

Review Essay

USING ALL AVAILABLE INFORMATION

Stephen G. Breyer, *Active Liberty: Interpreting our Democratic Constitution*
(Alfred A. Knopf, Pub., 2005)

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I. INTRODUCTION

It is questionable whether a less-fortunate title than *Active Liberty: Interpreting Our Democratic Constitution* could have been applied to Justice Breyer’s rejoinder to Justice Scalia’s 1997 volume on his interpretive philosophy.¹ Employed as it is in the context of the judicial process, “active liberty” calls to mind the ill-defined concept of “judicial activism.” Lambasting the federal judiciary with

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1. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Although it is certainly a free-standing tome, Justice Breyer concludes *Active Liberty* with a chapter titled “A Serious Objection,” in which he ably denudes textualist philosophy and discusses why his own philosophy should be thought superior. STEPHEN BREYER, *ACTIVE LIBERTY* 115-32 (2005). Justice Breyer has emerged in recent years as the public spokesman for the Court’s centrist faction, while Justice Scalia has remained the lion of the right. In one example, the two colleagues recently debated each other at American University on the use of foreign authority in judicial opinions. Antonin Scalia, Assoc. Justice, U.S. Supreme Court & Stephen Breyer, Assoc. Justice, U.S. Supreme Court, U.S. Ass’n of Constitutional Law Discussion: Constitutional Relevance of Foreign Law Court Decisions (Jan. 13, 2005) (transcript *available at* <http://www.freerepublic.com/focus/f-news/1352357/posts>) [hereinafter *Relevance of Foreign Law*].

cries of judicial activism has come into vogue in recent years.² Justice Breyer likely would respond that in taking his title to task, the

2. See David Limbaugh, *Benchmarks of Activism*, WASH. TIMES, Sept. 19, 2005, at A16, available at <http://www.washtimes.com/commentary/20050918-102750-2582r.htm> (noting that the new litigation by Michael Newdow “highlights the judicial activism of the 9th Circuit Court of Appeals and the U.S. Supreme Court in their Establishment Clause jurisprudence”).

Of course, the phrase is quite meaningless. It neither describes an interpretive philosophy nor is more readily applicable to opinions written by Justice Breyer than to opinions written by Justice Scalia. One writer argues persuasively that the overuse of the phrase “judicial activism” in political discourse has rendered the term effectively meaningless—such that it now means little more than disagreement with a decision. Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1141-82 (2002); cf. Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 2d 291, 299 (Apr. 29, 2005) (arguing that conservative jurists are as deserving of the label “activist” as are liberal jurists), available at <http://www.greenbag.org/Tribe.pdf>.

Those who view “activism” as manifesting a lack of respect for co-equal branches of government should prefer Justice Breyer’s approach to that of Justice Scalia. Justice Breyer is much less likely than his colleague to vote to strike down an enactment as unconstitutional. See Editorial, *Shaping the Court in Their Image*, THE OREGONIAN, Aug. 16, 2005, available at <http://www.oregonlive.com/editorials> (“Over the past decade, the two Supreme Court justices most likely to vote to overturn congressional laws are the two most conservative: Antonin Scalia and Clarence Thomas.”); Jeffrey Toobin, *Breyer’s Big Idea: The Justice’s Vision for a Progressive Revival on the Supreme Court*, THE NEW YORKER, Oct. 31, 2005, at 36-38, available at http://www.newyorker.com/fact/content/articles/051031fa_fact (“[B]etween 1994 and 2005 . . . , Breyer voted to strike down laws twenty-eight percent of the time—less often than any other Justice. Clarence Thomas voted to overrule Congress sixty-six percent of the time, more than any other Justice.”).

One criticism of defining “activism” in the fashion it is defined in this footnote is that “conservative” activism tends to invalidate legislation based on a narrow—what some might call “self-disciplined”—construction of the Constitution’s Commerce Clause. See *infra* note 20 and accompanying text (discussing Justice Alito’s view on judicial self-discipline). The same critics say “liberal” activism involves overturning legislation because of individual rights read into the Constitution that do not exist. One rejoinder to this criticism, that narrow interpretations are no less or more “activist” than are broad interpretations, is discussed in note 20, *infra*. Another rejoinder is that statistical analysis of votes to overturn automatically will have the effect of smoothing over anecdotal instances of the reasons for votes to overturn. A third is that no agreement exists as to “legitimate” as opposed to “illegitimate” bases for overturning legislation. For example, the nearly uncited Ninth Amendment to the U.S. Constitution has been argued to provide textual support for expansive rights-based interpretations of the U.S. Constitution. See generally RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2005).

reviewer missed the point. “Active liberty,” to Justice Breyer, has little to do with proactive judicial decision-making. It is defined as the power and commensurate responsibility of citizens to engage in self-government, and, for Justice Breyer’s purposes, it defines the role of judges in interpreting texts—constitutional or statutory—as seeking to preserve and protect that democratic ideal, through a process of understanding texts’ essential purposes and interpreting them to accomplish those purposes.³ On the sound-bite front, Justice Scalia, in *A Matter of Interpretation: Federal Courts and the Law*, offers “textualism,”⁴ while Justice Breyer risks further branding with “activism.” Justice Scalia has one more seeming advantage: his forty-five pages of text promises the elegance of simplicity.⁵ Justice Breyer took 135 pages for his contrary proposal. Judge Stephen Trott of the Ninth Circuit used to say to his clerks that the analysis of a case should be reducible to a concise bench memorandum of prescribed maximum length. Implicitly, arguments not susceptible to such fore-shortening were suspicious.⁶

But even Judge Trott permitted more pages if the subject was so inherently important or complex that fewer would not suffice. That is the case with Justice Breyer’s responsive salvo in the argument over statutory and constitutional interpretation, which this reviewer thinks appropriately recognizes the difficulty in and importance of the interpretive process. Justice Scalia’s *A Matter of*

3. As Justice Breyer explained his title in an interview with NPR Supreme Court correspondent Nina Totenberg, “I say ‘active liberty’ because I want to stress that democracy works if—and only if—the average citizen participates.” *All Things Considered: Supreme Court Justice Breyer on ‘Active Liberty’* (NPR radio broadcast Sept. 29, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4929668>. Justice Breyer “defines the term ‘active liberty’ as a sharing of the nation’s sovereign authority with its citizens.” BREYER, *supra* note 1, at 15.

4. SCALIA, *supra* note 1, at 23 (“The philosophy of interpretation I have described above is known as textualism.”).

5. See SCALIA, *supra* note 1, at 3-47 (elaborating on his philosophy of textualism and arguing for originalism in less than fifty pages). Justice Scalia does require the last twenty-one pages of his book, *Id.* at 129-49, to respond to Professors Gordon Wood, Laurence Tribe, Mary Ann Glendon and Ronald Dworkin, whose responses to Justice Scalia’s opening remarks also were included in the volume. *Id.* at 49-127. Justice Scalia also recognizes that in *A Matter of Interpretation*, he did not exhaust “the vast topic of textual interpretation.” *Id.* at 37.

6. The author clerked for Judge Trott in 1998 and 1999 (and recalls only once exceeding the page limit).

Interpretation is not merely simple, it is simplistic, and improperly so.⁷ In its simplicity it ignores the complexity of the process of interpreting language that often lacks a commonly-understood, everyday meaning.

With specific regard to statutory language, Justice Breyer explores the interpretive problem that arises when

statutory language does not clearly answer the question of what the statute means or how it applies. . . . Perhaps [Congress] failed to use its own drafting expertise or failed to have committee hearings, writing legislation on the floor instead. . . . Perhaps no one in Congress thought about how the statute would apply in certain circumstances. Perhaps it is impossible to use language that foresees how a statute should apply in all relevant circumstances.⁸

And constitutional interpretation is, if anything, a thornier problem. Justice Scalia himself noted: “The problem [of constitutional interpretation] . . . is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.”⁹

Active Liberty, which “originally took the form of the Tanner Lectures on Human Values presented at Harvard University in 2004”¹⁰ (Justice Scalia’s *A Matter of Interpretation* was taken from the same series nine years earlier¹¹), considers the theme of active liberty “as falling within an interpretive tradition and consistent with the Constitution’s history.”¹² Justice Breyer also describes a tension

7. See Gordon S. Wood, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 58 (1997) (“[T]he problem with which Justice Scalia is dealing is one deeply rooted in our history, and as such it is probably not as susceptible to solution as he implies.”).

8. BREYER, *supra* note 1, at 85-86.

9. Both Justice Breyer and Justice Scalia treat constitutional interpretation as an extension of the problem of statutory interpretation. See *infra* note 53 and accompanying text. However, obvious differences exist. SCALIA, *supra* note 1, at 37.

10. BREYER, *supra* note 1, at ix.

11. SCALIA, *supra* note 1, at xii (preface by Professor Amy Gutmann).

12. See BREYER, *supra* note 1, at vii (combining the titles of individual lectures).

between different judges' competing emphases in the process of statutory or constitutional interpretation. "Some judges emphasize the use of language, history, and tradition. Others emphasize purpose and consequence. These differences in emphasis matter—and this book will explain why."¹³

The two colleagues are not the first Members of the U.S. Supreme Court to articulate their interpretive philosophies outside of their work for the Court.¹⁴ But of the active members of the Court, only Justices Breyer and Scalia have attempted such complete public expositions of their views on the subject. Perhaps the best accolades for Justice Scalia come from the pen of one of his most vociferous critics. Professor Laurence Tribe concedes the difficulty of penning a coherent theory of interpretation—so difficult, in fact, that he declines to attempt to express his own theory.¹⁵ No surprise, then, that, as one reviewer noted, Justice Breyer's is the first effort outside of judicial opinions to rebut Justice Scalia's *and* to propose an alternate approach to interpretation.¹⁶ And these two colleagues have become *de facto* spokespersons for their respective wings—Justice Breyer, the centrist, Justice Scalia, the conservative—of the federal judiciary.¹⁷ Professor Tribe observed the "contrasting

13. BREYER, *supra* note 1, at 8.

14. See Mary Ann Glendon, *Comment* to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 95, 97-98 (1997) (citing works by Justice Cardozo while on the New York Court of Appeals and Justice Frankfurter); see also O.W. Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899) (discussing his theory of interpretation while a Justice on the Supreme Judicial Court of Massachusetts, before appointment to the U.S. Supreme Court).

15. Laurence H. Tribe, *Comment* to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 65, 72-73 (1997). Another critic, Professor Ronald Dworkin, says of Justice Scalia's thoughts on statutory interpretation: "[H]e has set out with laudable clarity a sensible account." Ronald Dworkin, *Comment* to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 115 (1997).

16. Toobin, *supra* note 2, at 36.

17. Where on the ill-defined political spectrum to place Justice Breyer and Justice Scalia might be the subject of much debate. Although Justice Breyer anecdotally is known generally to vote with other Democratic appointees and left-leaning Republican appointees Justices Stevens and Souter, and Justice Scalia anecdotally is known generally to vote with other Republican appointees, each Justice has broken ranks with his usual voting bloc on specific issues. Justice Breyer was the swing vote in the recent Ten Commandments decisions, *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005), and *Van Orden v. Perry*, 125 S. Ct. 2854

thinking articulated by Justices Breyer and Scalia” on issues of statutory interpretation.¹⁸ This is exemplified by the colleagues’ occasional concurrence in each others’ opinions or in the judgments reached, while advancing their own preferred approaches.¹⁹

Active Liberty and *A Matter of Interpretation* in some manner permit apples-to-apples comparison. For example, both Justices have applied their respective approaches both to statutory and to constitutional interpretation, treating the two analyses as parts of a unified whole.²⁰ Both have also examined the host of available

(2005), in which he voted in favor of striking down the Kentucky monument and in favor of maintaining the Texas monument. On a recent law-and-order issue, *United States v. Booker*, 543 U.S. 220 (2005), Justice Breyer voted in favor of upholding the United States Sentencing Guidelines against a Sixth Amendment challenge. In the line of authorities building up to the invalidation of the sentencing guidelines, of which *Booker* is the most recent, Justice Scalia has been a leading advocate of overturning the legislation on the grounds of an originalist interpretation of the Sixth Amendment, and wrote for a majority comprised of Justices Stevens, Souter, Thomas, Ginsburg and himself. See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that Blakely’s sentence violated his Sixth Amendment right to trial by jury). This review describes their political leanings based on the author’s own understanding of the anecdotal evidence.

18. Tribe, *supra* note 2, at 298.

19. See, e.g., *Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453, 1462 (2005) (Breyer, J., concurring in the majority opinion written by Justice Scalia) (“I would add that context, not just literal text, will often lead a court to Congress’ intent in respect to a particular statute.”); *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring in the judgment reached by the majority in an opinion by Justice Breyer) (“I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides”); see also *id.* at 163 (majority opinion of Breyer, J.) (“For those who find legislative history useful, the House Report’s account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion”).

20. See BREYER, *supra* note 1, at 39-108 (applying Breyer’s approach to interpretation issues of free speech, federalism, privacy, affirmative action, statutory construction, and administrative law); SCALIA *supra* note 1, at 14-44 (applying Scalia’s approach to various modalities of constitutional and statutory interpretation). The author believes it a difficult question whether such unified treatment of statutory and constitutional interpretation is appropriate. Justice Alito recently has recognized a distinction between the two interpretive problems:

Judicial self-discipline is especially important when federal courts are interpreting the Constitution. In non-constitutional cases, the political branches can check what they perceive to be erroneous judicial decisions by enacting corrective legislation. Decisions based on an interpretation of

interpretive aids and announced a preference for some over others. As Justice Breyer writes, “All judges use similar basic tools to help them accomplish the task” of statutory or constitutional interpretation.²¹ This review thus discusses *Active Liberty* in part by comparison and contrast to Justice Scalia’s *A Matter of Interpretation*. It concludes that Justice Breyer’s willingness to use all available information to inform interpretive problems is preferable to Justice Scalia’s narrower approach. But Justice Breyer’s statement of his philosophy fails to capitalize on its primary strengths and unfortunately lacks sufficient articulation of method.

Active Liberty is attractively packaged with a red cloth cover and glossy dust jacket. The latter might perhaps be criticized for its color scheme and design—red border, white background, and blue text and stars, which emphasize political implications in preference to the jurisprudential ones (but is a plain black cover, reminiscent of a judge’s robe, to be preferred?)—and for the exceedingly large reproduction of Justice Breyer’s portrait on the back cover. Who is Justice Breyer’s target audience? The \$21 price tag is steep for a reader of paperback bestsellers, but to this reviewer, who assigns \$100 casebooks, it does not seem unreasonable. Footnotes would be far preferable to the endnotes the editors chose, which, organized as they are by confusing reference to blocks of page numbers, are

the Constitution, by contrast, cannot be checked in this manner, and a thoughtful appreciation of the nature and essential limits of the judicial function is therefore acutely necessary to protect the democratic values that underlie our Constitution.

Written response of Samuel Anthony Alito, Jr., Nominee for the Supreme Court of the United States, to United States Senate, Committee on the Judiciary 60-61, available at http://judiciary.senate.gov/pdf/Alito_Questionnaire.pdf (last visited Apr. 14, 2006). The problems with Justice Alito’s analysis are at least three-fold. First, it is not clear that the error-correcting function is as readily available as Justice Alito believes in the legislative context. See *infra* note 79 and accompanying text (noting that Congress has much to deal with beyond having to correct problems wrought by judges through faulty interpretations of legislation). Second, at least two error-correcting options exist in the constitutional scheme. One is the amendment process. Another is the much-remarked process of changing constitutional interpretations by, over time, altering the make-up of the federal judiciary. Third, the problems Justice Alito remarks with unrestrained interpretations are no more significant than problems with too-restrained interpretations, which also do violence to the Constitution, but might exist because of, not due to the lack of, judicial self-discipline.

21. BREYER, *supra* note 1, at 7.

particularly difficult to use. None of these criticisms relate in any way to the substance of the book or detract in any significant manner from the reader's enjoyment of it.

II. FINDING "PURPOSE"

The interpretive tradition that Justice Breyer embraces in *Active Liberty* "sees texts as driven by *purposes*," and requires judges then "to look to *consequences*, including contemporary conditions, social, industrial, and political, of the community to be affected."²² The goal, then, is to ensure that the consequences of the interpretation accord with the purposes of the text.

Justice Breyer searches for purposes in constitutional interpretation primarily in the interplay between the concepts of so-called "active liberty"—which he sometimes refers to as "liberty of the ancients"—and "modern liberty." The former, broadly stated, is the people's collective right to democratic self-government (this review sometimes employs the phrase "majoritarian rights"). The latter is a set of individual rights preserved by the Constitution. Justice Breyer sees the structure of the Constitution as representing primarily a balance between these sometimes consistent, sometimes opposed, concerns. The *constitutional* interpretive problem, then, apparently is to identify the prevailing concern and give it effect. And although Justice Breyer does not clearly identify how to resolve conflicts that do arise, his insistence on interpreting the text of the Constitution—including amendments—as a unified whole²³ seems to make clear that in preferring majoritarian rights or individual rights, judges must permit as little impingement on the *other* form of liberty as possible.

Active Liberty begins by setting up the interpretive problem and Justice Breyer's approach to dealing with it. The "Introduction" perhaps is inaptly titled: in reality it fits seamlessly into the body of the book. It lays out in skeletal form one of the more interesting

22. BREYER, *supra* note 1, at 17-18 (internal quotation omitted).

23. Cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) ("Here is another feature of the Constitution: various words and phrases recur in the document. This feature gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation. I call this technique intratextualism.").

themes of the book—Justice Breyer’s careful and readily understandable analysis of the history of the Federal Constitution and the balance that it strikes between citizens’ “freedom from government coercion” and “freedom to participate in the government itself.”²⁴ Each of these purposes, *Active Liberty* makes clear, is reflected in various writings of the Founders. And Justice Breyer also points out that the two purposes may support each other but also may be at loggerheads.²⁵ By comparison, Justice Scalia failed in *A Matter of Interpretation* to ground in the Constitution’s text or history the source of his interpretive theory.²⁶ Although it convincingly states a case for respecting both principles of majoritarian rule and individual liberties, *Active Liberty* comes up short. It does not give the reader a means to know under what circumstances one principle should be preferred to the other.²⁷

The historical discussion is the most convincing, and in this reviewer’s mind the most enjoyable, portion of the volume. Justice Breyer draws upon the works of historical scholars Jack Rakove, Gordon Wood, Bernard Bailyn and Alexander Meikelfohn; cites also to papers and books by Akhil Amar, Robert Williams, Edward Corwin and Max Farrand; and undertakes his own analysis of James Madison’s *Federalists* 10 and 39.²⁸ In this chapter he describes the sometimes confused original understanding of the precise form of government the Constitution created: “John Adams, for example,

24. BREYER, *supra* note 1, at 3.

25. BREYER, *supra* note 1, at 31 (“[T]he state government experiments in less disciplined democracy had proved disappointing [in securing the modern liberty of individuals] . . . , bringing about what some called a new form of despotism.”) (citing GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 164 (1776-1787) (1969)).

26. *Cf.* Tribe, *supra* note 15, at 75-77 (noting that “the Constitution does not . . . tell us in any genuinely decisive and authoritative way, exactly what constitutes the content of an ‘amendment’” and advocating for the text of the Constitution to serve as a starting point for constitutional interpretation rather than the sole reference point). Justice Breyer observes, “The Framers did not say specifically what factors judges should take into account when they interpret statutes or the Constitution.” BREYER, *supra* note 1, at 117.

27. *See* Toobin, *supra* note 2, at 42 (quoting Professor Charles Fried as saying, “What is mysterious and really unexplained is the relationship between his embrace of democracy in his book and the vigorous enforcement, in which Justice Breyer has sometimes enthusiastically participated, of individual rights against majority decisions.”).

28. *See* BREYER, *supra* note 1, at 21-29, 140-41 n.13, 19.

understood the Constitution as seeking to create an Aristotelian ‘mixed’ form of government.”²⁹ The majority view, that the Constitution created a democratic government structure, carried the day, but even then, practical as well as philosophical considerations placed limits. “Democracy, of course, could not mean a Greek city-state.”³⁰ Instead of “the Athenian agora or a New England town meeting,” “the people would have to delegate the day-to-day work of governance.”³¹ But the Founders also had learned some practical lessons that influenced their philosophical approach to democracy: “The reason” why “the Framers [did] not write . . . a Constitution that contained” purer democratic structures “is that experience with many of these initial forms of democratic government had proved disappointing.”³² Instead of a pure democratic structure, the Constitution thus reflects “an effort to produce a government committed to democratic principle that would prove practically workable and that also, as a practical matter, would help protect individuals against oppression.”³³

In Justice Breyer’s conclusion about the purpose of the constitutional structure that ultimately was adopted we find his historical support for the thesis that constitutional interpretation should be undertaken with an eye to both the liberty to self-govern and the individual liberty that the Constitution was crafted to protect. He writes of an “interpretive tradition” that “calls for *judicial restraint*,” but nonetheless permits him to celebrate “decisions that . . . helped to make ‘We the People’ a phrase that finally includes those whom the Constitution originally and intentionally ignored.”³⁴ Once again, though, how simultaneously to protect individual liberty and respect principles of democratic self-government where those interests conflict is left to the reader to ponder.

29. BREYER, *supra* note 1, at 21.

30. BREYER, *supra* note 1, at 22.

31. BREYER, *supra* note 1, at 23.

32. BREYER, *supra* note 1, at 24.

33. BREYER, *supra* note 1, at 27-28.

34. BREYER, *supra* note 1, at 17, 20.

III. “Living Constitution”?

Active Liberty also broaches the topic of the “living Constitution”—an issue debated vociferously perhaps since *McCulloch v. Maryland*, in which Chief Justice Marshall famously employed the phrase, “this is a *Constitution* we are expounding.”³⁵ In *Active Liberty* Justice Breyer cites authority for the proposition that the phrase “We the people”—which begins the Constitution’s preamble—should be understood to mean “it is agreed, and with every passing moment it is re-agreed, that the people of the United States shall be self-governed.”³⁶ He argues earlier that the Constitution is “a continuing instrument of government” and that for it to be applied to “new subject matter . . . with which the framers were not familiar,” it should be construed by looking to purposes and consequences, not merely to text.³⁷

This discussion of continual constitutional renewal, however, feels disconnected with Justice Breyer’s refrain that judges must be restrained, humble, not willful, and are not permitted to “enforce whatever [they] think[] best.”³⁸ Between its description of what its detractors might describe as an “activist” interpretive philosophy and its prescription of essential attributes of judges that will protect against such perceived evils, *Active Liberty* fails to offer a method for ascertaining “purpose” and “consequence” that does *not* entail substantial subjectivity. Justice Scalia previously argued that “there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution” of the Constitution to accommodate modern-day realities. Justice Breyer argues that recognizing the purposes of the document will permit its natural evolution, checked primarily by a healthy dose of judicial self-restraint. Justice Scalia surely would respond with a different understanding of “purpose.”

35. 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Scalia disagrees with that use of Justice Marshall’s words: the “quotation from [*McCulloch*] refutes, rather than supports, that approach.” *McCreary County v. ACLU*, 125 S. Ct. 2722, 2756 (2005) (Scalia, J., dissenting) (citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852-53 (1989)).

36. BREYER, *supra* note 1, at 25 (quoting ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 14-15 (1948)).

37. BREYER, *supra* note 1, at 18 (quoting LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (3d ed. 1960)).

38. BREYER, *supra* note 1, at 18-19.

Active Liberty relies on “[j]udges” to “understand the human need to plan in reliance upon law, the need for predictability, the need for stability” and therefore to avoid “too radical, too frequent legal change.”³⁹ This will be criticized as placing too much faith in an unelected judiciary. Justice Breyer responds in his final chapter, “A Serious Objection,” that there is nothing inherently more objective about an originalist philosophy like Justice Scalia’s.⁴⁰ He points out that subjectivity is inherent even in the determination to rely on text alone because there is no definitive evidence, either textual or historical, that the Founders intended the constitutional text to be final and definitive.⁴¹

Justice Scalia, too, concedes that his originalist theory of constitutional interpretation permits subjectivity: “I do not suggest . . . that originalists always agree upon their answer. There is plenty of room for disagreement as to what original meaning was”⁴² And while decrying notions of evolution of the Federal Constitution, Justice Scalia is quite ready to permit such evolution to occur under certain circumstances. One much-observed example is Justice Scalia’s reference to the “trajectory of the First Amendment” to determine whether realities that were never envisioned by the Founders when drafting the First Amendment might nonetheless be within the original meaning of its text.⁴³

IV. ACTIVE LIBERTY IN APPLICATION

Justice Breyer turns next to seven “Applications” of his philosophy. Those applications arise in the contexts of speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law.⁴⁴ Certainly it must be said that Justice Breyer has not shied away in this volume from the most challenging issues facing courts, and the Supreme Court, in the modern era. Nor, considering the breadth of apparent application, does he concede any

39. BREYER, *supra* note 1, at 119.

40. BREYER, *supra* note 1, at 117.

41. BREYER, *supra* note 1, at 117.

42. SCALIA, *supra* note 1, at 45.

43. SCALIA, *supra* note 1, at 45.

44. BREYER, *supra* note 1, at vii.

limitation on the application of looking to purposes and consequences to interpret texts.⁴⁵

It is here, though, that Justice Breyer's analysis is at its weakest. *Active Liberty* is quite long on application, but unfortunately short on method. In each example of application—speech, federalism, privacy (literally,⁴⁶ rather than the hot-button questions of substantive due process limitations on legislation), and affirmative action—up until his discussions of statutory interpretation and administrative law, which are addressed below, Justice Breyer gives an example of a case, indicates what would be his preferred holding (usually what he argued in dissent), and justifies that result by reference to purposes and consequences.

Justice Breyer's analyses are fully persuasive as *post hoc* explanations. For example, in his discussion of free speech, Justice Breyer addresses campaign finance reform. He notes first that it is far too facile simply to utter the mantra, "speech is speech," and therefore to believe that all legislation having the effect of lessening communication must violate the First Amendment protection of the freedom of speech. Campaign finance reform legislation seeks to navigate a course between the Scylla of First Amendment rights and the Charybdis of protecting citizens' rights to self-government, which, Justice Breyer persuasively argues (citing to facts such as would come before the Court in a classic Brandeis brief) are undermined by corporate donations.⁴⁷ Viewing the First

45. In *A Matter of Interpretation*, Justice Scalia is not so ambitious, and does not attempt such a universal application of his textualist philosophy. Instead, Justice Scalia limits its application to select circumstances of what he views to be perversities resulting from looking beyond statutory or constitutional text. See, e.g., *infra* notes 73-74 and accompanying text (discussing Scalia's refusal to look at the history of the statute in question in *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50 (2004)).

46. The privacy examples Justice Breyer employs in *Active Liberty* deal with "a person's power to control what others can come to know about him or her." BREYER, *supra* note 1, at 66. He lists a range of problems arising from laws dealing with government monitoring of citizens' activities as well as private gathering and maintenance of personal information. BREYER, *supra* note 1, at 66-69.

47. BREYER, *supra* note 1, at 43-48. Justice Breyer has discussed elsewhere the importance of assistance by *amici curiae* in bringing to the Court legislative facts that better inform the Justices' understanding of the practical implications of the issues. This is apparently a method Justice Breyer would propose judges use to divine the "consequences" of a particular decision.

Amendment protection of the “freedom of speech” as part of the entire constitutional structure, Justice Breyer is persuaded that appropriate campaign finance reform legislation can “democratize the influence that money can bring to bear upon the electoral process . . . encouraging greater public participation,” which is the essence of his “active liberty” concern.⁴⁸ At the same time, he argues, this ultimately *increases* speech by fulfilling important First Amendment goals. This argument boils down to saying that, by breaking up the political-speech oligopoly, competition in the marketplace of ideas will be enhanced.⁴⁹

None of the examples, though, show how a judge, or a lawyer, should approach the problem. They instead are *post hoc* rationalizations of results that Justice Breyer says are preferable. In the introduction, Justice Breyer even warns us of this failing: “To illustrate a theme is not to present a general theory of constitutional interpretation.”⁵⁰ The unfortunate result, however, is that the philosophy Justice Breyer advances has an “I know it when I see it”⁵¹ quality—what one reviewer has called “an ad-hoc attempt at political compromise as much as the application of legal principles”—that recently has frustrated at least one federal judge.⁵²

48. BREYER, *supra* note 1, at 47.

49. BREYER, *supra* note 1, at 47. Justice Breyer’s antitrust background may be lurking behind his analysis, if this review has accurately encapsulated it. See Toobin, *supra* note 2, at 38 (noting Justice Breyer’s service as an attorney in the antitrust division of the Justice Department).

50. BREYER, *supra* note 1, at 7.

51. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [obscenity]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

52. See Toobin, *supra* note 2, at 39-40 (discussing U.S. District Judge Lawrence K. Karlton’s opinion in *Newdow v. U.S. Congress*, 383 F. Supp. 2d 1229, 1244 n.2 (E.D. Cal. 2005)). In *Newdow*, Judge Karlton complained about what he thought was a standardless body of law interpreting the First Amendment Establishment Clause, exemplified by the Court’s decisions last Term in *McCreary County* and *Van Orden*, which, respectively, rejected and permitted the placement of “Ten Commandments” statutes on public property. *Newdow*, 383 F. Supp. 2d at 1244. Justice Breyer did not write either opinion, but joined the majority in *McCreary County* and concurred in the judgment in *Van Orden*. In his *Van Orden* concurrence, Justice Breyer explained: “[T]here is ‘no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.’ . . . One must adhere to the basic purposes of the [First

And to the extent that Justice Scalia has provided a method, in *Active Liberty* Justice Breyer does not propose a workable alternative.

V. SEARCHING FOR AGREEMENT IN PHILOSOPHIES

Turning the page, the reader arrives at Justice Breyer's application in *Active Liberty* of his philosophy to the process of statutory interpretation.⁵³ Initially, there is something fundamentally different about how Justice Breyer conceives of this task in the overall scheme of his analysis from the treatment Justice Scalia gave the subject in *A Matter of Interpretation*. Rather than treat statutory interpretation as a task parallel in nature to constitutional interpretation, Justice Breyer treats statutory interpretation as an "application"—one more way in which his purposes and consequences approach to constitutional decision-making plays out in practice.⁵⁴ On further analysis, the difference appears to be one of organization rather than substance.

Amendment's Religion] Clauses." 125 S. Ct. 2854, 2868 (2005) (quoting *School Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberger, J., concurring)). Justice Breyer "[s]aw] no test-related substitute for the exercise of legal judgment," so long as that judgment "remain[s] faithful to the underlying purposes of the Clauses." *Van Orden*, 125 S. Ct. at 2869 (Breyer, J., concurring). When confronted by interviewer Jeffrey Toobin with Judge Karlton's complaint about the lack of guidance, Justice Breyer responded "'That's a problem for the person in question. . . . [T]here is also common-law guidance, which is by example. . . . You teach by example. You don't go too far too fast.'" Toobin, *supra* note 2, at 40 (quoting Justice Breyer).

53. According to Justice Scalia, statutory interpretation is "by far the greatest part of what [American judges] do." SCALIA, *supra* note 1, at 13-14. Critics second the importance of the process of interpreting legislation. According to Professor Mary Ann Glendon, "[a] comparatist with a special interest in contemporary European law," American lawyers are under-trained in the process of "dealing with enacted law" or "the art of legislative drafting." Mary Ann Glendon, *Comment* to ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 95, 95-96 (1997). For this reason, Professor Glendon tells us, Karl Llewellyn, the principal drafter of Article 2 of the U.C.C., relied on German statutes as models. *Id.* at 96.

54. *Compare* BREYER, *supra* note 1 (Table of Contents) (listing "Statutory Interpretation" under the heading "Applications") *with* SCALIA, *supra* note 1, at v (titling the role of U.S. federal courts as one that includes interpretation of both the Constitution and laws). Much ground exists for discussion concerning whether statutes and the Constitution should be interpreted in like manner, with perhaps more care given to the Constitution, or whether there is some fundamental

Both this chapter on statutory interpretation and the next chapter, dealing with administrative law,⁵⁵ are unique in *Active Liberty*: they are the only two in which Justice Breyer attempts seriously to articulate a methodological approach. The method Justice Breyer proposes is to envision a hypothetical “reasonable member of Congress.”⁵⁶ (Is it only this reviewer who takes delight in Justice Breyer’s calling the “reasonable member of Congress” construct a “fiction”?). This reviewer, who tries to instill in students the intuition for reducing to rationality abstracted legal doctrine, finds the “reasonable Congressperson” approach particularly attractive. Does Justice Scalia as well? In his articulation of “textualist” ideology, Justice Scalia prescribes construing a statute “reasonably, to contain all that it fairly means.”⁵⁷ Justice Scalia later describes his textualist ideology as a search for what statutory text “would reasonably be understood to mean.”⁵⁸ For his part, Justice Breyer is not seeking statutory purpose in a vacuum. He believes also in starting with “the statute’s language.”⁵⁹ To start, the colleagues’ approaches are not so different.

The detente that appears at first blush ends before the second. In *Active Liberty* Justice Breyer observes that statutory construction is not an interesting topic if a reasonable interpretation of the statutory language produces a definitive result.⁶⁰ He thus articulates the importance of using all available information—“the statute’s language, its structure, and its history in an effort to determine the statute’s purpose.”⁶¹ The goal is to ascertain the text’s meaning.

distinction between the two interpretive endeavors. *See supra* note 9 and accompanying text.

55. The chapter on administrative law is very similar to the chapter on statutory interpretation, which makes sense—much of the judicial role in administrative law *is* the process of statutory interpretation, determining what mandate Congress gave to the particular administrative agency. But the chapter also includes discussion of the non-delegation concerns attendant on the creation of a fourth branch of government. BREYER, *supra* note 1, at 103. Justice Breyer prefers a hands-off approach to the delegation question, permitting Congress to employ administrative assistance (with its attendant advantages of expertise) to assist “an inexperienced public” in its self-government tasks. *Id.* at 102-03.

56. BREYER, *supra* note 1, at 88.

57. SCALIA, *supra* note 1, at 23.

58. SCALIA, *supra* note 1, at 144 (responding to Prof. Dworkin).

59. BREYER, *supra* note 1, at 86.

60. BREYER, *supra* note 1, at 85.

61. BREYER, *supra* note 1, at 86.

Thus, “nothing that is logically relevant should be excluded.”⁶² Isolated from the contention surrounding interpretive philosophy, the merits of Justice Breyer’s approach—tried and true in other areas of the law⁶³—are almost too obvious to articulate. Indeed, the only way that employing all available resources in the interpretive process might be problematic is if misleading information becomes part of the mix.⁶⁴

To watchers of the modern Supreme Court, as well as to interested lay-persons, Justice Scalia’s professions of a “textualist” approach to statutory interpretation are well-known and might be considered quite influential.⁶⁵ Under this philosophy, Justice Scalia would stick to the language of the Constitution or a statute and let the chips fall where they may. Thus, as the lone dissenting voice in *Koons Buick Pontiac GMC, Inc. v. Nigh*, Justice Scalia argued, “‘If Congress enacted into law something different than what it intended,

62. BREYER, *supra* note 1, at 18 (citing sources including LEARNED HAND, *THE SPIRIT OF LIBERTY* 109 (3d ed. 1960)).

63. *Cf.* FED. R. EVID. 401, 402 (stating the rule that all relevant evidence is admissible).

Justice Breyer’s and Justice Scalia’s differing philosophies about the amount of extrinsic evidence that may permissibly be considered in the interpretive process is apparent in other aspects of their jurisprudence. It becomes apparent in the debate between the colleagues on the use of foreign authorities in judicial opinions. Justice Scalia “do[es] not use foreign law in the interpretation of the United States Constitution.” *Relevance of Foreign Law*, *supra* note 1, at 6 (comments of Justice Scalia). Justice Breyer takes a different approach: “‘If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough? Maybe I’ll learn something.’” *Relevance of Foreign Law*, *supra* note 1, at 7 (comments of Justice Breyer) (quoting his own earlier comments).

64. This is precisely Justice Scalia’s objection. *See* SCALIA, *supra* note 1, at 34-36 (referring to “the manipulability of legislative history”).

65. Justice Scalia’s interpretive philosophy has come to be called “strict constructionism” by many. In announcing the nomination of Harriet Miers to replace Justice O’Connor, President George W. Bush—who previously had expressed preference for Justice Scalia’s jurisprudence—said of his nominee: “I’m interested in people that will be strict constructionists, and Harriet Miers shares that philosophy.” Press Release, The White House, President Holds Press Conference (Oct. 4, 2005), <http://www.whitehouse.gov/news/releases/2005/10/20051004-1.html>. Justice Scalia rejects the phrase, however. “Textualism should not be confused with so-called strict-constructionism, a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist, and no one ought to be. . . .” SCALIA, *supra* note 1, at 23.

then it should amend the statute to conform to its intent. It is beyond our province to rescue Congress from its drafting errors”⁶⁶

In *Koons*, a Truth-in-Lending-Act (TILA) case in which the Court held that Congress did not amend the statute to remove liability limitations that had been contained in it since its 1968 enactment, Justice Scalia quoted the opinion in *Lamie v. United States Trustee*,⁶⁷ a bankruptcy case, for the proposition that the Court should not correct Congress’s errors.⁶⁸ In so doing, he exposed his approach to one of the most serious possible criticisms. Anecdotaly, unbending textualist philosophy appears to be employed selectively in cases in which a judge is less concerned about reaching a correct outcome and is commensurately more willing, in the name of strict adherence to principle, to require Congress to revisit a problem statute. The philosophy of leaving to the legislative branch responsibility for correcting obvious drafting errors or oversights has been applied readily enough in the contexts of consumer-law statutes like TILA. In other areas—such as criminal law (“uses a firearm” in relation to a drug crime does not include trading a gun for drugs)⁶⁹—Justice Scalia has been all too ready to interpret statutory language *contrary* to the plain textualist meaning in order to reach the result that he believes Congress obviously intended, although it would be a simple enough matter once again to have required Congress to amend the statute, using more precise language to account for a situation it did not envision when writing the text originally.⁷⁰

66. 543 U.S. 50, 76 (2004) (Scalia, J., dissenting) (quoting *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004)). This was just the rationale of the Fourth Circuit majority that interpreted the statute as having been amended. *See Koons Buick Pontiac GMC, Inc. v. Nigh*, 319 F.3d 119, 128 (4th Cir. 2003) (“However, the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent.”), *rev’d*, 543 U.S. 50 (2004).

67. 540 U.S. 526 (2004).

68. *See Koons*, 543 U.S. at 76 (stating that it is not the province of the Supreme Court to rescue Congress from its errors).

69. SCALIA, *supra* note 1, at 23-24 (citing *Smith v. United States*, 508 U.S. 223 (1993)).

70. On the danger of selective application of textualist philosophy, Justice Scalia concedes that “there are ambiguities involved, and hence opportunities for judicial willfulness, in other techniques of interpretation as well—the canons of construction, for example” SCALIA, *supra* note 1, at 36.

Another explanation for the strict textualism applied in consumer codes giving way in the criminal context might be based on comparing two attributes of the

The “uses a gun” example suffers the same failing that this reviewer noted regarding Justice Breyer’s application of his purposes and consequences approach. Why is it so clear that “uses a gun” or “do you use a cane” does not mean barter or decoration?⁷¹ Justice Scalia simply knows it when he sees it.⁷²

The *Koons* majority, though, reversed the Fourth Circuit’s holding. *Koons* was a case in which the addition of a clause to a previously clear statutory sub-paragraph rendered the sub-paragraph seemingly unclear on its face. But three primary reasons supported reversal: (1) there was a plain-language reading of the statute that supported reversal, relying on the fact that the word “sub-paragraph”

statutory schemes—their relative length, complexity, and the frequency with which Congress revisits them. TILA and the bankruptcy code, for examples, are both lengthy and complex and the regular subjects of congressional tweaking. A third possible attribute is a relatively small body of common law experience underlying the statutes. Those attributes seem to support adherence to a textualist philosophy. Criminal codes usually are shorter, if not less complex, and they may gather less frequent congressional attention, and have substantial common-law underpinnings. Those three attributes might explain differences between statutory and constitutional interpretation as well as differences in approaches to different codes.

71. SCALIA, *supra* note 1, at 24.

72. Justice Scalia’s preference for common-sense reading of statutory text puts him in good company. According to Justice Holmes, “the meaning of a sentence is to be felt rather than to be proved.” *United States v. Johnson*, 221 U.S. 488, 496 (1911). He also stated that “there is no canon against using common sense in construing laws as saying what they obviously mean.” *Roschen v. Ward*, 279 U.S. 337, 339 (1929). One recent dissent in a lower court provides another example:

A host separately asked two prospective guests what they liked to drink. One said, “I like bourbon and water.” The other said, “I like beer and wine.” When the second guest arrived at the event, the host served the guest a glass of beer mixed with wine. “What’s that awful drink?” said the guest, to which the host answered, “You said you liked beer and wine.” Replied the guest: “Pfui! You know what I meant. Quit playing word games and get me something I can drink.”

OfficeMax, Inc. v. United States, 428 F.3d 583, 600 (6th Cir. 2005) (Rogers, J., dissenting). Use in legal argument of analogies to alcoholic beverages has a venerable pedigree. *See* BREYER, *supra* note 1, at 68 (“To maintain preexisting projection, we must look for new legal bottles to hold our wine.”); *see also* Max Huffman, *Judge Painter’s Forty Rules*, 72 U. CIN. L. REV. 1011, 1022 (2003) (book review) (comparing a reduction in pages to a beer stein full of lager with no head).

in statutory text is a term of art; (2) throughout the voluminous history of amendments to TILA, Congress never made any textual change that would support the reading the Fourth Circuit had adopted, despite regularly having amended the provision at issue; and (3) the change the Fourth Circuit held had occurred could not possibly be considered rational legislative policy.⁷³ The strongest argument the Fourth Circuit panel, and Justice Scalia in dissent, could muster was that it would be inappropriate to rescue Congress from its drafting error. For support Justice Scalia cited to *Lamie*.⁷⁴ The failure to consider available evidence of the statute's meaning is all the more troubling in *Koons* because it did not require resort to "floor debates and (especially) committee reports," the process Justice Scalia derides.⁷⁵ Evidence was available in *Koons* of the history of TILA as enacted into law by Congress and signed by the President.⁷⁶

The *Koons* example demonstrates the benefits of an approach—to which Justice Breyer subscribes in *Active Liberty*—of considering all information that bears on the interpretive question, rather than merely some narrow subset of information. The criticism that Justice Scalia makes of this approach, that misleading

73. See Brief of the Am. Bankers Assoc. et al. as Amici Curiae Supporting Petitioners, *Koons Buick Pontiac GMC Inc. v. Nigh*, 543 U.S. 50 (2004) (No. 03-377), 2004 WL 865265 (arguing that the Fourth Circuit's analysis of the language of TILA was wrong).

74. *Koons*, 543 U.S. at 76 (Scalia, J., dissenting). *Lamie* is poor authority for the proposition in any event. Rather than dealing with poorly drafted language, in *Lamie* the Court addressed, and refused to ignore, clearly drafted language that simply did not say what the petitioner argued Congress meant. See *Lamie*, 540 U.S. at 535-36 (stating that the plain meaning of the word "attorney" is preferred in order to avoid confusion). *Lamie* was thus a clear application of Justice Jackson's admonition that the Court should "not inquire what the legislature meant; [it should] only ask what the statute means." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951), quoted in SCALIA, *supra* note 1, at 23, n.29.

75. SCALIA, *supra* note 1, at 34.

76. See *Koons*, 543 U.S. at 54 (stating that the purpose of TILA was to disclose credit terms in order to inform the consumer, and discussing the provisions of the original civil-liability provision for creditors); Transcript of Oral Argument at 3-9, *Koons*, 543 U.S. 50 (No. 03-377) (arguing based on amended statutory language rather than legislative history).

information may find its way into the mix,⁷⁷ is overstated. First, judges would not be worth their salaries if they could not draw distinctions between relevant information and red herrings. Second, in *A Matter of Interpretation* Justice Scalia does not give empirical evidence supporting his concern. He provides no example of legislative history that, when fully considered, would contravene, rather than merely aid in interpreting, statutory text. Instead, he says the opposite. He finds next to no examples in which he would change his vote had he relied on legislative history.⁷⁸ Finally, Justice Scalia fails in his dismissal of the topic to distinguish between different sorts of available information. For example, a history of prior enactments of the same statute surely are deserving of more weight than statements to an empty chamber in floor debates. Indeed, ripe as Justice Scalia's analysis is for criticism, in this reviewer's mind a primary drawback of *Active Liberty* is its complete failure to articulate the *method* of "using all available information" in the context of statutory interpretation.

A more optimistic understanding of the vagaries of seemingly selective application of textualist philosophy is that unbending adherence most often occurs in dissent, as seen in *Koons*. Why, one might ask, would an intellectual giant of Justice Scalia's stature simply fail to recognize that were his arguments to command a majority, the result would be waste and expense? A Congress currently overwhelmed with the Iraq War, Hurricane Katrina, and judicial appointments (of course, only the first and third of which were relevant when *Koons* was decided, but something akin to the second was predictable) would be forced to scurry to correct a seeming glitch in the text of TILA that confused next to nobody. If the answer is that formalism in interpretation is permitted to trump reason, it is a cause for serious concern. The answer is much easier to accept if it is only that rigid textualist philosophy is reserved for expression in dissents (as in *Koons*), concurrences, or extra-judicial writings and speeches. Often this is the case. Justice Scalia is famous for his concurrences in which he rejects the narrow portion

77. SCALIA, *supra* note 1, at 34 ("One of the routine tasks of the Washington lawyer-lobbyist is to draft language that sympathetic legislators can recite in a prewritten 'floor debate'—or, even better, insert into a committee report.").

78. SCALIA, *supra* note 1, at 36.

of a majority opinion in which legislative history is discussed.⁷⁹ And instances are rare—this reviewer knows of none—in which an express refusal to consider all available information in a case of true ambiguity has commanded a majority of the Supreme Court.

In any event, as Justice Scalia himself observed: “Frankly, [refusing to use legislative history] has made very little difference” in the results he has reached.⁸⁰ If that is true (although it is questionable whether an “honest textualist”⁸¹ would know, because a review of the legislative history must be thought to taint a pure exposition of statutory language), Justice Scalia’s method is simply another approach to the same result.

Of course, reasoning by anecdote necessarily is inadequate. Both Justice Breyer in *Active Liberty* and Justice Scalia in *A Matter of Interpretation* fall into that trap (and this reviewer now has joined them). It always will be possible to point to egregious examples of injustice attendant on following one interpretive philosophy or the other, or to drum up circumstances in which one judge or another apparently has deviated from a previously stated approach. Unfortunately, a principled comparison of differing interpretive philosophies would be more difficult even than crafting one’s own philosophy, for deciding whether textualism or purposes and consequences produces better decision results would require: (1) determining what are the ideal decision results, and (2) testing both philosophies to determine which reaches them more often. That comparison is beyond the scope of this review.

But it does appear that there is some common ground between Justice Breyer’s purpose-centered approach and Justice Scalia’s textualist approach—at least in the arena of statutory interpretation. It would indeed be a worthy outcome of the recent publication of *Active Liberty* if it permitted a synthesis of what are seemingly irreconcilable theories of statutory interpretation. A synthesis would require some bending by both sides, but neither *Active Liberty* nor *A Matter of Interpretation* give the impression that there is not room for movement. For example, Justice Breyer is mainly concerned with what he sees as the consequences of true

79. See, e.g., *F. Hoffmann-La Roche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 176 (2004) (Scalia, J., concurring) (stating that he concurs because the statutory language lends itself to the majority’s interpretation).

80. SCALIA, *supra* note 1, at 36.

81. SCALIA, *supra* note 1, at 28.

literalism. It is incorrect, he says, “to answer a lost driver’s request for directions, ‘Where am I?’ with the words ‘In a car.’”⁸² On that point I am confident Justice Scalia would agree.⁸³ Just as he reads “uses a gun” to mean something other than bartering with it, he believes the sentence “I put the saddle on the bay” has a clear meaning,⁸⁴ which of course it does, and Justice Breyer would, in turn, agree. The colleagues agree that the context in which words are used matters in their interpretation.⁸⁵

Justice Breyer’s search for purpose in a statute also should not be as controversial as it might seem. Justice Scalia has all but admitted a search for purpose as well. In his interpretive exercise, he seeks the “import” of the statute—which depends on its “purpose.”⁸⁶ Justice Scalia has admitted also a willingness to correct obvious

82. BREYER, *supra* note 1, at 87.

83. *Empagran*, 542 U.S. 155 (2004), provides an example of the colleagues’ agreement that literalist interpretations of text are not necessarily dispositive. Interpreting the Foreign Trade Antitrust Improvements Act to prevent the assertion of jurisdiction by a U.S. antitrust court over claims by foreign plaintiffs alleging harm in foreign commerce, Justice Breyer wrote for the Court and Justice Scalia concurred in the judgment. The text of the statute permits the exercise of jurisdiction if the conduct complained of has an effect on domestic U.S. commerce, and that effect gives rise to “a claim” under the U.S. antitrust laws. Plaintiffs argued that “a claim” meant any claim, not necessarily their claims. *Id.* at 173. The Court held that evidence, contained in the legislative history of the statute and in an appropriate understanding of the deterrence rationale of the U.S. antitrust laws, demonstrated a literalist interpretation of the provision could not prevail, and effectively rewrote the statutory text to read “the plaintiff’s claim.” *Id.* at 173-74. Justice Breyer wrote for the majority, “Despite their linguistic logic, [plaintiffs’] arguments are not convincing. . . . At most, [plaintiffs’] linguistic arguments might show that [plaintiffs’] reading is the more natural reading of the statutory language.” *Id.* at 173. Justice Scalia in concurrence would have held that the literalist interpretation must give way to principles of deference to foreign sovereigns’ right to regulate within their own borders. *Id.* at 176 (Scalia, J., concurring).

84. SCALIA, *supra* note 1, at 26.

85. Compare SCALIA, *supra* note 1, at 144 (noting that “the import of language depends upon its context, which includes the occasion for, and hence the purpose of, its utterance”), with BREYER, *supra* note 1, at 17 (referring to an interpretive tradition that “sees texts as driven by purposes”).

On the other hand, the breadth of the search for context is another question. Justice Breyer points in *Active Liberty* to an example—the wayward driver—of context derived by reference to external factors. Justice Scalia’s “gun” example demonstrates context drawn from the text. There may be less agreement here than it seems.

86. SCALIA, *supra* note 1, at 144.

errors—termed “scriveners’ errors”—in statutory text.⁸⁷ And Justice Scalia is quick to point out that his brand of textualism looks for natural meaning in the text. Is the real challenge in producing a synthesis only in finding common ground in the appropriate breadth of a search for statutory purpose?

This is the point at which, if each approach can be bent a small amount, a unified rule might emerge. Justice Breyer’s willingness to use all available information, which this review has praised, could be limited such that judges’ consideration of sources beyond the text is undertaken with a jaundiced eye—especially to the extent that a statement in legislative history reflects one or several legislators’ views, rather than the views of the entire legislative body.⁸⁸ But Justice Scalia’s textualist philosophy could bend too. If an adherent recognizes that the search for meaning in words requires an understanding of the context in which they are used, resorting to truly reliable external sources should not be prohibited. For example, although “I put the saddle on the bay”⁸⁹ does not require any help for the reader to understand its meaning, “I saw the bay” does. If textualist philosophy will permit judges to look no further, they are hamstrung.

And a decision about how far outside the text to look can be left to the wisdom and experience of the interpreting judge. For this synthesis to work, it will require faith in the co-equal branches of government to fulfill *their* responsibilities to appoint and confirm the sort of careful judges that can be trusted to execute their interpretive duties in a principled manner.

VI. WHAT IS ACTIVISM?

Because activism was this review’s starting point, the final question is whether Justice Breyer’s interpretive approach or the textualist approach of Justice Scalia is more deserving of the now-

87. SCALIA, *supra* note 1, at 20-21; *see also* Ronald Dworkin, *Comment to ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 115 (1997) (stating that Scalia admits that courts should remedy “scrivener’s error”).

88. Extending the analogy to the rules of evidence, *see supra* note 63, perhaps extra-textual sources should only be used if their probative value is not substantially outweighed by their prejudicial effect. *See* FED. R. EVID. 403.

89. SCALIA, *supra* note 1, at 26.

pejorative label “activist.” That otherwise meaningless term recently has been defined in connection with the spate of Supreme Court nominations to replace retiring Justice Sandra Day O’Connor and the late Chief Justice William Rehnquist: “Judicial activism,” according to the Senate Judiciary Committee’s questionnaire to White House Counsel Harriet Miers, nominated to replace Justice O’Connor, is defined as including the “tendency by the judiciary toward problem-resolution rather than grievance-resolution” and the “tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.”⁹⁰

Justice Breyer’s approach risks a court overstepping its bounds and ascribing to the legislature an intent that should not properly be ascribed. Whether and how often that occurs is a matter for empirical research, but this reviewer proposes it is a rare occurrence. The purposes and consequences approach in *Active Liberty* must not be confused with an attempt to shoulder the role of a co-equal branch of government. *Active Liberty* is loaded with indicators that Justice Breyer considers the judge’s role to be a deferential one.⁹¹ Statistics on votes to overturn congressional legislation bear this out.⁹²

By contrast, Justice Scalia, and those who subscribe to his proffered methodology—a set that Justice Breyer “hope[s]” is “fairly small in number”⁹³—at least in cases such as *Koons*, unapologetically do violence to the result the legislature sought to produce in the name of remaining faithful to its text. Justice Scalia “reject[s] intent of the legislature as the proper criterion of the

90. Written response of Harriet Miers, Nominee for the Supreme Court of the United States, to the United States Senate, Committee on the Judiciary, *available at* <http://www.npr.org/documents/2005/oct/miers/miersquestionnaire.pdf>. A substantially similar question was posed to Justice Alito, nominated to replace Justice O’Connor after Miers withdrew herself from consideration in the fall of 2005. Written response of Samuel Anthony Alito, Jr., Nominee for the Supreme Court of the United States, to United States Senate, Committee on the Judiciary 60-61, *available at* http://judiciary.senate.gov/pdf/Alito_Questionnaire.pdf.

91. *See, e.g.*, BREYER, *supra* note 1, at 17 (“Courts are ill-equipped to make the investigations which should precede most legislation . . . [and] a judge’s agreement or disagreement about the wisdom of a law has nothing to do with the right of a majority to embody their opinions in law.”) (internal quotations omitted).

92. *See supra* note 2 (noting that Breyer voted to strike down laws twenty-eight percent of the time, which was less often than any other Justice).

93. BREYER, *supra* note 1, at 132.

law.”⁹⁴ His confessed goal? To influence Congress’s resort to floor-debates and committee reports to clarify the meaning of the enacted statutory text⁹⁵—in other words, to teach a co-equal branch of government how to go about its business. *A Matter of Interpretation* is rife with disdain for the modern legislative process. In modern days, Justice Scalia says,

[t]he floor is rarely crowded for a debate, the members generally being occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken. And as for committee reports, it is not even certain that the members of the issuing committees have found time to read them.⁹⁶

The undisguised import of Justice Scalia’s discussion of legislative history is that by ignoring it, the Court hopefully will cause Congress to stop creating it and instead legislate in some more appropriate fashion. If any judicial endeavor is susceptible to being labeled “problem solution” or “oversight,” it is that one. Justice Breyer’s stated goal of determining the purposes of the text being interpreted and considering whether the consequences of a particular interpretation meet those purposes, must be thought the less activist approach.

This reviewer finds most pleasing the acknowledgment in *Active Liberty* of the challenges judges face in the exercise of interpretation, whether constitutional or statutory—an acknowledgment that stands in stark contrast to Justice Scalia’s seemingly blind faith in the clarity of the English language.⁹⁷ Regrettably, *Active Liberty* nonetheless disappoints. With the limited exception of his chapters on statutory interpretation and administrative law (and their invocation of the reasonable Congressperson and the use of all available information), Justice

94. SCALIA, *supra* note 1, at 31.

95. SCALIA, *supra* note 1, at 34.

96. SCALIA, *supra* note 1, at 32.

97. In Professor Tribe’s words, Justice Scalia fails to “concede how difficult the task is; [to] avoid all pretense that it can be reduced to a passive process of *discovering* rather than *constructing* an interpretation.” Lawrence H. Tribe, *Comment* to ANTONIN SCALIA, *A MATTER OF JUDICIAL INTERPRETATION: FEDERAL COURTS AND THE LAW* 49, 71 (1997).

Breyer has failed to prescribe a ground-up methodological approach to understanding the meaning of ambiguous texts. He demonstrates that reliance on purposes and consequences is effective *post hoc* as a means to rationalize a result already reached, but its use as an interpretive tool presumes an *ex ante* ability to determine a text's "purpose."⁹⁸ That determination might be thought as monumental a task as the very interpretive exercise being undertaken. This failure to prescribe a method is particularly disappointing because Justice Breyer, as the voice for the Court's ideological center, is seemingly well positioned to lead a majority of the Court in applying a coherent interpretive philosophy.

Instead, like Justice Scalia's *A Matter of Interpretation, Active Liberty* probably serves the reader best by providing readers insight into the thinking of one of this Nation's nine most influential jurists. This reviewer has reduced a particularly important insight into a pithy phrase for the title of the review: Justice Breyer forcefully argues that all available information bearing on difficult interpretive issues should be considered. In fact, in possible derogation from the analysis in the prior paragraph, this methodological tool *does* promise majority acceptance—see, for

98. I am not as troubled by the ability to discern "consequences" of an interpretation. For one thing, assistance by *amici curiae* might be a sufficient source of expertise. In *Empagran*, the United States and Federal Trade Commission submitted a brief and presented argument as *amici curiae* discussing what became a central theme in the Court's opinion—the concern that the literalist interpretation of the statute urged on the Court by plaintiffs would have the consequence of undermining government cartel enforcement efforts. See Brief of the United States as Amici Curiae Supporting Petitioners, *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (No. 03-724) (stating that the meaning of the statutory language must be analyzed in the context it was used, not in isolation); Transcript of Oral Argument, *Empagran*, 542 U.S. 155 (No. 03-724), 2004 WL 234125 (stating that when faced with two different interpretations, the court should chose the one that respects international law and does not antagonize the allies of the United States). Justice Breyer has commented that brief writing can be a means of fulfilling lawyers' important "public service role . . . as law reformer [W]e all depend upon lawyers to help shape the law . . . through judicial decisions." Stephen Breyer, Assoc. Justice, U. S. Supreme Court, "Our Civic Commitment," Keynote Address at the Annual Meeting of the American Bar Association (Aug. 4, 2001), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-04-01.html. This is in part because courts do not have a means on their own of ascertaining consequences. *Id.* ("[W]e, who are not expert in thermal imaging devices or computerized data bases, needed to understand the relevant technologies, their state of development, where they might lead.").

example, *Koons*—in an evolving Supreme Court. And even the gulf between Justice Breyer and Justice Scalia does not in all situations appear insurmountable. *Active Liberty* demonstrates a reasoned thought process that should encourage efforts toward bridging the gap. All this, and much else about *Active Liberty*, make it well worth the read.