BOOK NOTES

CONVERSATION, REPRESENTATION, AND ALLOCATION: JUSTICE BREYER'S ACTIVE LIBERTY

ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION. By Stephen Breyer.* New York: Alfred A. Knopf, 2005. Pp. 161. $21.00.

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INTRODUCTION

There seems to be a public perception that the members of the current, often divided, Supreme Court vote for partisan rather than principled reasons. As recent confirmation hearings have become more heated and polarized, this belief has only crystallized.[1] In *Active Liberty: Interpreting Our Democratic Constitution*, Justice Stephen Breyer challenges this perception through a thoughtful discussion of the constitutional commitments that inform his decisions. This book does not provide a comprehensive theory of constitutional and statutory interpretation;[2] rather, *Active Liberty* is important because in it, Justice Breyer gives the American public insight into the constitutional themes and values that he draws on when deciding cases. In particular, Justice Breyer focuses on one constitutional value that he believes has been underappreciated: a commitment to democratic participation and self-government which he calls "active liberty." Although Justice Breyer recognizes that other constitutional values are important, he believes that active liberty should play a more prominent role in constitutional adjudication.

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[1] The Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), did little to help the public's perception that the Court is politically motivated in its decisionmaking.

[2] Justice Breyer emphasizes this point: "To illustrate a theme is not to present a general theory of constitutional interpretation" (p. 7). In comparison, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997), which provides a more complete theory of statutory and constitutional interpretation.

Some commentators have viewed *Active Liberty* primarily as a response to Justice Scalia's theories of interpretation.[3] While Justice Breyer does spend some pages criticizing textualism,[4] and while he offers thoughts on how a commitment to active liberty might inform statutory interpretation (pp. 85–101), the primary purpose of the book is not to defend a theory of constitutional interpretation. The book is, in many ways, more polemic: Justice Breyer does not profess neutrality on substantive outcomes—he believes that active liberty has been underappreciated and that courts should interpret the Constitution to promote that value. *Active Liberty* does not provide an interpretive theory; rather, it provides an *interpretation* of the Constitution. Perhaps the book is better understood as a response to the Rehnquist Court's choice of constitutional emphasis[5] than as a response to Justice Scalia's theories of interpretation.

In this review, we explore Justice Breyer's notion of active liberty and situate it in the larger academic literature. We argue that Justice Breyer's active liberty envisions an active role for courts in policing the political process, in facilitating "'conversational' lawmaking" (p. 71), and in allocating decisionmaking authority to the appropriate

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[3] *See, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2388 (2006) (book review) (Justice Breyer "offers" active liberty "as a counterpoint to the conservatives' textualism-originalism . . . ."); James E. Ryan, *Does It Take a Theory?: Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1625 (2006) (arguing that Justice Breyer and Cass Sunstein each fail in their attempt to provide "a compelling and popular alternative theory . . . [that is] a serious competitor to originalism"); Jess Bravin, *Justice Breyer Takes "Originalists" to Task in New Book*, WALL ST. J., Aug. 23, 2005, at B1 (discussing Justice Breyer's book primarily in relation to Justice Scalia's); Cass R. Sunstein, *The Philosopher-Justice*, NEW REPUBLIC, Sept. 19, 2005, at 29, 29 ("At last there has appeared a direct and substantial challenge, within the Court, to the constitutional thought of Justice Antonin Scalia . . . ."). Other commentators do not focus as heavily on the Scalia-Breyer dynamic. *See* Stephen F. Rohde, *Active Liberty: Interpreting Our Democratic Constitution*, 28 L.A. LAW. 36 (2005) (book review).

[4] Justice Breyer devotes the final section, entitled "A Serious Objection" (pp. 115–32), to a response to textualism.

[5] Among other things, the Rehnquist Court focused on the value of federalism in a number of key decisions. *See, e.g.*, United States v. Morrison, 529 U.S. 598, 602 (2000) (striking down portion of Violence Against Women Act as beyond Congress's power because it encroached on traditionally state-regulated area); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down Gun Free School Zones Act as beyond Congress's power). *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) (noting importance of Rehnquist Court's federalism rooted in its decisions); Sandra Day O'Connor, *Testing Government Action: The Promise of Federalism*, *in* PUBLIC VALUES IN CONSTITUTIONAL LAW 35 (Stephen E. Gottlieb ed., 1993) (arguing for role of Court in protecting states' rights); Symposium, *The Rehnquist Court*, 99 Nw. U. L. REV. 1 (2004) (analyzing Rehnquist Court's jurisprudence and noting that "[f]ederalism is the signature issue of the Rehnquist Court"). At different times, the Court has emphasized different values in its interpretations of the Constitution; Justice Breyer makes the case that the Court should focus more on active liberty.

political actors. Justice Breyer's active liberty thus seems to incorporate theories of representation reinforcement,[6] deliberative democracy,[7] and civic republicanism,[8] including a role—not fully developed in the book—for experts in democratic decisionmaking.[9] Our goal is to understand Justice Breyer's theories, not to provide a normative assessment; we leave it to other commentators to argue that his views of the Constitution are either correct or misguided.[10]

In Part I we summarize Justice Breyer's argument about the role of active liberty. In Part II we discuss how active liberty counsels for judicial restraint in order to facilitate conversational lawmaking. In Part III we discuss how active liberty encompasses John Hart Ely's concept of representation reinforcement.[11] In Part IV we argue that Justice Breyer's active liberty goes beyond representation reinforcement and includes a role for courts in allocating decisionmaking authority to actors based on their areas of relative expertise.

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[6] *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (explaining theory of representation-reinforcing role for courts).

[7] *Cf.* Peter Berkowitz, *Democratizing the Constitution*, POL'Y REV., Dec. 2005–Jan. 2006, at 87, 91 (book review) (identifying Justice Breyer's "intellectual allies" among federal judges, legal academics, and legal political theorists as including Judge Richard Posner, John Hart Ely, John Rawls, Ronald Dworkin, and "proponents of deliberative democracy").

[8] In essence, civic republicanism and deliberative democracy theory place great emphasis on the capacity of "dialogue and discussion among the citizenry" to allow them to "escape private interests and engage in pursuit of the public good." Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985). Scholars who take this position argue that many of the Constitution's structures are designed to facilitate and encourage this deliberative process. Dialogic functions have been used to justify a wide variety of the Constitution's choices, even at the level of interbranch interaction. *See generally* Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990) (discussing open-textured nature of Congress's power to strip jurisdiction from federal courts).

[9] Justice Breyer has written elsewhere about the role of expertise in governmental policymaking. *See generally* STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (proposing elite cadre of super-expert civil servants that would play coordinating role between federal agencies).

[10] Commentators have taken a wide range of positions on the merits of Justice Breyer's argument, ranging from high praise, *see* Sunstein, *supra* note 3, at 29 (describing theories in *Active Liberty* as "an approach that deserves a place of honor in national debates"), to skepticism, *see* Rohde, *supra* note 3, at 36 ("To put it bluntly, interpreting the Constitution to advance its democratic objectives may sound laudable, but it could do injury to enforcing the Constitution as a guarantor of individual rights."), to active criticism, *see* Berkowitz, *supra* note 7, at 92 ("Without a persuasive basis in the text, history, and structure of the Constitution, [Justice Breyer's] according of privileged constitutional status to active liberty is judicial willfulness masquerading as judicial deference."); *see also supra* note 3.

[11] *See* ELY, *supra* note 6.

I
DEFINING ACTIVE LIBERTY

Justice Breyer analogizes his concept of active liberty to Benjamin Constant's idea of "'the liberty of the ancients'"—the "sharing of a nation's sovereign authority among that nation's citizens," which means "'an active and constant participation in collective power,'" including rights to publicly deliberate and vote (pp. 3–4).[12] This is contrasted with "'the liberty of the moderns,'" which is focused primarily on negative liberties—i.e., protection from state encroachment on individual rights (p. 5).[13] Justice Breyer argues that the Constitution's adoption of a basically democratic form of government is a result of the Framers' commitment to active liberty—a belief in democratically accountable decisionmaking, broad public participation, and the capacity of the public to exercise its democratic responsibility (pp. 6, 15–16)—as well as their commitment to negative liberties.

Justice Breyer makes a strongly normative claim: The current Court has "too often underemphasize[ed] or overlook[ed] the contemporary importance of active liberty" (p. 11). Accordingly, courts should go beyond their traditional role of protecting negative liberties by interpreting the Constitution with its democratic objective in mind. Focusing on active liberty will "yield *better* law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems" (p. 6) (emphasis added). Active liberty does not necessarily dictate the results of cases; instead, it is a structural value in the Constitution that, like other structural values, should be vindicated in the Court's decisions.

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[12] In this discussion, Justice Breyer quotes and cites BENJAMIN CONSTANT, THE LIBERTY OF THE ANCIENTS COMPARED WITH THAT OF THE MODERNS: SPEECH GIVEN AT THE ATHÉNÉE ROYAL IN PARIS (1819), *reprinted in* BENJAMIN CONSTANT, POLITICAL WRITINGS 309–28 (Biancamaria Fontana ed. & trans., 1988).

[13] *See supra* note 12 and accompanying text. The distinction between active liberty and negative liberty does not necessarily track the distinction between negative liberty and positive liberty, as "[n]egative liberty is the absence of obstacles, barriers or constraints," and "[p]ositive liberty is the possibility of acting—or the fact of acting—in such a way as to take control of one's life and realize one's fundamental purposes." Ian Carter, *Positive and Negative Liberty*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), http://plato.stanford.edu/archives/spr2003/entries/liberty-positive-negative/. In this book Justice Breyer is not arguing for those economic rights sometimes forwarded by proponents of positive liberty, such as the "right" to education or government protection from private actors. *Compare* Campaign for Fiscal Equity v. State, 801 N.E.2d 326, 328 (N.Y. 2003) (noting that New York State "has obligated itself constitutionally to ensure the availability of a 'sound basic education' to all its children") (internal citations omitted) *with* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191, 201 (1989) (holding that Due Process Clause of Federal Constitution does not create general right to basic governmental services).

Justice Breyer provides a set of examples to illustrate how active liberty can play a role in analyzing many important issues before the Court, including speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. In some contexts, active liberty will strongly suggest particular substantive outcomes, especially for political issues such as campaign finance (pp. 43–50). In other contexts, Justice Breyer's theory counsels for judicial modesty, leaving room for the political process to make policy decisions (pp. 50–54, addressing commercial speech; pp. 66–74, addressing privacy). Finally, Justice Breyer's view is founded on a specific conception of democracy and expertise that informs his view on statutory interpretation (pp. 85–101), agency deference (pp. 102–08), and federalism (pp. 56–65).

It is important to note that this book is not designed to provide a complete theoretical exposition of the concept of active liberty or the consequences of active liberty for judicial decisionmaking. In our attempt to more fully understand active liberty and its consequences, we look for suggestions from context and engage in a bit of speculation. We believe that, in essence, active liberty as described by Justice Breyer involves three main values: public deliberation, democratic accountability, and the effective exercise of public authority. Courts can respect these values in three ways: first, by *not* acting in certain situations, to allow room for "democratic conversation"; second, by acting affirmatively to reinforce representative institutions; and third, by allocating decisionmaking power among institutions according to their relative areas of expertise.

II

ACTIVE LIBERTY AND CONVERSATIONAL LAWMAKING

Because judges are often unelected, their central role in policymaking may seem to conflict with a commitment to democratic governance. Active liberty, then, might counsel for a strong form of judicial modesty.[14] Although Justice Breyer does not think that active liberty is merely a justification for judicial restraint, there seem to be contexts where modesty on the part of judges is an important consequence of appropriate respect for democratic decisionmaking.

Justice Breyer believes it is important that the Court not employ "an overly rigid method of interpreting the Constitution" (p. 73), and

[14] *See, e.g.*, LEARNED HAND, THE BILL OF RIGHTS (1958) (arguing from rights-skeptical point of view that Court should defer to value judgments of legislature); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that judicial review of democratically enacted law is only justified where legislatures commit clear constitutional mistake).

that it pay close attention to the effect of its holdings on "the ongoing policy-creating process" (p. 73). This is especially true where constitutional protections were initially conceptualized in a very different world. In this context, active liberty suggests that courts should tread lightly where democratically accountable political officials are making policy—especially policy of first impression. Courts should avoid interfering in this process out of respect for the democratic aim of the Constitution and the role of the political branches in facilitating a nationwide deliberation on possible policy alternatives. If the Court steps in and decides these issues on constitutional grounds, it short circuits this "'conversational' lawmaking process" (p. 71). For example, in the area of privacy (here referring to "a person's power to control what others can come to know about him or her" (p. 66)), Justice Breyer suggests that courts should engage in a form of judicial minimalism[15] in the face of rapid and uncertain technological development (pp. 66–74).

There are, of course, other justifications for judicial restraint. Modesty has been counseled based on the relative weakness of courts,[16] and courts' inability to deal with complex social problems.[17] Active liberty is yet another value which supports a relatively limited role for courts where judicial intervention would stifle public discourse before it has had a chance to fully examine issues of public concern.[18]

Active liberty, however, is not merely a theory of judicial restraint; indeed it provides "a source of judicial authority and an interpretive aid" in formulating "better law" (p. 6). As we discuss in the balance of the review, there is still an important role for judges to play in Justice Breyer's conception of democratic government.

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[15] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (setting out theory of judicial minimalism, in which Court makes limited decisions, leaving large questions open, so as not to shut down democratic deliberation process).

[16] *See* THE FEDERALIST NO. 78, at 520 (Alexander Hamilton) (Heritage Press 1945) ("The judiciary . . . . may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

[17] *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978) (discussing "polycentric" problems that are ill-suited to adjudication).

[18] *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT, at viii (1998) (discussing how courts "produce incompletely theorized agreements on particular outcomes" and "try to resolve cases without taking sides on large-scale social controversies"); SUNSTEIN, *supra* note 15.

III
ACTIVE LIBERTY AS REPRESENTATION REINFORCEMENT

John Hart Ely's argument in *Democracy and Distrust*[19] forms a backdrop for Justice Breyer's conception of active liberty. Ely was troubled by what he saw as a conflict between judicial review and a commitment to democratic norms. In order to overcome this conflict, Ely argued that courts should serve a "representation-reinforcing" role[20] by policing the political branches, first to ensure that democratic mechanisms were functioning, and second to provide substantive protection for groups that were excluded from the democratic process—most importantly "discrete and insular minorities."[21]

Although Justice Breyer's focus is not on justifying judicial review, he, like Ely, places great weight on the structural commitment to democracy present in the Constitution (p. 6). Justice Breyer and Ely both argue for an important role for the Court in structuring and facilitating the democratic process by ensuring, for example, opportunities for broad, effective public participation (pp. 15–16).[22]

Justice Breyer discusses two contexts in which active liberty should prompt courts to play a representation-reinforcing role. First, Justice Breyer argues that the First Amendment, properly understood, should be read not only as an individual right of expression, but also as a mechanism for facilitating meaningful political discourse (p. 42). His commitment to active liberty is used to explain his reasoning in cases involving campaign finance reform. Rather than simply strike down limits on campaign contributions as unconstitutional infringements on free speech, Justice Breyer asks whether Congress's restrictions will encourage or hamper political participation. He rejects simple "money is speech" or "money is not speech" logic, and instead conducts a more situational, context-specific analysis to determine

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19 ELY, *supra* note 6.

20 *Id.* at 88.

21 *See id.* at 75–77, 135–79. This is, of course, an oversimplification of Ely's much more well-developed and subtle position, but it is accurate to say that this is widely understood to be his basic argument. Ely relies, in part, on the rationale in footnote four of *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938), to argue for judicial intervention on behalf of discrete and insular minorities who are shut out of the democratic political process. Later commentators, such as Bruce Ackerman, have argued that we should be more worried about "diffuse and anonymous groups" losing out in the democratic process. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 733, 745 (1985).

22 *See* ELY, *supra* note 6, at 73–134 (arguing that Court should play active role in protecting democratic institutions by, inter alia, reducing barriers to entry and eliminating incumbent entrenchment mechanisms); *cf.* Vieth v. Jubelirer, 541 U.S. 267, 360–62 (2004) (Breyer, J., dissenting) (finding gerrymandering that leads to unjustified entrenchment of elected officials violates Constitution's commitment to "basic democratic norms").

whether the restriction advances the goals of active liberty by increasing the ability of the average citizen to participate in the electoral process (pp. 43–50).[23]

Second, Justice Breyer uses active liberty to justify upholding affirmative action in higher education. He argues that "some form of affirmative action [is] necessary to maintain a well-functioning participatory democracy" (p. 82) and to ensure that minorities are not effectively "shut out" of leadership positions in society (p. 83). This concern closely tracks Ely's defense of affirmative action on representation-reinforcement grounds.[24] However, Justice Breyer goes further, arguing that given "today's diverse civil society" (p. 83), affirmative action is needed to ensure that individuals will not "lack experience" functioning in a racially diverse environment. This goes beyond a commitment merely to guaranteeing access to the political process and moves toward ensuring that members of both the minority *and the majority* have the capacity to participate effectively in public debate and public life. Even within the context of representation reinforcement, Justice Breyer sees a role for courts not only to protect citizens' power, but also to encourage public deliberation that will better inform the exercise of that power.

The representation-reinforcement aspect of active liberty has promise for applications well beyond the contexts Justice Breyer discusses in his book. For example, the Court has been searching for a standard to adjudicate partisan gerrymandering claims for years.[25] Active liberty would inform the decision about whether and how to adjudicate these claims by focusing on both the structural commit-

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[23] Some Justices and commentators believe that campaign finance reform laws do little to increase political participation and instead serve as entrenchment measures that help protect incumbents by exacerbating the funding imbalance between incumbents and challengers. *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 249 (2003) (Scalia, J., concurring in part and dissenting in part) ("[*A*]*ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents."); Richard Briffault, *The Future of Reform: Campaign Finance After the Bipartisan Campaign Reform Act of 2002*, 34 ARIZ. ST. L.J. 1179, 1212–14 (2002) (noting that large funding gap between incumbents and challengers leads to uncompetitive races and that Bipartisan Campaign Reform Act would likely make matters worse). Whether the campaign finance laws are consistent with the goals of active liberty as defined by Justice Breyer depends on an empirical assessment of the laws' effects, but it is important to note that increasing participation and democratic accountability is recognized as a goal on both sides of this debate.

[24] *See* ELY, *supra* note 6, at 170–72.

[25] *See, e.g.*, *Vieth*, 541 U.S. 267 (plurality opinion finding partisan gerrymandering claims nonjusticiable because of lack of administrable standard, with remaining Justices each offering different standard); Davis v. Bandemer, 478 U.S. 109, 113 (1986) (finding partisan gerrymandering claims justiciable without announcing standard for evaluating vote dilution).

ment to democracy and the role of the courts in protecting that commitment. While the Court has struggled to ground much of its election law jurisprudence in specific *textual* provisions—such as the Equal Protection Clause[26]—reference to the *structural* value of active liberty may help make sense of this confused area of law. In this way, active liberty can provide a strong foundation for the Court's authority (and perhaps even responsibility) to police the political process—to ensure access, to increase responsiveness, and to counter entrenchment.[27]

IV
ACTIVE LIBERTY AS ALLOCATION

Justice Breyer's concept of active liberty is not limited to a representation-reinforcement role for the courts. In his view, judges are partially charged with the task of allocating duties and roles to different political actors according to their relative expertise in order to facilitate deliberation and the effective exercise of public authority. In this Part, we discuss three contexts where this aspect of active liberty seems to be guiding Justice Breyer's analysis.

A. Statutory Interpretation

Justice Breyer uses active liberty to defend a method of statutory interpretation that makes recourse to the idea of a "reasonable member of Congress" (p. 88). Where a statute is unclear, rather than overemphasizing the text or original context, Justice Breyer recommends that a judge look to the purposes of the statute and determine how a reasonable legislator would have answered the question currently before him, in light of those purposes (pp. 87–88).

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[26] *See, e.g.*, Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 553–54 (discussing equal protection challenges to redistricting plans); *cf.* ELY, *supra* note 6, at 30–33 (discussing general difficulties of clause-bound interpretivism and Equal Protection Clause).

[27] *Cf.* ELY, *supra* note 6, at 101–04 (explaining that representation-reinforcement approach posits role for courts in "policing the mechanisms by which the system seeks to ensure that our elected representatives will actually represent"); Issacharoff & Karlan, *supra* note 26, at 576–77 (discussing how "Justice Breyer in *Vieth* . . . tried to ground the constitutionality of gerrymandering in a broader sense of democratic accountability"). In his short opinion in *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594 (2006), Justice Breyer would have held a Texas mid-decade redistricting plan unconstitutional on the grounds that it entrenches an incumbent political party and will therefore "likely have seriously harmful electoral consequences." *Id.* at 2651–52 (Breyer, J., concurring in part and dissenting in part).

As an example, Justice Breyer points to the Foreign Sovereign Immunities Act[28] and argues that interpreting the statute based on text alone would lead to an absurd result.[29] Justice Breyer argues that the Court should interpret the statute in light of its purpose rather than giving a literal interpretation to the text (pp. 88–91).

It is noteworthy that the idea of active liberty is used to justify looking to the reasonable *legislator* rather than the reasonable *person*. Justice Breyer defends the use of this interpretive technique as being the most respectful of the Constitution's mechanism of using the legislature to "translate the public will, determined through collective deliberation, into sound public policy" (p. 101). The difference between the reasonable legislator and the reasonable person is that the former is a politically accountable "expert." A legislator both is subject to the will of the people through elections, and has special access to information (such as policy staff and expert testimony) and the benefit of a deliberative lawmaking process. Active liberty, then, is not just about vindicating the will of the people directly, but also about channeling and directing that will through the expertise of their elected officials.[30] Statutory interpretation should respect that expertise by playing close attention to legislative purposes.[31]

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[28] 28 U.S.C. §§ 1602–1611 (2000) (granting immunity from suit to corporation when "majority" of "shares or other ownership interest is owned by" foreign sovereign).

[29] On a straight textual interpretation, Justice Breyer claims that technicalities of corporate governance—specifically whether stock in a firm is owned directly by a foreign sovereign or whether the firm is a wholly owned subsidiary of a corporation owned by a foreign sovereign—will determine whether sovereign immunity will attach. Justice Breyer believes that legislators would not have chosen that outcome, and instead counsels for an interpretation of the Foreign Sovereign Immunities Act that more closely tracks the intent of the legislature to give foreign sovereigns "federal procedural protections that state court systems sometimes lack" (pp. 88–91).

[30] *Cf.* Sunstein, *supra* note 8, at 41 (articulating position, held by Madison and other Framers, that representative body was not "a necessary evil" but rather "an opportunity for achieving governance by officials devoted to a public good distinct from the struggle of private interests," where "[r]epresentatives would . . . engage in a form of collective reasoning," and "be free to engage in the process of discussion and debate from which the common good would emerge").

[31] Some might argue that the best way to respect the expertise of the legislature is for judges to adhere strictly to the text. *Cf.* Scalia, *supra* note 2, at 16–18. This is a legitimate area of disagreement, but each side accepts the fundamental point that legislatures should be allocated certain decisions based on their relative areas of expertise (and courts' lack thereof). The question arises when a legislature's decisions are unclear as applied to a specific factual matrix—whether the best way to respect the allocation of the decision to the legislature is by looking to the purposes of the statute or to the "plain meaning" of the textual provision. Justice Breyer argues that the idea of active liberty contains the answer to this question; a proposition that some have found contestable. *See* McConnell, *supra* note 3, at 2403–08.

B. Administrative Deference

Justice Breyer looks to expertise again in the context of judicial deference to administrative agencies: The various areas of expertise of legislatures and agencies drive the determination of when judicial deference to agency action is appropriate. Acknowledging that "in most instances, judges possess less relevant expertise than does the administering agency" in interpreting ambiguous provisions of its governing statute, Justice Breyer supports *Chevron* deference[32] as a rule of thumb, but not as an absolute (p. 106). For Justice Breyer, the legislator is the expert in making "values"-type decisions, and he would not have courts defer to agencies for those types of questions. Deference is not appropriate when strict adherence to *Chevron* would allow agencies to make decisions on matters that are of "national importance" or go to the fundamental purposes of the statute (p. 107).

Justice Breyer justifies this allocation of institutional authority by appealing to what the reasonable legislator would have wanted. He believes that recourse to the reasonable legislator in the deference context "makes *democratic* sense" because it "helps the statute work better" and creates clear lines of responsibility by which citizens can hold officials accountable (p. 108). Note, however, that one can reject Justice Breyer's theory of statutory interpretation, and still be compelled by his arguments regarding agency deference. If active liberty itself suggests the allocation of authority between various decisionmakers based on relative expertise, then there is no need to rely on the reasonable legislator—administrative deference might be appropriate regardless of one's theory of interpretation. There is a value to expertise: Administrators become more familiar with the day-to-day operations and technical details of their areas, so it is appropriate for the public to defer to expert opinion on technical matters. In fact, without experts, the effective exercise of public authority would be hampered significantly and the democratic purpose of the constitutional structure would be thwarted. Active liberty itself, then, is what determines whether *Chevron* deference is appropriate.

C. Active Liberty and Federalism

Current and former members of the Court, most recently Chief Justice Rehnquist and Justice O'Connor, have argued that the courts

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[32] Chevron v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) (holding that courts should defer to reasonable agency interpretations of ambiguous statutes). *See generally* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 284–415 (5th ed. 2002) (discussing *Chevron* doctrine).

have an important role to play in policing the line between federal and state power.[33] Justice Breyer argues that active liberty should play an important role in understanding the appropriate state-federal relationship. Specifically, he argues that the relative expertise of state and federal decisionmakers should help determine the role they play in the democratic conversation.

Justice Breyer assumes that decisionmaking in a local forum will encourage more meaningful participation and facilitate public access to the political process; however, he finds several problems with placing too many decisions at the local level (pp. 57–58). For example, local decisionmaking could spark a "race-to-the-bottom rationale," where states relax regulations in a competition to attract investment.[34] In addition, placing authority at the local level means that federal officials cannot bring their greater technical expertise to bear on policy problems (p. 58). Justice Breyer argues that a commitment to active liberty counsels in favor of "cooperative federalism," which relies on the federal government for technical expertise and for questions of national "common interest" while "more locally oriented questions of fact or value" are decided at the local level (pp. 58–59).

If local decisionmaking best stimulates political participation and access, a limited view of active liberty (i.e., representation reinforcement and nothing more) might seem to conflict with the value of expert decisionmaking.[35] However, Justice Breyer's concept of active liberty is more complex and encompasses a theory of the appropriate role for experts in a democratic society. On this account, active liberty involves more than a simple commitment to majority rule; instead it specifies the appropriate roles that different political actors should play in the exercise of political power in a democratic nation.

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[33] *See supra* note 5.

[34] Dean Revesz has argued that race-to-the-bottom concerns cannot provide a justification for federal regulation in many cases because interstate competition for investment does not necessarily lead to suboptimal levels of regulation. *See* Richard L. Revesz, *The Race to the Bottom and Federal Environmental Regulation: A Response to Critics*, 82 MINN. L. REV. 535 (1997). There are of course other justifications for federal intervention, such as interstate externalities. *See id.* at 540.

[35] At least some Framers had a strong sense that their constitutional order would include an important role for certain types of experts, particularly legislators. James Madison illustrates this point in THE FEDERALIST NO. 10:

> The effect of [the delegation of the government . . . to a small number of citizens elected by the rest] is . . . to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.

THE FEDERALIST NO. 10, at 60 (James Madison) (Heritage Press 1945).

CONCLUSION

Although this book emphasizes active liberty, Justice Breyer fully recognizes that there are other important commitments present in the Constitution.[36] For Justice Breyer, the role of courts is to vindicate the Constitution's substantive commitments, which include, but are not limited to, active liberty. Justice Breyer uses this book to illustrate the importance of a structural theme that he believes has been undervalued.

Because Justice Breyer's conception of active liberty is applicable in contexts where participatory rights are not in question, there must be more to active liberty than facilitating participation. Ely's notion of representation reinforcement only encompasses one aspect of active liberty—democratic accountability. Facilitating public deliberation is another significant aspect. A third aspect, to which Justice Breyer alludes but which he does not fully explain, seems to describe the appropriate role of experts in the constitutional order. Judges, legislators, administrators, and citizens all have their relative spheres of expertise; active liberty seeks to allocate decisionmaking responsibility among these various actors to facilitate the exercise of public authority in order to produce a fuller and more effective form of political participation. While this complex concept is not fully articulated in his short book, Justice Breyer has nevertheless provided a compelling argument on behalf of this essential constitutional value. In so doing, he has given us useful insight into the commitments and reasoning that have shaped his decisions.

This book is an important contribution to the broad dialogue between the Court and the public about the meaning of the Constitution. At a time of flux within the Court, those that care about the values underpinning constitutional decisionmaking will appreciate insight into the commitments and reasoning of a Justice who has been and will no doubt continue to be a key voice on the Court for many years.

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[36] One example is the substantive due process privacy right, which Justice Breyer has supported. For an illustration, see Justice Breyer's majority opinion in Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000), a case that struck down a state statute outlawing "partial birth" abortions.