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## The Pragmatic Passion of Stephen Breyer

Now in his twelfth year as a Supreme Court Justice, Stephen Breyer has written an important book, *Active Liberty*,<sup>1</sup> which crystallizes a fundamental set of beliefs about the American Constitution and his role as a Justice. Taking *Active Liberty* as the entry point, this piece places Breyer's book in the wider context of his judicial opinions and activities as a Justice—and, as such, seeks to provide a preliminary sketch of Breyer's distinctive place in American law today.

### I. VOICE

*Active Liberty* emphasizes one theme that Breyer says runs through our primal document and that should help guide how we determine its meaning in a wide variety of cases: the idea of democratic participation. Breyer argues that our Constitution embodies not only a commitment to “negative liberty” (protecting citizens from government interference with their lives) but also a commitment to “active liberty”—creating and fostering a form of democratic government in which the people “share the government’s authority” and actively “participat[e] in the creation of public policy.”<sup>2</sup> Viewing the Constitution in this way, Breyer argues, will lead to better constitutional interpretations and a more “workable democratic government.”<sup>3</sup>

To understand *Active Liberty*—and the Justice who penned it—we must first understand what it is not. It would be a mistake to see this book—as some of its critics have—as offering a “theory” about the Constitution. Breyer explicitly disclaims that he is setting forth a “theory.”<sup>4</sup> Although a longtime

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1. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005).

2. *Id.* at 33.

3. *Id.* at 34.

4. *Id.* at 7, 110.

professor at Harvard Law School before becoming a judge on the United States Court of Appeals in 1980 (he was an administrative law scholar whose writings focused on the practice of economic regulation), Breyer is not by temperament a theorist—certainly not in the sense currently fashionable in the legal academic world. And his judicial opinions since becoming a judge have not seemed to be shaped by general theories.

Instead, his book is best seen as an activity of induction. Here Breyer is open about what the book represents: At a certain point in his judicial career, after deciding an enormous number of individual cases and writing a large number of opinions that explain conclusions in terms of legal doctrine and practical policy, he has looked for a “pattern” in his own work.<sup>5</sup> The theme of democratic participation, then, is not only what he has found in his study of the framing of our Constitution and in American history, but also a thematic pattern that he sees in his own judicial decisions. This is something, one senses, that he had not seen until recently as such a significant and unifying thread in his own prior work. He is not providing a roadmap for deciding future cases. Breyer describes his ideas as “themes,” an “approach,” an “attitude,” not a “theory,” and emphasizes that they can “help” decide close cases, rather than dictate results without regard to other interpretative tools.<sup>6</sup>

Nor is this book a comprehensive statement of Breyer’s views of the law or a full portrait of Breyer the Justice. Certainly the book’s substantive theme of democratic participation, however strongly Breyer emphasizes it, is only one of his substantive preoccupations as a constitutional judge—themes and values that include, one must add, a certain distrust of populist democracy and a faith in elite expertise.<sup>7</sup> The part of *Active Liberty* that may capture Breyer’s behavior as a judge more fully is the book’s other main theme, which is methodological: Judging is a pragmatic and purposeful activity in which interpretation and decision must always be attentive to the purposes of legal provisions, the multiplicity of factors involved in specific cases, and the practical consequences of judicial decisions, and should not focus exclusively on textual exegesis and uncovering original understandings.

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5. *Id.* at 110-11; Linda Greenhouse, *Court Veteran Remembers a Scary Start*, N.Y. TIMES, Feb. 16, 2006, at A31 (quoting Breyer as saying that “[w]riting the book, the doing of it, forced me to work through and find the coherence” in his opinions).

6. BREYER, *supra* note 1, at 6, 7, 9, 11, 12, 18-19, 34, 50, 53, 56, 110-11.

7. *Active Liberty* is particularly interesting to read alongside a book that Breyer wrote as a U.S. Court of Appeals judge shortly before his appointment to the Supreme Court, which emphasizes the importance of administrative expertise as a way to resist populist pressures to overregulate risk. STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993); *see also* BREYER, *supra* note 1, at 86, 102-03, 105 (recognizing some tension between democracy and administrative decisionmaking).

To understand the book and Justice Breyer more fully, the book is best read alongside Breyer's judicial decisions. The true virtuoso in Stephen Breyer is expressed through recurring decisions in specific cases, explained through unusually compact, complex, transparent, practical, and balanced explanations in hundreds of opinions. Breyer's decisions not only address a wider set of substantive themes than the book, but his decisions also capture the particularity of Breyer's approaches to concrete cases and specific legal issues. His opinions never rest on unitary principles, including "active liberty," but invariably draw on multiple sources of meaning. He is not a case-at-a-time judge, but he is always engaged in the detailed particularity of specific cases, and in many ways his distinctive excellence is that he sees that particularity so clearly and can hold in place and attempt to balance the many factors that he sees at stake at particular moments of decision. These are the qualities that lead some to view him at times as too subjective or too cautious; for me and many others, however, they are the qualities that make Breyer an exceptional Justice—a consummate pragmatic judge. His book is an important work of self-reflection, made especially valuable because it gives us a glimpse into the general thinking of a judge who lives each day in the fray, with responsibilities and preoccupations very different from a scholar's. But we should not privilege this book over the day-to-day work of Stephen Breyer the Justice, any more than we might privilege a poet's reflections on poetry over the poems themselves.

The book is a manifesto of sorts, a sustained expression of his personal approach to constitutional interpretation, and a respectful criticism of the current Supreme Court for having "swung back too far" in the wrong direction by "too often underemphasizing or overlooking the contemporary importance of active liberty."<sup>8</sup> Moreover, Breyer's most interesting and important contributions as a Justice have largely been in separate opinions—expressions of a distinctive individual voice, not the views of a Court majority.

Given this, we should recall how Breyer was perceived and described when President Clinton nominated him to the Court in 1994. He was perceived, correctly I think, as a consensus-builder.<sup>9</sup> He was described as a moderate-liberal Democrat: As a top staff member of the U.S. Senate's Judiciary Committee, he had worked very effectively across party lines to find common

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8. *Id.* at 11.

9. Remarks Announcing the Nomination of Stephen G. Breyer To Be a Supreme Court Associate Justice and an Exchange With Reporters, 1 PUB. PAPERS 909 (May 13, 1994) ("He has proven that he can build an effective consensus and get people of diverse views to work together for justice's sake."); Paul Gewirtz, Op-Ed., *Who Is Stephen Breyer?*, HARTFORD COURANT, July 24, 1994, at D1 (highlighting Breyer's "vaunted ability to build consensus.").

ground (indeed, this explained why his nomination to the U.S. Court of Appeals for the First Circuit was approved by the Republican-led Senate even after President Carter had lost the election to Ronald Reagan<sup>10</sup>). As a Court of Appeals judge, he had found grounds for decision that typically produced unanimous opinions on his court. At the time of his nomination to the Court, some perceived him as too much of a “technocrat”—holding against him his background in administrative law and regulatory policy, as if those fields were inconsistent with compassion—and some perceived him as insufficiently ardent about social causes.<sup>11</sup> But the dominant view was that he was a pragmatic moderately liberal judge, and a person who had a good chance of helping a fractured Supreme Court find consensus and common ground in decisions.<sup>12</sup>

To a large extent, this prospect of consensus-building has proven illusory. Justice Breyer’s colleagues on the Supreme Court, it has turned out, are not especially committed to finding consensus. They are strong individuals who have views that they wish to express. Most significantly, this is an era of conservative ascendancy. To the extent that there are blocs on the Court, Breyer is part of a minority bloc. At times he crosses over (more on this below), but on many of the most contested issues at the Court he is part of the dissenting group of more liberal Justices. Yet Breyer, by temperament, is not the dissenting type. He likes to solve problems, find areas of agreement, and cooperate with others. During an interview at the Brookings Institution, he recently suggested that in his third grade class students were graded based on their ability to get along with others—“participating and cooperating” was what he called it.<sup>13</sup> Breyer emphasized that these are good traits to develop among citizens in a democracy; but “participating and cooperating” is also his own style as a person, and undoubtedly his preferred style as a judge.<sup>14</sup> He found at least one colleague who substantially shared his temperament and also

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10. John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. 470, 492-93 (1997).

11. See, e.g., *Nomination of Stephen G. Breyer To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 369 (1994) (statement of Sen. Howell Heflin, Member, S. Comm. on the Judiciary) (stating to Breyer that “the word ‘technocrat’ has been frequently used in descriptions about you” and “that technical approach has sometimes been criticized”).

12. See, e.g., Gewirtz, *supra* note 9.

13. Stephen Breyer, Remarks at the Brookings Institution 51 (Oct. 17, 2005), available at <http://www.brookings.edu/comm/events/20051017Breyer.pdf>.

14. In this respect, he also emphasized “the importance for everyone of getting on with people you disagree with.” *Id.* at 45. He also cites de Tocqueville as noting that the reason American democracy works is because people here “learn how to work together.” *Id.* at 51-52.

his instinct for moderation—Sandra Day O’Connor—and their collegueship would itself be an interesting subject for future scholarly study. But because their political starting points were frequently different, and because her more centrist position on the Court allowed her a somewhat wider field for coalition building, Breyer and O’Connor never emerged as a consistent partnership on the Court.

Although Breyer has never flagged in his optimism that consensus is possible in most cases,<sup>15</sup> he has not become a great consensus builder on the Court. Instead, he has emerged as an individual voice, and often in dissent or in concurring opinions.<sup>16</sup> He has certainly adjusted to his role, but it cannot have been how he expected it would turn out. His book, *Active Liberty*, reflects a continuation of this development of an individual voice and perspective, and provides an additional path for spreading the influence of his ideas.

## II. IDEAS

Breyer’s commitment to active liberty has two different implications for his view of how constitutional cases should be decided. In different situations, it can lead either to judicial deference to the democratic process, or to judicial invalidation of legislation that limits democratic participation. We see various aspects of this two-sidedness both in the examples that Breyer discusses in *Active Liberty* and in his opinions as a Justice.

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15. It is revealing that in his book, as well as in public appearances, Breyer repeatedly underscores that the Justices reach broad agreement in most cases and also that in the Court’s conference room he has “never heard one member of the Court say anything demeaning about any other member of the Court, not even as a joke.” Breyer, *supra* note 13, at 44; see also BREYER, *supra* note 1, at 110.

16. This is not to slight the many cases in which Breyer speaks for the Court in majority opinions. Many are of large significance. See e.g., *Stenberg v. Carhart*, 530 U.S. 914 (2000) (concerning abortion rights); *Zadvydas v. Davis*, 533 U.S. 678 (2001) (deportation of aliens). Some reveal a remarkable snatching of partial victory from defeat. See, e.g., *United States v. Booker*, 543 U.S. 220 (2005) (Breyer, J., dissenting in part). And in many more ordinary cases, by Supreme Court standards, Breyer demonstrates an easy command of the multiple tools of legal interpretation to reach sensible results and bring majorities along. See, e.g., *Small v. United States*, 125 S. Ct. 1752 (2005) (construing a firearm statute). Moreover, we do not know the consensus-building role of Justices who silently join majority opinions, even though they may have been instrumental in producing the majority. Interestingly, according to the *Harvard Law Review’s* statistics for the 2004 Term, Justice Breyer was tied with Justice O’Connor as the Justice most frequently in the majority in cases in which the Court was not unanimous, suggesting the possibility that he has been developing a larger consensus-building role. See *The Supreme Court 2004 Term – The Statistics*, 119 HARV. L. REV. 415, 423 tbl.I(D) (2005).

First, Breyer's theme that "courts should take greater account of the Constitution's democratic nature" leads him to be a strong advocate and practitioner of "judicial modesty"<sup>17</sup>—the courts' deference to the decisions of other more democratic branches of our government, branches that tend to involve fuller democratic participation by citizens. In a recent study of the decisions of the Supreme Court between 1994 and 2005, Chad Golder and I have shown that Breyer has voted to overturn provisions of congressional statutes the least number of times of any of the Justices—a showing that surprised those who had associated "judicial activism" with the Court's more liberal wing, of which Breyer is usually a part. (Indeed, according to the study, "conservative" Justices voted to overturn congressional provisions the most frequently.)<sup>18</sup>

Second, in certain contexts, Breyer's theme leads him to justify a more active role for courts in giving concrete life to the Constitution's "democratic nature"—by striking down decisions of other branches of government that limit democratic participation. The early pages of *Active Liberty* suggest that Breyer is more interested in the second, more activist implication of his theme than the first.<sup>19</sup> But in fact most of his major examples in the "Applications" section highlight his deference to the choices made by other institutions (for example, deference to Congress on campaign finance legislation, deference to Congress on Commerce Clause and related federalism questions, deference to the University of Michigan Law School on affirmative action).<sup>20</sup> There are certainly many situations in which Breyer has voted to strike down the acts of other institutions as unconstitutional—for example, the death penalty for juveniles<sup>21</sup> and mentally retarded persons,<sup>22</sup> school voucher programs that involve religious schools,<sup>23</sup> restrictions on abortion,<sup>24</sup> laws punishing homosexual conduct,<sup>25</sup> some antiterrorism detention measures,<sup>26</sup> California's

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17. BREYER, *supra* note 1, at 5.

18. Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A23.

19. See BREYER, *supra* note 1, at 5-6.

20. *Id.* at 49, 60-65, 79-84.

21. See *Roper v. Simmons*, 543 U.S. 551 (2005).

22. See *Atkins v. Virginia*, 536 U.S. 304 (2002).

23. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 717-29 (2002) (Breyer, J., dissenting).

24. See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (Breyer, J.).

25. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

26. See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

“three strikes” law,<sup>27</sup> certain restrictions on political speech<sup>28</sup> and sexually explicit speech,<sup>29</sup> and copyright protections lasting an extremely long period of time.<sup>30</sup> But his work as a judge, like his book, shows him to be a liberal who gives genuine deference to other branches of government.

The single most important area of Breyer’s work on the Court has been his opinions on the First Amendment, in which he has developed a unique and pathbreaking approach to issues of freedom of speech. Indeed, in my judgment, Breyer’s are the most important new ideas about the First Amendment on the Supreme Court since Justices Brennan and Black. The entire active liberty theme in the book seems to have developed out of insights and approaches that Breyer first developed in concurring and dissenting opinions in free speech cases during his first years on the Court. Justice Breyer’s core idea is that the First Amendment’s role is not simply to protect individuals from direct government restraints on speech. The First Amendment’s freedom of speech seeks not only to protect a negative liberty, but also to promote active liberty by encouraging the exchange of ideas, public participation, and open discussion. In other words, the purpose of protecting the freedom of speech in the First Amendment is to promote a system of free expression that provides speakers wide opportunities for public and private expression, provides listeners diverse sources of information, fosters greater democratic participation, and creates greater public confidence in the democratic process.

This has various implications. For one thing, it leads Justice Breyer to argue that in many First Amendment cases the particular restriction on speech is not the only free speech interest involved. Rather, the restrictions on speech in the challenged laws may actually enhance the speech of some, even though they limit the speech of others. Constitutionally protected interests “lie on both sides of the constitutional equation.”<sup>31</sup> In such cases, Breyer argues, it is

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27. See *Ewing v. California*, 538 U.S. 11, 35-62 (2003) (Breyer, J., dissenting); see also *Lockyer v. Andrade*, 538 U.S. 63, 77-83 (2003) (Breyer, J., dissenting).

28. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 665-86 (2003) (Breyer, J., dissenting from the dismissal of the writ of certiorari as improvidently granted).

29. See *Reno v. ACLU*, 521 U.S. 844 (1997). But see *Ashcroft v. ACLU*, 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting) (finding the Child Online Protection Act constitutional).

30. See *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting).

31. BREYER, *supra* note 2, at 48; see also *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring) (“[T]he question before us . . . implicates competing constitutional concerns.”); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“[C]onstitutionally protected interests lie on both sides of the legal equation.”); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 226 (1997) (Breyer, J., concurring in part) (“[T]here are important First Amendment interests on the other side as well.”).

inappropriate to assess a restriction on speech using strict scrutiny. Rather, the right question is whether the laws “impose restrictions on speech that are disproportionate when measured against their . . . speech-related benefits.”<sup>32</sup> Questions can be raised about whether this recalibrated balance is appropriate and whether courts can be trusted to implement it—as I have discussed elsewhere<sup>33</sup>—but none of these undermine the importance of Breyer’s insights and his challenge to the Court’s current approach to First Amendment issues.

In a variety of separate opinions, Justice Breyer has used his new approach to the First Amendment to reach conclusions that differ from his colleagues. Most importantly, at a time when campaign finance laws were still under the heavy cloud created by *Buckley v. Valeo*,<sup>34</sup> Breyer wrote a concurrence in *Shrink v. Missouri* that showed greater tolerance for laws limiting campaign contributions and spending so as to “democratize the influence that money . . . may bring to bear upon the electoral process,” and “to “encourag[e] the public participation and open discussion that the First Amendment itself presupposes.”<sup>35</sup> Here, Breyer foreshadowed the Court’s later decision—if not the precise reasoning—in *McConnell v. FEC*,<sup>36</sup> upholding the main provisions of the “McCain-Feingold” federal campaign law of 2002.<sup>37</sup>

*Active Liberty* gives particular attention to the issue of campaign finance, and also to Breyer’s view that courts should distinguish political speech from commercial speech and allow greater regulation of the latter. Breyer has used his approach to resolve cases differently from the Court majority in a variety of other contexts as well, which show more fully the far-reaching implications of his distinctive ideas. For example, he would allow Congress greater leeway to require opening cable TV to more diverse voices in order to promote the democratic objective of “assuring that the public has access to a multiplicity of information sources,” even though the speech interests of the cable owners are somewhat restricted.<sup>38</sup> He has indicated a greater willingness to uphold legislation that restricts the media in order to promote privacy, in part because protecting privacy of communications itself encourages people to speak more

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32. BREYER, *supra* note 1, at 49.

33. Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 193-98.

34. 424 U.S. 1 (1976).

35. 528 U.S. at 401 (2000) (Breyer, J., concurring) (internal quotation marks omitted).

36. 540 U.S. 93 (2003).

37. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 and 47 U.S.C.).

38. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 227 (1997) (Breyer, J., concurring in part) (quoting *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 663 (1994)).

freely and thus promotes a more vibrant system of free expression.<sup>39</sup> Justice Breyer has also been more receptive than the Court majority to upholding restrictions on speech when there is an important competing value that is not itself a speech value. For example, he wrote a dissenting opinion stating that he would uphold a restriction on the programming leeway of cable operators when the value on the other side was protecting children from indecent programming.<sup>40</sup>

A second area where Breyer has made major contributions as a Justice is federalism. Limiting national powers in federalism cases was one of the hallmarks of the Rehnquist Court, and Breyer has been a leading dissenter in this area and he gives it distinctive attention in his book.<sup>41</sup> In cases such as *United States v. Lopez*, in which the Court has struck down congressional enactments as exceeding Congress's Commerce Clause powers, Breyer has emphasized the importance of deferring to Congress because of its plausible conclusions and comparative advantage in assessing social facts (the empirical detail of his dissent shows him writing in the tradition of Justice Brandeis<sup>42</sup>), and because "the public has participated in the legislative process at the national level" (invoking the active liberty theme).<sup>43</sup> His book gives somewhat greater attention to federalism decisions striking down congressional legislation because it "commandeers" state officials<sup>44</sup> or violates the Eleventh

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39. See BREYER, *supra* note 1, at 71-73 (discussing *Bartnicki v. Vopper*, 532 U.S. 514 (2001)).

40. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting). That said, there are also situations involving what he considers core political speech when Breyer might impose stricter limitations on speech regulation than his colleagues. See *Nike, Inc. v. Kasky*, 539 U.S. 654, 665-86 (2003) (Breyer, J., dissenting from the dismissal of the writ of certiorari as improvidently granted).

41. BREYER, *supra* note 1, at 56-65.

42. For Breyer's interesting and perhaps self-reflective discussion of Justice Brandeis, see Stephen Breyer, *Justice Brandeis as Legal Seer*, Brandeis Lecture at the University of Louisville School of Law (Feb. 16, 2004), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_02-16-04.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_02-16-04.html).

43. 514 U.S. 549 (1995); see also *United States v. Morrison*, 529 U.S. 598 (2000); BREYER, *supra* note 1, at 62. The majority in these cases accuses Justice Breyer of abdicating any judicial role in putting limits on Congress' Commerce Clause powers and relying exclusively on the political safeguards of federalism. See *Lopez*, 514 U.S. at 565-68. Breyer's response is that "two centuries of scientific, technological, commercial and environmental change . . . , taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce . . . . Since judges cannot change the world . . . , Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance." *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting).

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

Amendment by imposing damage liabilities on states<sup>45</sup>—and here Breyer sounds an interesting if not completely convincing variant on his active liberty idea. He criticizes these decisions largely on the ground that they will decrease active liberty at the local level, reduce the role of local governance, and produce less flexible and more national forms of regulation. These decisions seem easier to criticize on different grounds—both on originalist grounds and on the ground that Breyer emphasizes in his dissents in the Commerce Clause cases: that Congress is the preferred institution for deciding where the federal/state balance lies in these instances. Moreover, Breyer's arguments here rest in part upon predicted consequences of striking down the laws in question that subsequent experience may not have borne out. But Breyer's arguments in his dissents and book are original and important, and also have the advantage of moving beyond the common national sovereignty critique of the Rehnquist Court's federalism decisions to suggest that the Court majority was undermining its own professed commitment to localism.

Among the book's other applications of Breyer's active liberty theme, one stands out because it is the only specific area of law that Breyer discusses that he had not previously addressed in his judicial opinions, and it is a major one: affirmative action. Justice Breyer joined Justice O'Connor's majority opinion in *Grutter v. Bollinger*,<sup>46</sup> the landmark opinion upholding the use of affirmative action in the educational context. But until this book, Breyer had not previously explained his own views on the subject. The Madison Lecture in 2001, in which Breyer first developed the democratic participation theme, contains only the briefest mention of affirmative action in the specialized context of race-conscious districting.<sup>47</sup> Given that *Grutter* was decided after the Madison Lecture, it is reasonable to think that the general ideas in the Madison Lecture helped Breyer to see deeper links between his theme of democratic participation and the affirmative action issue; that *Grutter* gave Breyer the opportunity to think through and apply his new understandings in an actual case; and that the section on affirmative action in *Active Liberty* allowed him to present his ideas in his own voice. Thus, to a student of Breyer the Justice, the book's discussion of affirmative action contains particularly interesting news—

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45. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Bd. of Tr. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

46. 539 U.S. 306 (2003).

47. Stephen Breyer, *Our Democratic Constitution*, The Fall 2001 James Madison Lecture at New York University Law School (Oct. 22, 2001), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_10-22-01.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_10-22-01.html).

and it is important news, because Justice O'Connor's departure from the Court has made affirmative action one of the most important issues in play on the new Court.

We do not know what role Justice Breyer played in helping to develop Justice O'Connor's majority opinion in *Grutter*,<sup>48</sup> but the passages in the opinion that Breyer emphasizes in *Active Liberty* certainly echo his own ideas about democratic participation. For Breyer, the justification for affirmative action in the context of higher education does not rest fundamentally on either the idea that it is a remedy to overcome the effects of past or present discrimination or the idea that, under our First Amendment, universities should receive distinctive deference in making educational choices. Nor does he emphasize the contributions that a diverse student body makes to education in the university setting itself—the rationale in Justice Powell's famous *Bakke* opinion,<sup>49</sup> the central rationale offered by the University of Michigan itself in *Grutter*, and a significant part of Justice O'Connor's opinion. Rather, in *Active Liberty* Breyer justifies affirmative action as “necessary to maintain a well-functioning participatory democracy.”<sup>50</sup> He reads Justice O'Connor's opinion as ultimately resting on this active liberty and democratic participation theme, and quotes the following passage in which, he says, she drew her various other arguments together:

“[N]owhere is the importance of . . . openness more acute than in the context of higher education. Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized. . . . [Indeed,] the path to leadership [must] be *visibly* open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and

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48. We do know that they were the only two Justices who voted to uphold the affirmative action program used by the University of Michigan's Law School in *Grutter* but also voted to strike down the affirmative action program used by the University of Michigan's undergraduate college challenged in the companion case of *Gratz v. Bollinger*, 539 U.S. 244 (2003). Because their two votes determined the outcomes in these exceptionally important cases, it is plausible to think that they discussed the cases. Breyer wrote only a brief separate opinion in the cases, stating his votes and adding that even though he disagreed with the dissenters in *Gratz*, he agreed with them that “government decisionmakers may properly distinguish between policies of inclusion and exclusion.” *Id.* at 282 (Breyer, J., concurring).

49. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

50. BREYER, *supra* note 1, at 82.

integrity of the educational institutions that provide this training. . . .  
[And] all [must] participate . . . .”<sup>51</sup>

Although this is indeed a quotation from O’Connor’s majority opinion, Breyer’s ellipses and brackets focus on Breyer’s own interpretation—culminating in the last sentence, which is largely a reconstruction and which focuses attention on the theme of “participation.”

Breyer then adds, in altogether his own words:

What are these arguments but an appeal to principles of solidarity, to principles of *fraternity*, to principles of *active liberty*? They find some form of affirmative action necessary to maintain a well-functioning participatory democracy. . . . [If affirmative action were outlawed, too] many individuals of all races would lack experience with a racially diverse educational environment helpful for their later effective participation in today’s diverse civil society. Too many individuals of minority race would find the doors of higher education closed; those closed doors would shut them out of positions of leadership in the armed forces, in business, and in government as well; and too many would conclude that the nation and its governmental processes are *theirs*, not *ours*. If these are the likely consequences—as many knowledgeable groups told the Court they were—could our democratic form of government then function as the Framers intended?<sup>52</sup>

*Active Liberty* discusses a variety of other areas of constitutional law—ranging from privacy and religious freedom to criminal procedure and desegregation—but there is at least one noteworthy omission. Unmentioned, and perhaps understandably so, is the most momentous and controversial constitutional case of Breyer’s tenure at the Court: *Bush v. Gore*,<sup>53</sup> the case that effectively ended the Presidential election of 2000 and one that certainly engages the book’s theme of democratic participation.<sup>54</sup>

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51. *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 332–33 (2003) (citations omitted)).

52. *Id.* at 82–83. Note his emphasis on “consequences” as a guide in giving meaning to the Equal Protection Clause and his reliance on the amicus briefs to inform him about real-world consequences.

53. 531 U.S. 98 (2000).

54. Breyer also does not mention two other cases with overtones of presidential politics in which he wrote opinions: *Clinton v. Jones*, 520 U.S. 681, 710–24 (1997) (Breyer, J., concurring), the famous case in which President Clinton unsuccessfully sought to defer a sexual harassment suit against him until his term of office ended, in which Breyer wrote an opinion formally styled as “concurring in the judgment” but that was in many respects a dissent, and *Rubin v. United States ex rel. Independent Counsel*, 525 U.S. 990 (1998) (Breyer, J., dissenting from the

No sketch of Breyer can ignore the case, however. Breyer's dissent in *Bush v. Gore* is a *cri de coeur*, as impassioned an opinion as Breyer has ever written, addressing what he clearly saw as a calamity for the Supreme Court. Even though written under extraordinary time pressures, it both dissects the majority's legal arguments with analytic power and clarity, and also expresses his vision of the Supreme Court as a national institution. Uncharacteristically, Breyer's dissent begins with a rhetorical blast of a pair of "wrong" and "wrong": "The Court was wrong to take this case. It was wrong to grant a stay."<sup>55</sup> And what immediately follows is a statement of the opinion's insistent theme, that even though "[t]he political implications of this case for the country are momentous[,] . . . the federal legal questions presented . . . are insubstantial,"<sup>56</sup> and that the proper role for the Supreme Court here was to be restrained.

Breyer's legal analysis takes apart the majority's particular arguments one by one. But the particular force of Breyer's opinion is in Part II, in which he pleads for the Supreme Court to stay out of this ultimate political moment in a democracy. Under both the Constitution and Congressional statutes drafted after the wrenching experience of the contested 1876 election, Breyer argues, Congress has the ultimate authority and responsibility to count electoral votes. Anticipating one of *Active Liberty*'s themes—indeed, perhaps partly animating it—Breyer writes: "However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people's will far more accurately than does an unelected Court. And the people's will is what elections are about."<sup>57</sup>

Drawing upon Professor Alexander Bickel's writings about the 1876 election, in which Justices of the Supreme Court played a key role, Breyer closes his opinion with lessons from that history and with anguished concern for the Court as an institution. Describing the Justices' role in the 1876 election, but perhaps also expressing his own anxiety about how to understand the majority's actions in *Bush v. Gore*, Breyer observes that "[m]any years later, Professor Bickel concluded that [Justice] Bradley was honest and impartial."<sup>58</sup> But the role of Justice Bradley and other Justices in the 1876 election "did not

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denial of the writ of certiorari), in which Breyer wanted to consider the establishment of an evidentiary privilege to limit testimony by Secret Service agents protecting the President. Each opinion is marked by a characteristic focus on the practical consequences for the constitutional interests at stake.

55. 531 U.S. at 144 (Breyer, J., dissenting).

56. *Id.*

57. *Id.* at 155.

58. *Id.* at 156.

lend that process legitimacy. Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.<sup>59</sup> Turning explicitly to *Bush v. Gore*, he wrote that one reason for judicial self-restraint is that the “sheer momentousness” of this kind of case “tends to unbalance judicial judgment.”<sup>60</sup> “And, above all, in this highly politicized matter, the appearance of a split decision runs the risk of undermining the public’s confidence in the Court itself. That confidence is a public treasure. It has been built slowly over many years, some of which were marked by a Civil War and the tragedy of segregation.”<sup>61</sup> Here, Breyer seems to be reminding us of *Brown v. Board of Education*, which he has invoked on many occasions as the paradigmatic case of how the Court’s reserve of legitimacy allowed it to bring transformative benefits to the justice of our country. Breyer adds: “[That public confidence] is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.”<sup>62</sup>

None of the carefully polished prose about democratic participation and judicial modesty in *Active Liberty* has more power or resonance than Breyer’s dissent in *Bush v. Gore*, hastily crafted in the midst of battle, propelled by the particularity of litigation, and informed by the history it remembered and recognized was being made.

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I have focused thus far on *Active Liberty*’s substantive theme about the Constitution—the theme of democratic participation. But the book also develops important methodological themes about how to approach the task of legal interpretation. Judges, Breyer argues, should consider the purposes of the legal provision in question and the practical consequences of various possible interpretations, and not look only to the language of the law, the original intent of its adopters, or precedent. In addition, Breyer argues, particularly in close cases, judges should avoid wooden doctrinal formulas and rigid rules, because they frequently need to balance a variety of factors, make pragmatic judgments, and see matters of degree as dispositive. Approaching legal interpretation in this way, Breyer says, will not only determine legal meaning most accurately

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59. *Id.* at 157.

60. *Id.* (quoting ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 184 (1962)).

61. *Id.* at 157.

62. *Id.* at 157-58.

but also promote democratic values more fully and pragmatically. Breyer's methodological arguments present an important intellectual challenge to the interpretive method defended with intellectual force by Breyer's colleague, Justice Antonin Scalia.<sup>63</sup>

The most significant criticism of Breyer's methodological approach, even by those who praise the book, is that it leads to judicial subjectivity and legal indeterminacy.<sup>64</sup> Breyer anticipates the criticism in a full section of his book titled, with characteristic directness, "A Serious Objection." Although Breyer does not put it this way, much of the criticism reflects an exaggerated view that leeway can be eliminated from Supreme Court decisions. The Supreme Court, however, is frequently interpreting general provisions of the Constitution or imprecise provisions in federal statutes. A Justice has available a wide range of tools for interpreting these provisions, drawing upon a variety of sources (text, precedent, legislative history, and so forth). Inescapably, there is leeway for choice—choice in method of interpretation, and choice in the meaning given to a provision—choices that will inevitably be shaped in part by a judge's experience and fundamental beliefs and choices that will require the judge to make reasonable judgments and not just engage in logical deduction. This is especially so with cases decided by the Supreme Court, which are the typically borderline and difficult cases that have no clear answers. One of Breyer's contributions is that he acknowledges these inescapable truths and is explicit about the basis for his own choices.

Breyer's basic answer to the concerns about subjectivity is to argue that (1) alternative approaches have subjective elements as well; (2) his approach has more constraints than critics will acknowledge; and (3) even if there is somewhat more leeway for judicial choice in his method, there are more than compensating benefits. Breyer is especially strong in summarizing the various indeterminacies and subjectivities of originalism. Concerning constraints in his own method, Breyer emphasizes that examining purposes and consequences does not displace the important—and importantly constraining—role that text, history, and precedent also should play.

Two of Breyer's other arguments about constraints warrant special emphasis since they tend to be ignored or downplayed by his critics. The first is Breyer's argument that his method brings to the surface factors that are often in play but undisclosed in other methods, and that the transparency of his method is itself an important constraint. "There is no secret. There is no

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63. See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).

64. See, e.g., Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 *YALE L.J.* 1719, 1732-36 (2006).

hidden agenda. What you see is what you get,” Breyer has stated.<sup>65</sup> His opinions often rest upon many diverse factors, but their relevance is explained—and when there is a pivot point of difficulty or judgment, Breyer will tell you. Transparency is a check on the judge, both because it disciplines the judge’s own thought and because the judge is opening himself to disciplining criticism from others. Breyer also argues that his method requires the judge to act with a sense of humility and caution—to defer to other institutions often, and, when intervening, to take small bites in recognition of the complexity of both the method and the issues. This is a point at which Breyer’s substantive theme of democratic participation and his methodological themes come together, because they both counsel the judge to defer frequently to other decisionmakers.

Cynics may be dismissive of invocations of humility by those with power, but humility and caution are particularly appropriate to demand of judges in a democracy, and Breyer’s record supports that he practices what he preaches. In the study mentioned earlier, Breyer was the most deferential to Congress of any of the Justices on the Court. (The criticisms of Breyer’s book by Robert Bork and George Will, that it is a license for judicial activism or the announcement of an ambitious liberal program, simply ignore what Breyer says and the clear evidence of his cautiousness and deference to other institutions.<sup>66</sup>) Breyer’s opinions often rest upon the combination of so many factors that they leave to the future how he would decide closely related cases, itself an expression of a constraining humility and caution.

Of course, purposes are not always easily characterized, and consequences not always easy to predict. The question is whether an interpretive effort—such as originalism—that deems purposes and consequences off limits produces better law than interpretation that gives attention to these factors and is accompanied by a self-conscious effort to minimize (eliminate would be impossible) the imposition of the judge’s own personal value choices. Breyer’s ultimate argument is that even if his method may sometimes provide judges more room for judgment than a strict originalist or textualist approach, there are more than compensating benefits—a law that better carries out the purposes of the Constitution and of statutes, and that better serves the country. Here, of course, Breyer’s method merges with his understandings of substantive constitutional meaning. For example, to say that any restriction on speech in a negative liberty sense triggers strictest scrutiny might be more determinate than Breyer’s approach, but for Breyer it would be wrong. Rigid

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65. Breyer, *supra* note 13, at 17.

66. Robert H. Bork, *Enforcing a “Mood,”* NEW CRITERION, Feb. 2006, at 63; George F. Will, *Mr. Breyer’s ‘Modesty,’* NEWSWEEK, Sept. 26, 2005, at 72.

doctrinal rules might reduce a judge's leeway for judgment, but Breyer believes that the right constitutional meaning is often found in a context-specific balancing of multiple factors, judgments of "proportionality,"<sup>67</sup> and matters of "degree."<sup>68</sup>

A further question, which Breyer does not really address, is whether his method can work well in the hands of the ordinary judge without Breyer's social understanding and good sense. It takes a true virtuoso to play Beethoven's late piano sonatas—and the ordinary pianist would be advised to play simpler though inferior music. In the hands of others, perhaps the results would be less pleasing. This is a common critique by those who favor legal rules over standards,<sup>69</sup> and it is certainly a fair question to ask about Breyer's approach.

As both Richard Posner and Cass Sunstein note in this issue,<sup>70</sup> Breyer's policy orientation does a considerable amount of the work in the decisions he reaches—his commitment to democratic participation and his methodology do not by themselves produce his results. Other judges might conceivably invoke his themes and use his method and reach results that I, for one, would cheer less, because they draw different implications from a commitment to democratic participation, identify purposes of legal provisions that are less congruent with my understanding, and assess likely consequences in less plausible and less insightful ways. But Breyer's method requires transparency at the points at which judgment or policy comes into play, and transparency not only constrains but also invites candid dialogue. Breyer's method also insists upon a genuine attitude of humility and deference, and that prevents excessive judicial intrusion in democratic processes. If you believe, as Breyer believes, that leeway and some measure of policymaking are inescapable parts of judicial decisions in the distinctively difficult, borderline, and contested issues that reach the Supreme Court, the comparative advantages of Breyer's approach become clearer. It may not eliminate debates in particular cases, but it

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67. BREYER, *supra* note 1, at 49. For a brief discussion of Breyer's reliance on the concept of proportionality, see Gewirtz, *supra* note 33, at 195-98.

68. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting) ("The majority believes [my] conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. And in this case the failings of degree are so serious that they amount to failings of constitutional kind." (citations omitted)).

69. See Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

70. Richard A. Posner, *Justice Breyer Throws Down the Gauntlet*, 115 YALE L.J. 1699 (2006); Sunstein, *supra* note 64.

puts those debates on a more open terrain. And it leaves great room for debate to be had, and choices made, in more democratic institutions.

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I noted at the outset that *Active Liberty* should be seen as a work of induction, in which Breyer discerned a pattern and themes in his earlier judicial opinions. Perhaps not surprisingly, writing this book (and its precursors, the 2001 Madison Lecture and the 2004 Tanner Lectures) seems to be having an effect on Breyer's continuing judicial work.

I have already noted the apparent effect his democratic participation theme seems to have had on his approach to the 2003 campaign finance cases and affirmative action cases (in which he did not write major opinions). But we can also see the democratic participation theme playing out in less prominent cases in which Breyer has written opinions. In *Board of Education v. Earls*,<sup>71</sup> for example, Breyer split off from his liberal colleagues and concurred in a judgment upholding a school district's policy of conducting drug testing of students participating in competitive extracurricular activities. At a pivotal point in his concurrence he notes:

When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community the opportunity to be able to participate in developing the drug policy. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process . . . revealed little, if any, objection to the proposed testing program.<sup>72</sup>

In another case, *Ring v. Arizona*, Breyer actually reversed his conclusion in an earlier case, and concluded that "the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death."<sup>73</sup> His conclusion rests upon his view that, given the extensive debates about the appropriateness of the death penalty, jury sentencing "will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted."<sup>74</sup> Put

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71. 536 U.S. 822 (2002).

72. *Id.* at 841 (Breyer, J., concurring) (internal quotation marks and citation omitted).

73. 536 U.S. 584, 614 (2002) (Breyer, J., concurring).

74. *Id.* at 618.

another way, the jury's role will provide fuller democratic participation by the community in the death penalty decision.

We can also see a new self-conscious deployment of his methodological emphasis on looking to purposes and consequences in interpreting laws. Most striking is Breyer's application of this method—which was fully articulated in the 2004 Tanner Lectures—in the two 2005 cases involving public displays of the Ten Commandments that were decided after he delivered those lectures.<sup>75</sup> The Ten Commandments cases are especially noteworthy because Breyer ended up being the pivotal Justice in each case, providing the decisive fifth vote to allow the display in one case and the decisive fifth vote to disallow it in the other.<sup>76</sup> As the only Justice to reach different conclusions in the companion cases, he was at the center of the Court, but there alone. It cannot have been an easy place to come to rest. But there is nothing tentative in Breyer's opinions—the tone is self-confident, the voice of a judge comfortable with his method of decision and where it has led him. And the method is explicitly all about the purposes of the Establishment Clause and the consequences of one interpretation over another<sup>77</sup>—Breyer's most developed use of these concepts in any opinion he has written.

Breyer's earlier opinions, we have seen, evolved into this book. His recent opinions demonstrate that his book is now producing evolutions in his opinions, which are making more self-conscious use of ideas developed in his book.

### III. CIVIC ENGAGEMENT

One final part of the sketch is necessary: Breyer's theme concerning the citizen's active participation in public life is expressed not only in his legal ideas but also in his own activities of civic engagement. Several times in his book Breyer quotes John Adams's phrase extolling citizens' "positive passion for the public good"<sup>78</sup>—and the phrase fits Breyer himself, not just as a description of his personality but also of the way he understands his judicial role. A Supreme

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75. Stephen Breyer, *Our Democratic Constitution*, Harvard University Tanner Lectures on Human Values (Nov. 17-19, 2004), available at [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_11-17-04.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_11-17-04.html). Indeed, after the Tanner Lectures were delivered and he had written his opinion in the Ten Commandments case, Breyer added a section on those cases to the chapter on methodology in *Active Liberty*. BREYER, *supra* note 1, at 122-24.

76. *Van Orden v. Perry*, 125 S. Ct. 2854 (2005); *McCreary County v. ACLU of Kentucky*, 125 S. Ct. 2722 (2005).

77. *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring in the judgment).

78. BREYER, *supra* note 1, at 3, 135.

Court Justice can help to educate society. A Supreme Court Justice needs to understand society.

He believes that one of his roles is to educate and engage the general public about the Supreme Court and about our government institutions. His opinions are remarkably jargon-free, and, for all of their analytic brilliance, they are usually written as if they are to be read by ordinary citizens. His opinions have no footnotes (they are full of citations, of course, but these are embedded in the text), which I take to be a symbolic assertion that his opinions are arguments to the public, not a scholar's writings. He is one of the Court's most active (and wittiest) participants at oral argument; and because oral arguments often receive as much press coverage as the Court's actual opinions, this in practice, if not intent, provides another channel for him to educate the public. He sees great value in amicus briefs filed with the Court since they inform him about the real world of things and the potential consequences of legal rulings.<sup>79</sup> But he also remains involved with society directly.

One reason that *Active Liberty* is an important book is that it aspires to reach a wider audience of readers than legal scholars, other judges, and lawyers.<sup>80</sup> The book seeks to contribute to the public's understanding of not only the Supreme Court, but also, and perhaps above all, the public's own role in our democratic system. Justice Breyer has done a remarkable number of interviews related to the publication of this book—for example, he has done television, radio, print and other interviews with George Stephanopoulos (ABC News), Larry King (CNN), Jim Lehrer (PBS), Charlie Rose (PBS), Linda Greenhouse (*New York Times*), Jeffrey Toobin (*New Yorker*), Nina Totenberg (NPR), and Stuart Taylor (*National Journal*), among others. While taking pains to explain how the Supreme Court works, these interviews all emphasize the public's own responsibilities to participate in our political life, and are acts of public encouragement.

Even before the book appeared, Breyer was willing to speak to general audiences, to university entities, to bar associations and other nonprofit organizations, and to participate in conferences of all sorts.<sup>81</sup> Some of his colleagues lead quite insular lives as Justices, whether out of a sense of self-protection or propriety, but Breyer has resisted that. He participates in

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79. *Id.* at 41-42.

80. Breyer has recounted that the origin of this book was a meeting at the Carnegie Foundation where he, Justice O'Connor and Justice Kennedy were discussing how to teach high school students about the Constitution. See Breyer, *supra* note 13, at 7, 8.

81. A partial listing of Breyer's speeches and public appearances is provided on the Supreme Court's website at <http://www.supremecourtus.gov/publicinfo/speeches/speeches.html> (last visited Mar. 22, 2006).

Washington, D.C.'s social life, and he spends considerable time in his longtime home of Cambridge, Massachusetts, as a member of that community. (Indeed, the book jacket's description of Breyer has only two sentences: the first says that he is an associate justice of the Supreme Court, and the second says that "He is a resident of Cambridge, Massachusetts, and Washington, D.C."—in that order.)

Like most of his colleagues, at the Court he often receives delegations from foreign countries, most typically judges from other countries' courts. In turn, like other of his colleagues, he also regularly accepts invitations to speak abroad about the American legal system—sometimes under the auspices of the U.S. Department of State. In this respect, he is essentially a diplomat. The American legal system and our commitment to the rule of law is widely admired around the world—it is part of our "soft power" as a country. A Supreme Court Justice speaking to a foreign audience about our country and its legal system brings particular attention to them, improves understanding of our system, and contributes to America's standing in these countries.<sup>82</sup> In the course of these visits and exchanges, Justice Breyer himself learns about the work of foreign courts. This, along with the increasing practice of lawyers in cases before the Supreme Court bringing foreign materials to the Court's attention, has made Justice Breyer a leading proponent of the idea that it is sometimes valuable for our courts to consider the experiences of other countries in the course of making decisions—not because those foreign decisions in any way bind us or shape the meaning of U.S. legal texts, but because they may provide useful insights and even empirical experience with particular kinds of issues.<sup>83</sup>

Breyer also believes that a Supreme Court Justice is part of the American government system, not apart from it. This understanding of his role is expressed in numerous and, at times, unusual ways. For example, Breyer is single-handedly carrying forward the old tradition that members of the Supreme Court attend the State of the Union address. The rest of his colleagues no longer attend. (This year was an exception, apparently because the State of the Union address took place the same day that Justice Samuel Alito was sworn into office.) The attendance of Justices at the State of the Union address, however traditional, certainly produces some awkward moments, since the President's remarks are often highly political and

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82. For example, Justice Breyer also regularly attends the annual Global Constitutionalism Seminar at Yale Law School, which brings together justices from supreme courts and constitutional courts around the world with the Yale faculty to discuss issues of common interest.

83. Stephen Breyer, Keynote Address Before the 97th Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265 (2003).

nowadays members of Congress frequently either stand to cheer or put on sullen expressions for the TV cameras; an attending Justice typically sits benignly, neither cheering nor disapproving. But Breyer's persistence in attending reflects, I think, not only his sense that members of the Court should participate in this symbolic event. It also reflects one aspect of Breyer's characteristic optimism: Yes, we have separate branches of government and they each must check the other; but we are in the end one Union with a set of common purposes.

Breyer believes this. His public interviews and speeches are filled with optimism.<sup>84</sup> He emphasizes again and again the large area of common ground within the United States, in understandings about the Constitution, and even concerning cases that come to the Supreme Court. His optimism is expressed not simply in overt expressions of faith in American institutions, but in his basic problem-solving style. He believes that common ground can be found. And when a problem can't be solved—in the sense that common ground for a sensible solution can't be found—he emphasizes that the question at issue is a close one, that each side has something to be said for it. Many others have contrasted Justice Breyer and Justice Scalia in terms of their interpretative methods and judicial philosophies. But there is also a marked contrast in their temperaments, including their judicial temperament: One is a witty provocateur, the other is a cheerful problem solver. They share a zest for expressing their different temperaments, but one emphasizes differences and enjoys the posture of adversary, the other emphasizes commonalities and enjoys the role of conciliator.

Breyer's optimism, especially about American institutions, explains why *Bush v. Gore* was such a significant event for him—it was a major challenge to his faith in the essential wisdom of our institutions and the nonpartisanship and professionalism of judging. But, significantly, in his limited public comments on the case since it was decided he has said only two things: First, he thinks he was right; and, second, the country accepted the Court's decision, and this is a sign of how strong our institutions are and how strong the public's faith in our institutions is.<sup>85</sup> One senses that he has bracketed *Bush v. Gore* in his understanding of both the Supreme Court and the country. It was a terrible mistake, but we have moved on—and we can move on without drawing harsh lessons that Supreme Court decisionmaking is inherently or pervasively partisan or corrupt. It was a terrible mistake, but our country will survive it—and Breyer's faith has survived it.

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84. See, e.g., Breyer, *supra* note 13, at 39.

85. *Id.* at 38-39.

Of course, one consequence of *Bush v. Gore* is that it indeed did change Breyer's life. President Bush is reshaping the Supreme Court with his talented and strongly conservative appointments, and this has made it more likely that Breyer will remain in the minority bloc for the foreseeable future, perhaps for the remainder of his career. It is difficult to see Breyer playing a larger role as a consensus builder now that Justice O'Connor has left the Court. There is the chance, of course, that given the lawyerly professionalism of the two new appointees, John Roberts and Samuel Alito—and the fact that they, like Breyer, enjoy the detailed analysis of cases and seem often to decide cases narrowly—Breyer will find significant areas of common ground with them, even in borderline and particularly important cases. In any event, although usually characterized as part of the conservative bloc, Justice Kennedy will retain his comparatively centrist and at times unpredictable place on the Court, so Breyer still might play a role as a shaper of majority positions if common ground is found with Justice Kennedy.

In that role, it is important to remember that Breyer himself is at times an unpredictable liberal. To mention just a few examples, he has split with Justices Stevens, Souter, and Ginsburg on a variety of important cases, including some free speech cases,<sup>86</sup> one of the Ten Commandments cases,<sup>87</sup> the affirmative action case involving the University of Michigan's undergraduate college,<sup>88</sup> and some criminal procedure cases,<sup>89</sup> among others. There is also, of course, the chance that a Democrat will be elected President in 2008 and that the Court can be reshaped yet again before Breyer retires so that he becomes a shaper of more progressive majority positions. But at the moment all of this is most uncertain.

Thus, Breyer is a judge of extraordinary quality, but has no clear majority on the Court to follow his lead. If this does not change, what will Breyer's path be? Greatness as a Justice, as the examples of John Marshall Harlan, Louis Brandeis, and Robert Jackson demonstrate, does not require a commanding role as leader of majorities. It can be based on a powerful judicial identity; a set of ideas; a method and an integrity that gain deeper recognition and influence over time; and even influential roles played outside the Court's daily work. We

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86. *Ashcroft v. ACLU* 542 U.S. 656, 676-91 (2004) (Breyer, J., dissenting); *United States v. Am. Library Ass'n*, 539 U.S. 194, 215-20 (2003) (Breyer, J., concurring); *Bartnicki v. Vopper*, 532 U.S. 514, 535-41 (2001) (Breyer, J., concurring); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 835-47 (2000) (Breyer, J., dissenting).

87. *Van Orden v. Perry*, 125 S. Ct. 2854, 2868-73 (2005) (Breyer, J., concurring).

88. *Gratz v. Bollinger*, 539 U.S. 244, 281-82 (2003) (Breyer, J., concurring in the judgment).

89. *E.g.*, *Minnesota v. Carter*, 525 U.S. 83 (1998); *see also* *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

can predict that, for Justice Breyer, the theme and method set forth in *Active Liberty* will give his ideas an influence that individual judicial opinions almost never can have. He will continue to be a powerful individual voice on the Court with a distinctive approach, method, and set of ideas—implementing the pragmatic strain in American thought in a way rarely seen within the American judiciary. Over time, one can imagine that Justice Breyer will find other specific areas of law that he can rethink in detail with a new perspective, as he has already done with his innovative approach to the First Amendment. One can also expect him to continue his own activities of civil engagement outside the courthouse, filling crucial gaps in the American public's understanding of our public institutions, and acting as an unusually effective public diplomat for American legal institutions and for the United States abroad.

He may even find the time for other important books like *Active Liberty*. We are lucky to have this one.

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