor threats to health and safety, while more serious dangers are neglected.[122] *Breaking the Vicious Circle* concludes that the impact of public ignorance on regulatory policy should be alleviated by giving greater power to bureaucracies insulated from the political process.[123] Whatever the merits of this proposal, it obviously undercuts rather than strengthens popular participation in government policy, the value Justice Breyer wishes to advance in *Active Liberty*. Thus, it is unfortunate and somewhat surprising that he ignores the possibility that judicially imposed restrictions on the scope of government might alleviate the immense knowledge burden the modern state imposes on rationally ignorant voters.

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[117] *See* ROBERT HIGGS, CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT 20–34 (1987) (summarizing the history of the growth of government, and emphasizing that growth in scope is as significant as growth in size).

[118] For more detailed analysis, see Somin, *supra* note 25, at 1336–40.

[119] For a detailed argument along these lines, see *id.*

[120] *See id.* at 1290–93 (reviewing the extensive literature on the countermajoritarian difficulty and showing that it almost completely ignores the problem of political ignorance).

[121] BREYER, *supra* note 2, at 133.

[122] BREYER, VICIOUS CIRCLE, *supra* note 6, at 33–39.

[123] *Id.* at 59–81.

2. "Foot Voting" and Judicial Review of Federalism.—Justice Breyer, like many other critics of judicial federalism, ignores the possibility that accountability in government is produced by what Albert Hirschman called "exit" as well as by "voice" (conventional voting).[124] Citizens who are harmed by the policies of their state or local governments can "vote with their feet" and move to other jurisdictions that better meet their needs. State and local governments seeking to attract tax revenue have to reckon with this possibility and refrain from pursuing policies that could drive too many people and businesses away.[125]

"Foot voting" has important advantages over ballot box voting as a tool for imposing accountability on government.[126] Unlike ballot box voters, foot voters are not subject to the constraints of rational ignorance. Each individual or family can move to another jurisdiction where conditions are better, even if everyone else remains ignorant of the contrast between the two areas. Prospective foot voters therefore have a much stronger incentive to acquire relevant knowledge than ballot box voters do. Even poorly educated groups living under highly adverse circumstances have historically been able to acquire enough information to effectively vote with their feet. For example, hundreds of thousands of poor Jim Crow-era southern Blacks learned that conditions in the northern states were relatively better for African-Americans and moved accordingly.[127]

Exit rights are not a panacea for all injustices, nor do they impose perfect accountability on government. A serious limitation is that they do not provide much protection to people and assets (such as land) that are immobile or have very high moving costs.[128] Nonetheless, as the Jim Crow example shows, exit can be of great help even in cases of severe oppression. Foot voting is an important tool for imposing popular constraints on government power, one that avoids some of the informational problems associated with ballot box voting. Justice Breyer and other critics of judicial federalism should take greater account of it.

Unfortunately, exit rights are rendered useless in situations where the federal government imposes a unitary policy on the entire country. Dissenters cannot escape the reach of federal fiat by means of exit, except through the costly and difficult step of leaving the United States entirely.

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[124] ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

[125] For discussion of and citations to relevant literature, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461, 468–71 (2002).

[126] For detailed discussion, see Somin, *supra* note 25, at 1344–50.

[127] *See* WILLIAM COHEN, AT FREEDOM'S EDGE: BLACK MOBILITY AND THE SOUTHERN WHITE QUEST FOR RACIAL CONTROL 1861–1915 (1991); FLORETTE HENRI, BLACK MIGRATION: MOVEMENT NORTH, 1900–20, at 51–66 (1975); David E. Bernstein, *The Law and Economics of Post-Civil War Restrictions on Interstate Migration by African-Americans*, 76 TEX. L. REV. 781, 782–85 (1998).

[128] Somin, *supra* note 25, at 1350–52 (discussing this and other limitations of exit rights); *see also* Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 154–58 (1992).

Judicial enforcement of federalism can help preserve a sphere in which government accountability is fostered through exit rights. In the absence of judicial enforcement, both federal officials and state governments can prevent foot voting by lobbying for a unitary federal policy that prevents other states from competing with them.[129]

3. Federalism and Diversity.—Justice Breyer's position on federalism also ignores the likelihood that decentralized federalism can enable government to satisfy a wider range of voter preferences than is possible under a unitary federal policy.[130] To the extent that "red state" voters differ ideologically from their "blue" counterparts, more voters can live in areas that follow their preferred policies under decentralization. In recent years, for example, a federal government controlled by conservative Republicans has tried to suppress blue state policies on medical marijuana, public education, assisted suicide, and same-sex marriage, among other issues.[131] In other instances, of course, liberal policymakers have sought to use federal power to constrain more conservative states.

By limiting the scope of federal power, judicial review of federalism issues can in some instances prevent the federal government from undermining interstate diversity in public policy. Therefore, a higher percentage of the population will be able to live under the policies they prefer.[132] This conclusion is clearly relevant to Justice Breyer's democracy-promoting vision of judicial review. Unfortunately, he does not consider the relationship between federalism, diversity, and democratic participation in *Active Liberty*.

4. Federalism and Democracy.—The federalism arguments advanced here are more relevant to some conceptions of democratic participation than others. Foot voting, for example, is unlikely to further the cause of "deliberative democracy," which requires citizens to engage in sophisticated reasoning about public policy.[133] But neither is deliberative democ-

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[129] Somin, *supra* note 25, at 1347–50. *See generally* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 333–40 (2003) (showing how states can lobby for federal intervention that reduces interstate competition).

[130] It should be recognized that the "diversity" argument for judicial review of federalism is distinct from the foot voting argument. The former does not require citizens to move, nor does it require any competition between state governments to be effective.

[131] For a discussion of numerous examples of recent conservative assertions of federal power, see Ilya Somin, Gonzales v. Raich*: Federalism as a Casualty of the War on Drugs*, 16 CORNELL J.L. & PUB. POL'Y (forthcoming 2006).

[132] For further analysis of the diversity rationale, see, for example, Somin, *supra* note 125, at 464–68; Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–1500 (1987).

[133] *See supra* Part II.B.2. *But cf.* GUIDO PINCIONE & FERNANDO TESON, RATIONAL CHOICE AND DEMOCRATIC DELIBERATION: A THEORY OF DISCOURSE FAILURE 228–42 (forthcoming 2006) (arguing that strong exit rights can help stimulate the creation of "voluntary communities" that improve the quality of deliberation).

racy likely to arise from the kind of almost unlimited federal power advocated by Justice Breyer. Decentralized federalism, however, can help implement those theories of participation that require popular control over policy outcomes. In addition, by reducing the information burden on voters, it can even facilitate the implementation of the minimalistic Schumpeterian theory, which requires voters to acquire information about the policies of incumbent officeholders.[134]

My analysis of the political ignorance, foot voting, and diversity rationales for judicial enforcement of federalism is not intended to suggest that judges should decide federalism cases by weighing the consequences for political knowledge or federalism on a case-by-case basis. This approach would replicate one of the key shortcomings of Justice Breyer's own consequentialist framework: requiring judges to analyze complex empirical issues on which they lack expertise.[135] Still less do I mean to suggest that these considerations are the only ones that need to be considered in determining the appropriate scope of judicial review of federalism issues.

At the same time, political ignorance, foot voting, and diversity do highlight ways in which judicial enforcement of federalism could strengthen popular control of government policy. They thereby reveal a contradiction between Justice Breyer's democracy-promotion theory of judicial review and his steadfast opposition to judicial enforcement of federalism.

III. JUSTICE BREYER'S CRITIQUE OF ORIGINALISM

In what is sure to be one of the most widely debated parts of the book, Justice Breyer criticizes the originalist approach to constitutional theory, arguing that it fails to adequately constrain judicial discretion, and leads to potentially harmful consequences.[136] Justice Breyer emphasizes that originalism often fails to give determinate answers to difficult constitutional questions, thereby opening the door for judicial imposition of subjective policy preferences.[137] In addition, he contends that originalism cannot be justified on the basis of the Framers' own expectations, since they did not intend to establish originalism as the preferred mode of constitutional interpretation.[138]

Justice Breyer is certainly right to argue that results-oriented judges can manipulate originalism to produce the outcomes they prefer, especially in situations where constitutional text and history are vague or ambiguous.

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[134] *See* Somin, *Richard Posner's Democratic Pragmatism*, *supra* note 59, at 10–12 (discussing knowledge prerequisites of Schumpeterian democracy).

[135] *See supra* Part II.A.2.

[136] BREYER, *supra* note 2, at 115–32.

[137] *Id.* at 126–27.

[138] *Id.* at 117.

He effectively demonstrates that originalism is not a comprehensive panacea for the problem of "judicial activism," however activism is defined.

Unfortunately, Justice Breyer's case against originalism is weakened by his failure to distinguish it from textualism. He also fails to differentiate between original intent and original meaning. Furthermore, his argument is undercut by the fact that the case for originalism is comparative, not absolute. Originalists do not claim that their theory completely eliminates judicial discretion, but merely that it does a better job of controlling it than alternative versions. Justice Breyer also ignores an important way in which originalism might advance the democratic values that figure prominently in his own theory of judicial review.

A. Conflating Originalism and Textualism

Justice Breyer's analysis of originalism fails to distinguish it from textualism. As he explains it, the target of his criticism is the school of thought that "ask[s] judges to focus primarily upon text, upon the Framers' original expectations, narrowly conceived, and upon tradition."[139] He uses the terms "textualist," "originalist," and "literalist" more or less interchangeably.[140]

This conflation ignores the fact that textualism and originalism are differing and distinct modes of analysis. A judge can be committed to textualism while rejecting originalism, and vice versa.[141] A consistent textualist follows the words of the text, at least in cases where they are reasonably clear, even if doing so goes against "the Framers' original expectations."[142] On the other hand, a jurist who prioritizes originalism over textualism can choose to ignore even a clear text in cases where there is strong evidence that the Framers expected a different outcome than that mandated by simple adherence to the text.

This distinction is of considerable relevance to Justice Breyer's analysis, because some of his criticisms of originalism do not apply to textualism. For example, Justice Breyer contends that the theory he attacks cannot be justified on the basis of the Framers' own intentions because there is no evidence that they favored a particular school of legal interpretation.[143] However valid as a criticism of originalism, this point carries little weight against textualism, because the justification for textualism does not rely on the "specific intentions" of the Framers. Rather, textualists defend their

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[139] *Id.* at 116.

[140] *Id.*

[141] *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 25–26 (1982) (explaining why "textualist" constitutional argument is distinct from "historical" claims and rests on different premises).

[142] BREYER, *supra* note 2, at 116.

[143] *Id.* at 117.

theory on the ground that the text is the only "law" that has actually been enacted by legitimate constitutional processes.[144]

Similarly, Justice Breyer's claim that the "'textualist,' 'literalist,' and 'originalist' approaches . . . possess inherently subjective elements" that empower judges to follow their policy preferences is less applicable to textualism than originalism. Especially in cases where there was a disagreement among the Framers themselves as to the meaning of a provision of the Constitution, originalist interpretation may indeed deteriorate into subjectivity. Consider for example the framers' internal disagreements over the meaning of the Necessary and Proper Clause[145] and the Reconstruction amendments.[146] Textualist analysis, on the other hand, will often dictate a clear outcome even in the face of disagreement over original intent.

To be sure, Justice Breyer correctly observes that textualism and originalism (here too, he does not distinguish between them) "often fail to provide objective guidance in . . . truly difficult cases."[147] However, a key advantage of textualism is that it can greatly reduce the number of cases that we should regard as "truly difficult." For example, under a textualist analysis, the question of whether the power to "regulate commerce . . . among the several States"[148] gives Congress the authority to ban possession of homegrown medical marijuana not used for commercial purposes is extremely easy. It is clear that no such power can be derived from the text of the Commerce Clause, especially when one considers the fact that doing so would render most of Congress' other enumerated powers completely superfluous.[149] Thus, the legal question at issue in *Gonzales v. Raich*,[150] a recent highly controversial case that divided the Court six to three, is rendered easy if we adopt a textualist methodology.[151]

Similarly, textualism also makes it easy to reject the claim that the Eleventh Amendment's ban on allowing federal courts to hear "any suit in law or equity, commenced or prosecuted against one of the United States by

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[144] *Cf.* ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (1997) (making this point); John Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–21 (2005) (explaining the basis of textualism, as distinct from theories of legislative intent).

[145] *See, e.g.*, Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003) (discussing significant disagreements on this issue among various Framers).

[146] *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 158–61 (1986) (describing disagreement among Republicans over the scope of Congressional power under the Fourteenth Amendment just a few years after their party pushed through the Amendment's ratification); JOSEPH B. JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 187–92 (1965) (discussing disagreements among the framers of the Fourteenth Amendment).

[147] BREYER, *supra* note 2, at 124.

[148] U.S. CONST. art. I, § 8, cl. 3.

[149] *See* Somin, *supra* note 131 (analyzing the textual issues in detail).

[150] 545 U.S. 1 (2005).

[151] This point applies most fully to the claim that Congress' action was justified by the Commerce Clause. The relevance of the Necessary and Proper Clause leads to a somewhat more complicated textual analysis, though I believe it results in the same conclusion. *See* Somin, *supra* note 131.

Citizens of another State"[152] can be extended to require a ban on suits against a state by its own citizens.[153] In fact, a narrow Supreme Court majority was able to reach the opposite conclusion only because they deliberately set aside the text in order to impose their understanding of original intent.[154] As Justice Souter argued in dissent in *Seminole Tribe of Florida v. Florida*, a textualist analysis makes the issue easy, as there is no plausible reading of the text that supports interpreting the Eleventh Amendment as a ban on citizens suing their own states in federal court.[155]

To be sure, textualism is less helpful in cases where the constitutional provision at issue is vague or broadly worded, such as the Equal Protection Clause or the Necessary and Proper Clause. However, where the text is reasonably clear—as it is on a surprisingly wide range of constitutional issues that have divided the Court—textualism provides more determinate answers and less room for judicial discretion than either originalism or Justice Breyer's consequentialist theory. In addition to the noteworthy controversies over the Commerce Clause and the Eleventh Amendment noted above, these include many issues involving the First Amendment's guarantee of freedom of speech. As Justice Breyer notes in a rare passage that actually distinguishes textualism and originalism,[156] "a more textualist (if not more originalist) approach [to the First Amendment] would treat all speech alike" and thereby lead to judicial invalidation of attempts to restrict commercial speech.[157] One might add that the same fate would befall many of the campaign finance laws that Justice Breyer voted to uphold in *McConnell* and now defends in *Active Liberty*.[158]

B. Conflating Original Meaning and Original Intent

In addition to conflating originalism and textualism, Justice Breyer's analysis also fails to distinguish between "original intent originalism" and "original meaning originalism." The former would require judges to implement the specific expectations of the framers at the time of enactment.[159] The latter, by contrast, is based not on the specific intentions of individuals but on the "ordinary meaning" of the words as they were generally under-

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[152] U.S. CONST. amend. XI.

[153] Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[154] *Id.* at 53–54, 69–71 (explicitly making the point that the Court understands the Eleventh Amendment as going beyond its text, and citing evidence of original intent to support this conclusion).

[155] *Id.* at 109–10 (Souter, J., dissenting).

[156] This is the only such passage that I have been able to find in the book.

[157] BREYER, *supra* note 2, at 130.

[158] *See supra* Part II.A.2.a.

[159] For an example of a prominent scholarly work relying on original intent originalism, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

stood at the time of enactment.[160] A statement by Robert Bork captures the distinction well:

> What is the meaning of a [constitutional] rule that judges should not change? It is the meaning understood at the time of the law's enactment. Though I have written of the understanding of the ratifiers of the Constitution, . . . that is actually a shorthand formulation, because what the ratifiers understood themselves to be enacting must be taken to be what the public of that time would have understood the words to mean. It is important to be clear about this. The search is not for a subjective intention. If someone found a letter from George Washington to Martha telling her that what he meant by the power to lay taxes was not what other people meant, that would not change our reading of the Constitution in the slightest. Nor would the subjective intentions of all the members of a ratifying convention alter anything. . . . [W]hat counts is what the public understood. Law is a public act. Secret reservations or intentions count for nothing. All that counts is how the words used in the Constitution would have been understood at the time.[161]

While many originalists, myself included, disagree with much else in Bork's jurisprudence, most would accept the statement quoted above. In terms strikingly similar to Bork's, prominent liberal originalist Akhil Amar argues that "[w]hat counts as text is the document as understood by the American People who ratified and amended it, and what counts as history is accessible public meaning, not secret private intent."[162] Most academic and judicial originalists today advocate original meaning originalism, not original intent.[163]

This distinction, like that between originalism and textualism, weakens the force of some of Justice Breyer's arguments. Justice Breyer's claim that the Framers of the Constitution did not support originalism may be valid with respect to original intent[164] but has much less force when applied against original meaning. There is in fact considerable evidence that the Framers defended the latter and expected judges to apply it.[165]

Similarly, Justice Breyer's contention that originalism leads to indeterminacy in "truly difficult cases" is a less formidable attack on original

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[160] For a helpful discussion of the distinction, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 90–94 (2004).

[161] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1989).

[162] Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000).

[163] BARNETT, *supra* note 160, at 92–93.

[164] A point previously made by Paul Brest and H. Jefferson Powell. *See* Brest, *supra* note 37; Powell, *supra* note 37.

[165] *See, e.g.*, BARNETT, *supra* note 160, at 97–100 (providing evidence, including statements by James Madison and other Framers rejecting the relevance of original intent but embracing textualism and original meaning).

meaning than on original intent.[166] Many constitutional provisions, like statutes, have a complex legislative history that involves political actors with diverse and sometimes conflicting agendas. Justice Breyer uses an example of this type to illustrate the point that originalism often fails to provide clear answers to disputed questions.[167] However, analysis of original meaning may often be simpler than analysis of original intent, because the former requires only that we have evidence of the common usage of particular words at the time of enactment and does not require judges to establish the subjective intentions of numerous individual legislators and other political actors.

This is not to suggest that original meaning analysis, any more than textualism, will always provide us with clear, easy answers to hard questions. It is, however, less subjective than the original intent model, as well as Justice Breyer's consequentialist approach. Despite its flaws, originalism may still do a better job of constraining judges than does Justice Breyer's own theory.

C. Originalism, Supermajoritarianism, and Democracy

1. Originalism and the Democratic Advantages of Supermajorities.—
Justice Breyer's analysis ignores an important argument for originalism that is especially relevant to his own emphasis on the importance of democratic participation. Unlike constitutional interpretations derived from Breyer's theory, the original meaning of any given constitutional provision has usually been adopted through a strong supermajoritarian process such as the Article V amendment system[168] or the ratification process that led to the enactment of the original 1787 Constitution, which was first adopted by the Philadelphia Convention and then had to be ratified by at least nine of the thirteen states before it could take effect.[169]

Thus, there is substantial likelihood that the original meaning of any given constitutional provision was based on a broad political consensus. In recent years, this point has been emphasized by both liberal originalists, such as Akhil Amar, and conservative ones, such as John McGinnis and Michael Rappaport.[170] The requirement of supermajority support may help ensure that the resulting constitutional interpretations lead to better policy outcomes.[171] A rule of law that has supermajority support is, other things equal, likely to benefit a greater number of people than one enacted by a

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[166] BREYER, *supra* note 2, at 124.
[167] *Id.* at 125–26.
[168] U.S. CONST. art. V.
[169] *Id.* at art. VII.
[170] *See, e.g.*, Amar, *supra* note 162; John O. McGinnis & Michael Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002).
[171] *See* McGinnis & Rappaport, *supra* note 170, at 728–43.

simple majority, much less one that is supported merely by five or more Supreme Court Justices. This point has important implications for a constitutional theory that urges judges to "consider[] practical consequences," as Justice Breyer's does.[172] Due consideration for consequences should lead judges to take seriously the possibility that the consequentialist reasoning of a supermajority is, on average, likely to be superior to their own.

Of even greater relevance, however, are the implications of supermajoritarianism for Justice Breyer's emphasis on the value of democratic participation. A constitutional provision adopted by a supermajority embodies an unusually high degree of popular participation in developing government policy. Compared to ordinary legislation, it is less likely to have been enacted merely to appease a narrow interest group. Moreover, it is less vulnerable to the manipulation of political ignorance because the amassing of supermajority support requires that an amendment gain the support of a large portion of the well-informed minority among voters, as well as the often ignorant majority.[173]

This argument functions primarily as a defense of original meaning and text. It applies with much less force to original intent, since the latter may represent only the wishes of individual political leaders. Nonetheless, it is an important point against Justice Breyer's claim that judicial promotion of "active liberty" is best accomplished by adopting a nonoriginalist mode of constitutional interpretation.

2. Democracy and the Dead Hand Problem.—Surprisingly, Justice Breyer's critique of originalism omits any discussion of the "dead hand problem," one of the standard criticisms of the theory by earlier writers.[174] The dead hand argument holds that originalism and democracy are at odds because holding to the original meaning of a constitutional text enacted many years ago necessarily constrains the power of current democratic majorities.[175] It is undeniably a potential objection to the argument presented here.

In a certain sense, the dead hand argument has obvious validity. The enforcement of the original meaning of constitutional text necessarily *does* constrain current democratic majorities in at least some cases. The question addressed here, however, is not whether originalism is perfectly democratic, but whether it is more or less democratic than nonoriginalist judicial consequentialism of the sort advocated by Justice Breyer. On this point, it is important to recognize that judicial enforcement of original meaning, whatever

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[172] BREYER, *supra* note 2, at 6.

[173] *See* Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 45 WM. & MARY L. REV. 595, 667–69 (2003).

[174] *See, e.g.*, Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085, 1102–05 (1998) (making the standard argument that the dead hand problem renders textualism and originalism incompatible with traditional notions of democratic self-government).

[175] *Id.*

its other defects, at least enforces the results of a past democratic process, one that generally has stronger democratic credentials than ordinary legislation.[176] By contrast, Breyerian judicial consequentialism enforces the constitutional views of a majority of current Supreme Court Justices. Moreover, judicial enforcement of original meaning, while in one sense constraining current voters, also empowers them: it enables them to enact constitutional amendments of their own and have their text and original meaning enforced in the future.[177]

While the Justices are not completely disconnected from democratic control, having gone through a nomination process, their positions on issues generally receive considerably less democratic vetting than does constitutional text enacted through the amendment process. Since the confirmation process requires merely a presidential nomination and support from a majority of senators, Supreme Court Justices lack the supermajority mandate of a constitutional amendment. There is thus a greater chance that their appointment serves merely the objectives of well-organized and informed interest groups rather than those of the electorate as a whole.[178] Moreover, whereas the text of a constitutional provision is usually enacted after direct consideration of the problems it addresses, the issues at stake in any given case often were not considered during the nomination of the Justices who decided it.[179] For example, abortion played little or no role in the confirmation of the justices who decided *Roe v. Wade*, and federalism issues did not figure prominently in the nomination processes of the Rehnquist Court justices who later rendered the controversial "new federalism" decisions.[180]

Finally, it is important to recognize that nonoriginalist judicial decisionmaking can create significant dead hand problems of its own. Supreme Court justices who have retired since 1970 have served an average of 26.1 years on the Court.[181] Thus, it may take many years before new appointments are able to reverse even a highly unpopular judicial decision.[182] In

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[176] *See supra* notes 169–72 and accompanying text.

[177] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) (making a similar argument with respect to textualist interpretation of legislation).

[178] *See* Somin, *supra* note 173, at 667–69 (explaining how a supermajoritarian process reduces the chance that constitutional amendments will benefit narrow interest groups with superior knowledge at the expense of the rationally ignorant majority).

[179] *See, e.g.*, STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENT PROCESS 54–118 (1994) (discussing how confirmation processes are usually focused on a few issues that happen to be salient at the time).

[180] *See generally* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 296–373 (1992) (discussing issues that motivated Supreme Court nominations in both periods, and failing to indicate any significant role for abortion and federalism respectively).

[181] Steven G. Calabresi & James Lindgren, *Term Limits for The Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

[182] *See id.* at 809–813 (arguing that lengthy judicial tenure makes it difficult to impose democratic accountability).

some situations, an unpopular or harmful decision may be impossible to reverse even after its opponents *have* succeeded in getting a majority on the Court. Over time, decisions can become institutionalized, and reversing them might be extremely costly or politically unfeasible, given the opposition of powerful interest groups whose strength has increased as a result of the decision itself.[183]

The above analysis focuses on the connection between the dead hand problem and democratic control of public policy, and does not consider the question of whether a constitutional dead hand unduly impedes adjustment to changing conditions. This broader issue is beyond the scope of the present analysis. But it is useful to note that the benefits of maximizing flexibility must be weighed against the need to "lock in" important values and policies against easy change, which is one of the major purposes of having an enforceable written constitution in the first place.[184] Obviously, originalism does not necessarily impair political flexibility in cases where it requires judges to simply leave the question at issue to the decision of the political branches. In cases where originalism requires judges to constrain legislative or executive power, on the other hand, it does indeed impair flexibility at least to some degree. But reducing the power of the political branches may increase the ability of the private sector to make its own adjustments, free of political interference. In many situations, the "spontaneous order" of free markets and civil society can adjust to changing conditions faster and more effectively than can the state.[185]

Both judicial consequentialism and originalism sometimes produce dead hand problems. Indeed, some degree of dead hand restriction of current political majorities is an essential element of constitutionalism. The question of how much dead hand control is optimal is one that we cannot resolve here. However, the "dead hand" of originalism is no more undemocratic—and is in some ways less so—than consequentialist judicial decisionmaking.

D. Originalism, Consequentialism, and Comparative Advantage

Ultimately, both originalism and Justice Breyer's consequentialist approach are highly imperfect. Prominent originalists, including Justice Breyer's jurisprudential rival Justice Scalia, readily concede that original-

[183] *Cf.* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1114–26 (2003) (explaining how the adoption of a judicial decision or public policy may strengthen interest groups who benefit from it and weaken those who oppose it, thereby making it more difficult to reverse). *See generally* MANCUR OLSON, JR., THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES (1982) (discussing how harmful policies are often difficult to reverse because powerful interest groups that benefit from them tend to coalesce over time).

[184] For a good recent analysis developing this point and linking it to the case for originalism, see BARNETT, *supra* note 160, at 103–09.

[185] For the classic argument to this effect, see F.A. HAYEK, THE CONSTITUTION OF LIBERTY 22–70 (1960); 3 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY 93–97 (1979).

ism has weaknesses, including an inability to completely prevent judicial policymaking.[186] I do not contend that textualism and originalism are the only permissible modes of constitutional interpretation. Nonetheless, they do have a number of comparative advantages over Justice Breyer's approach.

Unlike Justice Breyer's consequentialist approach, discussed above, these methodologies do not require judges to make complex empirical judgments for which they lack the necessary expertise.[187] In addition, textualism and the original meaning version of originalism have the virtue of supermajority endorsement, which makes it more likely that they are the product of broad democratic participation and less likely that they will lead to harmful consequences.[188]

Textualism and originalism impose tighter—though by no means perfect—constraints on judicial discretion than does Justice Breyer's consequentialism. We have already seen how textualism cabins judicial discretion at least in those cases (including many important ones) where the text is relatively clear.[189] Original meaning originalism can do the same in cases where the words of the Constitution had a clear generally understood meaning at the time of enactment.

By contrast, Justice Breyer's emphasis on judicial consideration of consequences imposes considerably fewer constraints on judicial discretion. Justice Breyer tries to limit this danger by suggesting that "to consider consequences is not to consider simply whether the consequences of a proposed decision are good or bad."[190] Instead judges should "emphasize consequences related to the particular textual provision at issue."[191] They should "examine consequences through the lens of the relevant constitutional value or purpose" that the provision is intended to achieve.[192]

This stricture, however, provides a lot less constraint than meets the eye. First, Justice Breyer does not explain how judges are to determine which consequences are "related" to the "textual provision at issue" and which ones are not. If the answer is to look at text or original meaning, then Breyer's theory seems little different from those he purports to criticize. If, on the other hand, judges are to rely on their own reasoning and intuition in determining "relatedness," then it is unlikely to impose much constraint. Moreover, this element of subjectivity is likely to be particularly

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[186] *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 857, 861–62, 864 (1989) (conceding shortcomings of originalism, and noting that originalism cannot eliminate "[t]he inevitable tendency of judges to think that the law is what they would like it to be").

[187] *See supra* Part II.A.

[188] *See supra* Part III.C.

[189] *See supra* Part III.A.

[190] BREYER, *supra* note 2, at 120.

[191] *Id.*

[192] *Id.*

severe in the "truly difficult cases" that Justice Breyer believes are especially important for a constitutional theory to resolve.[193] After all, almost any important social or political value is "related" to such vague and broadly worded provisions as the General Welfare Clause, the Equal Protection Clause, and the Necessary and Proper Clause. These provisions can easily be linked to a wide range of "value[s] or purpose[s]."[194]

Furthermore, many parts of the constitution are likely to be "related" to the advancement of more than one value. For example, Justice Breyer correctly suggests that one of the values advanced by the Religion Clauses of the First Amendment is to reduce conflict between different religious groups.[195] As we have seen, he uses this claim to justify his vote to forbid the inclusion of private religious schools in school choice programs.[196] But the Religion Clauses are also plausibly "related" to the purposes of protecting religious freedom and ensuring equal treatment of adherents of different religious and secular belief systems. These considerations might counsel against requiring government to discriminate against religious institutions in funding schools. Indeed, they might even lead a judge to affirmatively forbid the government to engage in such discrimination.[197] Judges of differing ideological persuasions could easily choose to emphasize one of these "related" values at the expense of the others and thereby justify whatever decision they would like to reach on policy grounds.

These dangers of Justice Breyer's methodology are not limited to vague or broadly worded constitutional provisions such as the Religion Clauses. For example, a Breyerian jurist could reasonably conclude that the "purpose" of the Article II requirement that a president be at least thirty-five years old[198] is to ensure that a presidential candidate has sufficient maturity for the office. However, to use Justice Breyer's words, "the changing nature of our society" might require judges to "interpret the Clause more broadly than the Framers might have thought likely" so as to "implement the basic value that the Framers wrote the clause to protect."[199] Thus, Breyerian judges might reasonably conclude that improvements in scientific understanding of maturity and the effects of aging should lead them to allow presidential candidates under the age of thirty-five who have demonstrated a requisite level of maturity. By contrast, candidates over that age who re-

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[193] *Id.* at 124.

[194] *Id.* at 120.

[195] *Id.* at 120–21.

[196] *See supra* notes 91–95 and accompanying text.

[197] *See, e.g.*, Michael McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 11–20 (1989) (arguing that the principles of government neutrality towards religion and respect for religious liberties require the state to treat religious and secular schools equally).

[198] U.S. CONST. art. II, § 1, cl. 5.

[199] BREYER, *supra* note 2, at 121.

main immature, according to scientific criteria adopted by the Supreme Court, should perhaps be barred from holding our highest political office.[200]

A Breyerian judge cannot appeal to the clear statement of the text to stave off this result because Justice Breyer specifically rejects textualism and originalism as "not hospitable to the kinds of arguments I have advanced,"[201] implying that the words of the text should not be followed if a different conclusion is required by his own methodology. In Justice Breyer's framework, judges must look to the "value or purpose"[202] that the text is supposed to achieve rather than to the precise meaning of the words themselves. Thus, Justice Breyer's consequentialist approach could potentially import broad judicial discretion into even the clearest and most unambiguous clauses of the Constitution.

The point is not that Justice Breyer himself is at all likely to actually adopt such an absurd interpretation of Article II. It is, rather, that this result is not barred by his methodology. An approach sufficiently malleable that it can be used to justify overriding even the clearest of textual provisions is unlikely to provide meaningful constraints on judicial decisionmaking in even moderately ambiguous cases—much less the "truly difficult" ones that Justice Breyer emphasizes.[203]

The comparative advantages of textualism and originalism over Justice Breyer's theory do not prove that these approaches are ideal or that they should be the exclusive modes of constitutional interpretation relied on by judges. They do, however, suggest that textualism and originalism should have a greater role in constitutional interpretation than consequentialist reasoning of the sort advocated by Justice Breyer.

CONCLUSION

This Review has focused, perhaps excessively, on my disagreements with Justice Breyer's analysis in *Active Liberty*. It should therefore be emphasized that the book is not without its strengths. In particular, Justice Breyer is right to emphasize the importance of promoting democracy as one of the objectives of judicial review. He is also right to highlight some of the shortcomings of originalism, including its failure to constrain judges as much as some originalists claim. Finally, Justice Breyer deserves credit for being the first modern Supreme Court justice to write a book about what Ely called the judiciary's "representation-reinforcement" function[204]—the

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[200] *Cf.* RICHARD A. POSNER, LAW AND LITERATURE 219 (rev. & enlarged ed. 1998) (suggesting that a "deconstructionist judge . . . might argue that the provision in Article II of the Constitution that you must be at least 35 years old to be President of the United States could mean merely that you must have the maturity of the average 35-year-old").

[201] BREYER, *supra* note 2, at 116–17.

[202] *Id.* at 120.

[203] *Id.* at 124.

[204] ELY, *supra* note 1.

use of judicial intervention to promote popular participation in the political process.

Ironically, however, Justice Breyer's goal of using the judiciary to promote "active liberty" is often best achieved by the very means that he condemns. The combination of federalism, textualism, and originalism may turn out to produce better and more democratic results than the consequentialist reasoning Justice Breyer himself advocates.