
A PELAGIAN VISION FOR OUR AUGUSTINIAN CONSTITUTION: A REVIEW OF JUSTICE BREYER'S *ACTIVE LIBERTY*

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INTRODUCTION

Early in the fifth century, the Christian Church was divided by the “Pelagian Controversy.”¹ Pelagius, a British monk, taught that individuals had the capability to repent their sins and achieve salvation.² God’s grace is helpful, but it is unnecessary.³ In contrast, Augustine, a North African Bishop, taught that individuals lacked the capacity to repent their sins and achieve salvation.⁴ God’s grace is indispensable.⁵ Although framed in terms of a narrow—but fundamental—theological question, the “Pelagian Controversy” involved a much broader issue: the inherent nature of humanity.⁶ Essentially, the Pelagian view states that humanity is inherently good or virtuous.⁷ In contrast, the Augustinian view states that humanity is inherently bad, corrupt, or, yes, sinful.⁸

While the Christian Church resolved the theological issue in the fifth century,⁹ humanity continues to grapple with the broader question.¹⁰ For a nation, the

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1. ALLISTER E. MCGRATH, *CHRISTIAN THEOLOGY: AN INTRODUCTION* 443 (3d ed. 2001).

2. R.C. SPROUL, *WILLING TO BELIEVE: THE CONTROVERSY OVER FREE WILL* 35 (1997).

3. MCGRATH, *supra* note 1, at 448 (“For Pelagius, humanity merely needed to be shown what to do, and could then be left to achieve it unaided.”).

4. SPROUL, *supra* note 2, at 51. *See also* R.C. SPROUL, *CHOSEN BY GOD* 65 (1986) (discussing Augustine’s views in the context of the doctrine of predestination).

5. SPROUL, *supra* note 2, at 51 (“Augustine established grace as indispensable to the Christian life.”). *See also* MCGRATH, *supra* note 1, at 448 (“[F]or Augustine, humanity needed to be shown what to do and then gently aided at every point . . .”).

6. MCGRATH, *supra* note 1, at 443.

7. SPROUL, *supra* note 2, at 41–42.

8. SPROUL, *supra* note 2, at 52–55.

9. *Id.* at 42–45.

10. Indeed, as George Weigel has observed, the debate over the European Constitution was

collective answer to that question inevitably will determine how it organizes its government. If the nation—like Pelagius—assumes that humanity is inherently good and virtuous, then it will develop a constitution that largely defers to the democratic process, which is an expression of society’s collective will.¹¹ Alternatively, if a nation—like Augustine—assumes that humanity is inherently bad and corrupt,¹² then it will develop a constitution that will be distrustful¹³ of “any entity exercising power” and will check the exercise of power.¹⁴ When applied to all aspects of life rather than simply the government, the Augustinian vision results in power and responsibility being divided between family, guild, university, city, region, church, and nation with each exercising “sovereignty” in its own “sphere.”¹⁵

This distinction between a Pelagian constitutional vision and an Augustinian constitutional vision forms a basis for reviewing Justice Stephen Breyer’s new book, *Active Liberty: Interpreting Our Democratic Constitution*.¹⁶ Although it is an important work and has many strengths, *Active Liberty* is flawed—it adopts a Pelagian

effectively a debate over the nature of humanity in general. See GEORGE WEIGEL, *THE CUBE AND THE CATHEDRAL* (2005). Similarly, Robert Keegan has suggested that the foreign policy disputes between the United States and Europe are a product of different perspectives on humanity. See ROBERT KEEGAN, *OF PARADISE AND POWER* (2003).

11. SPROUL, *supra* note 2, at 41–42. Of course, there might be a small community where a bad or corrupt majority gains control. However, because the Pelagian view assumes that “human nature was created not only good, but incontrovertibly good,” it logically follows that in the Pelagian worldview the larger community will be dominated by the good and virtuous. R.C. SPROUL, *WHAT IS REFORMED THEOLOGY?* 122 (1997). Thus, the values of the nation or the world must trump those of the city or the region.

12. SPROUL, *supra* note 2, at 52–55.

13. The Augustinian concept of distrust is perhaps best exemplified in Calvinist principles. As Professor Hamilton explained:

One of the dominating themes of Calvin’s theology is this fundamental distrust of human motives, beliefs, and actions. On Calvin’s terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good. . . . Thus, Calvinism counsels in favor of diligent surveillance of one’s own and other’s actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT* 293, 295 (Michael W. McConnell, Robert F. Cochran, Jr., & Angela C. Carmella, eds. 2001) [hereinafter *CHRISTIAN PERSPECTIVES*].

14. Hamilton, *supra* note 13, at 293. Although such a perspective is firmly rooted in the Protestant theology of Calvin, it is also consistent with the Roman Catholic notion of subsidiarity, first expressed by Pope Leo XII. See Robert F. Cochran, Jr., *Tort Law and Intermediate Communities: Calvinist and Catholic Insights in CHRISTIAN PERSPECTIVES*, *supra* note 13, at 486, 488–89.

15. See Abraham Kuyper, *Sphere Sovereignty* (1880) in ABRAHAM KUYPER: A CENTENNIAL READER 461 (James D. Bratt ed., 1998). Kuyper was both a Calvinist theologian and Prime Minister of the Netherlands. For a brief overview of the notion of “sphere sovereignty,” see Cochran, *supra* note 14, at 487–88.

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

vision of the Constitution,¹⁷ but our Constitution is Augustinian.¹⁸ In other words, Justice Breyer puts forth a vision that is directly contrary to the assumptions of our Constitution. The remainder of this review demonstrates this thesis. Part I discusses Justice Breyer's "theme" of constitutional interpretation. Part II demonstrates why our Constitution conforms to an Augustinian vision. Part III explains why Justice Breyer's theme of constitutional interpretation conforms to the Pelagian vision.

I. JUSTICE BREYER'S THEME OF CONSTITUTIONAL INTERPRETATION

Based on his Tanner Lectures on Human Values at Harvard University in 2004,¹⁹ *Active Liberty*, like Justice Scalia's *A Matter of Interpretation: Federal Courts and the Law*,²⁰ is intended to discuss a "theme"²¹ of constitutional interpretation.²² Justice Breyer accomplishes this objective by first laying out his theme,²³ explaining why he thinks it is consistent with both an interpretative tradition²⁴ and American constitutional history,²⁵ and then applying his theme to six different areas of the law—speech,²⁶ federalism,²⁷ privacy,²⁸ affirmative action,²⁹ statutory interpretation,³⁰ and administrative law.³¹ He concludes by explaining why he believes that his theme is

17. By comparing Justice Breyer's view to that of Pelagius, I do not mean to suggest that Justice Breyer or anyone who shares his Pelagian view of the Constitution or of humanity should be regarded as a religious heretic or is guilty of some offense against the Church. Rather, I simply mean to suggest Justice Breyer's view is consistent with the worldview that logically flows from an acceptance of the basic tenets of Pelagian thought.

18. More precisely, the Constitution is based on Calvinist principles. Hamilton, *supra* note 13, at 293–94. Of course, the Augustinian view forms the basis for the theology of John Calvin. SPROUL, *supra* note 2, at 105.

19. BREYER, *supra* note 16, at ix. See also Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245 (2002) (discussing the same "theme" of constitutional interpretation as part of his James Madison Lecture on Constitutional Law at New York University School of Law in 2001).

20. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997).

21. Justice Breyer insists that he is "not arguing for a new theory of constitutional interpretation," but rather "for greater awareness of, and emphasis upon, the Constitution's democratic imperative." BREYER, *supra* note 16, at 110. *Id.* at 7 ("To illustrate a theme is not to present a general theory of constitutional interpretation.").

22. Indeed, some have suggested that Justice Breyer wrote *Active Liberty* as a means of rebutting Justice Scalia's constitutional vision. See Jeffrey Toobin, *Breyer's Big Idea*, THE NEW YORKER, Oct. 31, 2005, at 36 ("The book . . . was inspired in part by Breyer's disdain for the method of constitutional interpretation championed by his principal ideological rivals on the Court, Antonin Scalia and Clarence Thomas.").

23. BREYER, *supra* note 16, at 15–16.

24. *Id.* at 17–20.

25. *Id.* at 21–34.

26. *Id.* at 39–55.

27. *Id.* at 56–65.

28. *Id.* at 66–74.

29. *Id.* at 75–84.

30. *Id.* at 85–101.

31. *Id.* at 102–08.

superior to the textualist approach advocated by Justice Scalia and others.³²

Drawing upon a dichotomy first suggested by the nineteenth century French philosopher Benjamin Constant, Justice Breyer makes a sharp distinction between “modern liberty” and “ancient liberty.”³³ Modern liberty is the “individual’s freedom to pursue his own interests and desires free of improper government interference,”³⁴ and ancient liberty is the “freedom of the individual citizen to participate in the government and thereby to share with others the right to make or to control the nation’s public acts.”³⁵ Although he is “conscious of the importance of modern liberty,”³⁶ he wishes to “focus primarily”³⁷ on the “active and collective participation in political power.”³⁸

Justice Breyer’s basic message is that “reference to the Constitution’s basic democratic objectives can help courts shape constitutional doctrine, reconcile competing constitutional values, time judicial intervention, interpret statutory ambiguities, and create room for agency interpretations.”³⁹ Justice Breyer insists that an emphasis on the “democratic objective”⁴⁰ will “yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary social problems.”⁴¹ In order to accomplish this “sharing of a nation’s sovereign authority,”⁴² judges must ensure that the people “have the capacity to exercise their democratic responsibilities”⁴³ so that they can “participate in government”⁴⁴ with broad authority “to decide and leeway to make mistakes.”⁴⁵

Of course, a possible conflict emerges in the relationship between Justice Breyer’s “embrace of democracy in his book and the vigorous enforcement, in which [he] has sometimes enthusiastically participated, of individual rights against majority decisions.”⁴⁶ Justice Breyer insists that the judiciary “can defer to the legislature’s own judgment insofar as that judgment concerns matters (particularly empirical matters) about which the legislature is comparatively expert,”⁴⁷ but that the judiciary should not defer “when they evaluate the risk that [a statute] will defeat the participatory self-government objective itself.”⁴⁸ Thus, the exact role of the courts

32. *Id.* at 115–32.

33. *Id.* at 3–5.

34. *Id.* at 5.

35. *Id.* at 3.

36. *Id.* at 5.

37. *Id.*

38. *Id.*

39. *Id.* at 109.

40. *Id.* at 6.

41. *Id.*

42. *Id.* at 15.

43. *Id.* at 16.

44. *Id.* at 15.

45. *Id.*

46. Toobin, *supra* note 22, at 42 (quoting former Justice of the Supreme Judicial Court of Massachusetts and U.S. Solicitor General Charles Fried).

47. BREYER, *supra* note 16, at 49.

48. *Id.*

remains “mysterious and really unexplained.”⁴⁹ One suspects that Justice Breyer views the Court as a check on majority decisions—as a “bevy of platonic guardians”⁵⁰ who invalidate laws simply because the policy choice is “uncommonly silly.”⁵¹

II. OUR AUGUSTINIAN CONSTITUTION

Our Constitution embodies the Augustinian Perspective in three ways.⁵² First, “[i]n the compound republic of America, the power surrendered by the people is first divided between two distinct governments.”⁵³ The Constitution establishes “two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”⁵⁴ By dividing sovereignty between the national government and the States,⁵⁵ the Constitution insured that “a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”⁵⁶ Thus,

the preservation of the States, and the maintenance of their governments, are as much within the design and care of the

49. Toobin, *supra* note 22, at 42 (quoting former Justice of the Supreme Judicial Court of Massachusetts and U.S. Solicitor General Charles Fried).

50. *Griswold v. Connecticut*, 381 U.S. 479, 526–27 (1965) (Black, J., dissenting).

51. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting). Thus, the ordinary or original meaning of words within a statute might be disregarded in order to give substance to individual desires or aspirations. *See* SCALIA, *supra* note 20, at 17. The courts might assume responsibility for the management of the day-to-day functions of government.

52. The Constitution’s “marriage of distrust in individuals but hope in properly structured institutions is no mere historical accident but has its roots in the Reformation theology of John Calvin, the greatest systematic theologian of the Reformation.” Hamilton, *supra* note 13, at 293. Indeed, Calvinist ideas were influential in colonial culture and were dominant among the delegates of the Constitutional Convention. *Id.* at 293–94.

53. THE FEDERALIST NO. 51 (James Madison). As early as 1768, John Dickinson suggested that sovereignty should be divided between the British Parliament and the Colonial Legislatures. *See* 1 ALFRED H. KELLY, WINFRED A. HARBISON, & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 46–49 (7th ed. 1991).

54. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

55. Prior to the adoption of the Constitution, the thirteen States effectively were thirteen sovereign nations. *See* DECLARATION OF INDEPENDENCE (U.S. 1776) (“[T]hese United colonies are, and of right ought to be Free and Independent States.”). Each individual State retained the “Full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do.” *Id.* Indeed, the Articles of Confederation explicitly recognized that each State “retains its sovereignty, freedom, and independence, which is not by this confederation expressly delegated to the United States, in Congress assembled.” ARTICLES OF CONFEDERATION, art. II (1777). Thus, before the ratification of the United States Constitution, the States were sovereign entities. *See* *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

56. THE FEDERALIST NO. 51 (James Madison). *See also* THE FEDERALIST NO. 28 (Alexander Hamilton) (“Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government.”).

Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.⁵⁷

This division of sovereignty between the States and the national government “is a defining feature of our Nation’s constitutional blueprint.”⁵⁸ It “protects us from our own best intentions” by preventing the concentration of “power in one location as an expedient solution to the crisis of the day.”⁵⁹ The division of power between *dual sovereigns*—the States and the National Government—is reflected throughout the Constitution’s text,⁶⁰ as well as in its structure.⁶¹ Because “the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom,”⁶² the Supreme Court has intervened to maintain the sovereign prerogatives of both the States and the National Government.⁶³

In order to preserve the sovereignty of the National Government, the Court has prevented the States from imposing term limits on members of Congress,⁶⁴ and from instructing members of Congress as to how to vote on certain issues.⁶⁵ Similarly, it has invalidated state laws that infringe on the right to travel,⁶⁶ that undermine the Nation’s foreign policy,⁶⁷ and that exempt a State from generally-applicable regulations of interstate commerce.⁶⁸ Conversely, recognizing that “the erosion of state sovereignty is likely to occur a step at a time,”⁶⁹ the Supreme Court has declared that the national government may not compel the States to pass

57. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

58. *Fed. Mari. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002).

59. *New York v. United States*, 505 U.S. 144, 187 (1992).

60. *See Printz v. United States*, 521 U.S. 898, 933 (1997).

61. *See Alden v. Maine*, 527 U.S. 706, 714–15 (1999). *See also* U.S. CONST. amend. X. (The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.).

62. *United States v. Lopez*, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring).

63. Moreover, the Supreme Court has reinforced the division of power among the sovereigns by insisting that “if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.” *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989) (internal quotation marks omitted). *See also* *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991) (requiring a clear statement in federal legislation for Congress to dictate the qualifications for state officials); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (prohibiting abrogation of sovereign immunity without a clear statement); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981) (requiring a clear statement from Congress to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, State sovereignty can only be diminished by a clear expression of congressional intent within the statutory text.

64. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 800–01 (1995).

65. *Cook v. Gralike*, 531 U.S. 510, 519–22 (2001).

66. *Saenz v. Roe*, 526 U.S. 489 (1999) (citing *United States v. Guest*, 383 U.S. 745, 757 (1966)).

67. *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–74 (2000).

68. *Reno v. Condon*, 528 U.S. 141, 150 (2000).

69. *South Carolina v. Baker*, 485 U.S. 505, 533 (1988) (O’Connor, J., dissenting).

particular legislation,⁷⁰ require state officials to enforce federal law,⁷¹ dictate the location of the State Capitol,⁷² or regulate purely local matters.⁷³ Similarly, the Court has restricted Congress' power to enforce the Fourteenth Amendment⁷⁴ and its ability to abrogate the States' sovereign immunity.⁷⁵ Indeed, in some circumstances, the States' sovereignty interest will preclude federal courts from enjoining on-going violations of federal law.⁷⁶

Second, after sovereignty is divided between the States and the National Government, "then the portion [of sovereignty] allotted to each [is] subdivided among distinct and separate departments."⁷⁷ The Constitution "does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, 'shall take Care that the Laws be faithfully executed,' personally and through officers whom he appoints."⁷⁸ Thus, Congress may not interfere with the President's enforcement of the law.⁷⁹ Conversely, the President may not interfere with the ability of Congress to legislate.⁸⁰ Of course, the judiciary, through the practice of judicial review,⁸¹ ensures that the national government remains one of

70. *New York v. United States*, 505 U.S. 144, 162 (1992).

71. *Printz v. United States*, 521 U.S. 898, 935 (1997).

72. *Coyle v. Smith*, 221 U.S. 559, 579 (1911).

73. *United States v. Morrison*, 529 U.S. 598, 617–19 (2000); *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995).

74. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

75. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996).

76. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (citing *Seminole Tribe of Fla.*, 517 U.S. at 44).

77. THE FEDERALIST NO. 51 (James Madison).

78. *Printz v. United States*, 521 U.S. 898, 922 (1997).

79. *INS v. Chadha*, 462 U.S. 919, 954–56 (1983).

80. *Clinton v. New York*, 524 U.S. 417, 444–47 (1998).

81. Judicial review is the power to nullify the results of the democratic process. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 4 (Harvard University Press 1980) (1938). The elected members of the legislature, thinking that they are acting in accordance with the federal and state constitutions, pass a law that has the overwhelming support of the people. The elected executive, thinking that the bill presented is constitutional, signs the proposal into law. Yet, despite the measure's popularity and despite the fact that the elected legislature and the elected executive think that the new statute is both wise policy and constitutional, the judiciary, which is the least democratic branch, may invalidate the law simply because it interprets the Constitution differently. Thus, the will of the people, as expressed through their elected leaders, is thwarted by a simple majority of judges.

Recognizing the dangers of rule by a "bevy of Platonic Guardians," the judiciary generally has embraced judicial restraint—the idea that the courts will intervene only when necessary to vindicate the fundamental values expressed in the Constitution—as a check on its power of judicial review. *Griswold v. Connecticut*, 381 U.S. 479, 513 (Black, J., dissenting). Thus, "uncommonly silly" laws are upheld as constitutional unless it can be shown that the statute violates a textual provision of the Constitution. *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting). The meaning of a statute turns on "the provisions of our laws rather than the principal concerns of our legislators." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). The courts acknowledge that they are not "omni-competent" and, thus, cannot micromanage government departments. *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 536 (7th Cir. 1997) ("The conceit that [courts are competent to decide every issue] belongs to a myth of the legal profession's omniscience that was exploded long ago.").

enumerated, and thus limited, powers.⁸²

Third, various provisions of the Fourteenth Amendment restrict the States while empowering the national government to protect civil liberties.⁸³ Both the Equal Protection Clause⁸⁴ and the Privileges and Immunities Clause impose substantive restrictions on the States.⁸⁵ Moreover, although the Bill of Rights originally did not apply to the States,⁸⁶ the Due Process Clause incorporates most of the provisions in those first ten amendments.⁸⁷ In addition, Section Five of the Fourteenth Amendment gives Congress the authority to enact legislation that enforces the substantive guarantees of Section One against the States.⁸⁸ Consequently, if the States have engaged in conduct that violates the Fourteenth

82. *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

83. Similarly, the Thirteenth, Fifteenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments contain provisions that allow Congress to enforce them against the States. *See* U.S. CONST. amend XIII, § 2; XV, § 2; XIX § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. Presumably, if a State was violating the rights guaranteed by these Amendments, Congress would be able to abrogate its sovereign immunity as a means of enforcing the Amendments.

84. U.S. CONST. amend. XIV, § 1. The Equal Protection Clause is “essentially a direction that all persons similarly situated . . . be treated alike.” *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). The implication is that the Constitution protects “*persons*, not *groups*.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original). *See also* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 279–80 (1986) (Powell, J., concurring). Indeed, the “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). If a program treats everyone equally, there is no equal protection violation. *Romer v. Evans*, 517 U.S. 620, 623 (1996) (stating that the Equal Protection Clause enforces the principle that the Constitution neither knows nor tolerates classes among its citizens).

The “general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440 (citing *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981)). This general rule gives way in those rare instances when statutes infringe upon fundamental constitutional rights or utilize “suspect” or “quasi-suspect” classifications. *See Cleburne*, 473 U.S. at 440–41. *See also* *Graham v. Richardson*, 403 U.S. 365 (1971); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

85. *See Johnson v. California*, 543 U.S. 499 (2005) (discussing equal protection); *Saenz v. Roe*, 526 U.S. 489, 503–04 (1999) (discussing privileges and immunities).

86. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833). Of course, many regard the Bill of Rights as *creating limits* on the national government. I regard the Bill of Rights not as creating limits, but merely as *confirming* limits that already existed. In other words, even if the Bill of Rights did not exist, the national government would be incapable of establishing a church, punishing the free exercise of religion, abridging the freedom of speech, etc.

87. *See* 2 DAVID M. O’BRIEN, *CONSTITUTIONAL LAW AND POLITICS* 310–11 (5th ed. 2003) (listing cases and specific provisions of the Bill of Rights). *Cf.* MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986) (arguing that the Privileges or Immunities Clause incorporates all provisions of the Bill of Rights). Indeed, it appears that the only provisions of the Bill of Rights that have not been incorporated are: (1) the Second Amendment; (2) the Third Amendment; (3) that portion of the Fifth Amendment guaranteeing a right to indictment by a grand jury; (4) that portion of the Seventh Amendment guaranteeing a right to a jury trial in civil cases; and (5) that portion of the Eighth Amendment prohibiting excessive fines and bail. 2 O’BRIEN, *supra* note 87, at 312.

88. *See City of Boerne v. Flores*, 521 U.S. 507, 519–20 (1997).

Amendment, then Congress can take remedial action to correct the violation and to prevent future violations.⁸⁹

III. JUSTICE BREYER'S THEME CONFORMS TO THE PELAGIAN VISION

Justice Breyer's "theme" conforms to the Pelagian vision in three ways. First, he ignores the division of sovereignty between the States and the National Government. Instead of recognizing that "a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,"⁹⁰ Justice Breyer advocates "federal-state cooperation that permits effective action."⁹¹ He contends that the Court's recent decisions upholding State sovereignty,⁹² "are

89. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 68, 81 (2000). For example, because "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment," one way of enforcing the Fourteenth Amendment is to abrogate the States' sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (citation omitted). If Congress is enforcing the Fourteenth Amendment, then it may abrogate a State's sovereign immunity. See *Tennessee v. Lane*, 541 U.S. 509, 518 (2004); *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 364 (2001); *Kimel*, 528 U.S. at 80; *Alden v. Maine*, 527 U.S. 706, 756 (1999); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 637 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1986). In other words, abrogation of sovereign immunity is an appropriate response to unconstitutional conduct by the States. See *United States v. Georgia*, 126 S. Ct. 877, 882 (2006).

90. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

91. BREYER, *supra* note 16, at 57.

92. See *Fed. Mari. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (ruling that sovereign immunity bars individuals from bringing federal administrative proceedings against the States); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, (2001) (declaring there to be no abrogation of sovereign immunity for ADA Title I claims); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that there was no congressional authority to enact the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that there is no abrogation of sovereign immunity for ADEA claims); *Alden v. Maine*, 527 U.S. 706 (1999) (implying that there is no abrogation for FLSA claims); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (allowing no waiver of sovereign immunity for Lanham Act claims); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (allowing no abrogation for intellectual property claims); *Printz v. United States*, 521 U.S. 898 (1997) (ruling that Congress may not commandeer state and local officials to enforce federal law); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (allowing no abrogation of sovereign immunity for Indian Gaming Act claims); *United States v. Lopez*, 514 U.S. 549 (1995) (declaring there was no congressional authority to regulate possession of a gun near a school); *New York v. United States*, 505 U.S. 144 (1992) (holding that Congress may not force States to pass particular types of legislation). Cf. *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (holding that the U.S. Attorney General may not adopt an interpretative rule which would invalidate Oregon's Death with Dignity Act).

To his credit, Justice Breyer—unlike many commentators and scholars—does not refer to these developments as "States' Rights." That term—which seems to be favored by those who are opposed to dual sovereignty—elicits visions of John C. Calhoun advocating nullification of federal law, of Jefferson Davis and his colleagues attempting to break the Union over slavery, and of Southern political leaders refusing to follow federal court orders during the 1960s. Such associations are unfortunate and ignore the fact that the division of sovereignty is a two-way street. Just as the sovereignty of the States limits the powers of the national government, the

often retrograde”⁹³ because “[t]hey discourage use of cooperative, incentive-based regulatory methods.”⁹⁴ Because Congress may not force States to pass particular laws⁹⁵ or utilize state officials to enforce federal statutes,⁹⁶ Justice Breyer believes that Congress is forced “either to forego the program in question altogether or, perhaps more likely, to expand the size of the program-related federal bureaucracy.”⁹⁷ Similarly, limiting congressional power to regulate matters traditionally assigned to the States⁹⁸ ignores the public’s participation “in the legislative process at the national level”⁹⁹ and makes “it less likely that Congress will enact laws that might well embody cooperative federalism principles.”¹⁰⁰ As to those decisions limiting the ability of the legislative branch to abrogate State sovereign immunity,¹⁰¹ Justice Breyer contends that they “make it more difficult for Congress to create uniform individual remedies under legislation dealing with nationwide problems.”¹⁰² In sum, Justice Breyer does not appear to view the

sovereignty of the national government limits the authority of the States. States are still subject to the supremacy of federal law under the Constitution; in those areas where sovereignty is explicitly assigned to the national government, the national government remains superior. *See, e.g.*, U.S. CONST. art. I, § 10 (enumerating the powers of Congress); art. VII (presenting the Supremacy Clause).

93. BREYER, *supra* note 16, at 59.

94. *Id.*

95. *New York v. United States*, 505 U.S. 144 (1992).

96. *Printz v. United States*, 521 U.S. 898 (1997).

97. BREYER, *supra* note 16, at 60.

98. *United States v. Morrison*, 529 U.S. 598 (2000) (finding no congressional authority to enact the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (finding no congressional authority to regulate possession of a gun near a school).

99. BREYER, *supra* note 16, at 62.

100. *Id.* at 63.

101. *See Fed. Mari. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (ruling that sovereign immunity bars individuals from bringing federal administrative proceedings against the States); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, (2001) (declaring there to be no abrogation of sovereign immunity for ADA Title I claims); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (holding that there is no abrogation of sovereign immunity for ADEA claims); *Alden v. Maine*, 527 U.S. 706 (1999) (implying that there is no abrogation for FLSA claims); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (allowing no waiver of sovereign immunity for Lanham Act claims); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (allowing no abrogation for intellectual property claims); *Printz v. United States*, 521 U.S. 898 (1997) (ruling that Congress may not commandeer state and local officials to enforce federal law); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (allowing no abrogation of sovereign immunity for Indian Gaming Act claims).

Justice Breyer refers to these decisions as requiring “a state to *waive* its Eleventh Amendment immunity for suit by private citizens.” BREYER, *supra* note 16, at 60–61 (emphasis added). This is incorrect. There is a fundamental difference between abrogation of sovereign immunity and waiver of sovereign immunity. Abrogation occurs where Congress passes a statute abolishing sovereign immunity for certain claims. Waiver occurs where the State voluntarily takes an action that relinquishes its immunity for certain claims. *See generally* WILLIAM E. THRO, *WHY YOU CANNOT SUE STATE U: A GUIDE TO SOVEREIGN IMMUNITY* (2001).

102. BREYER, *supra* note 16, at 61.

States as “a defining feature of our Nation’s constitutional blueprint,”¹⁰³ but simply a convenient mechanism for the Congress to implement the national majority’s will.

Second, Justice Breyer blurs “the separation and independence of the coordinate branches of the Federal Government”¹⁰⁴ by imagining what “a hypothetical member of Congress *would have* decided.”¹⁰⁵ His discussions of statutory interpretation¹⁰⁶ and administrative law illustrate the point.¹⁰⁷ Although “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,”¹⁰⁸ Justice Breyer seeks “an interpretation of the statute that tends to implement the legislator’s will.”¹⁰⁹ He contends that an “overly literal reading of a text can too often stand in the way” of the “translation of the general desire of the public for certain ends.”¹¹⁰ Thus, the Judicial Branch’s *interpretation* of what a majority of the public *meant to say* appears to replace what the Legislative Branch *actually said*. Similarly, while the Supreme Court will defer to an administrative agency’s interpretation of an ambiguous statute,¹¹¹ Justice Breyer insists that such deference is only “a rule of thumb”¹¹² that does not apply if “a statutory term . . . concerns a matter that Congress is likely to have wanted to decide for itself.”¹¹³ In seeking to ascertain what Congress, or more accurately an imaginary member of Congress, would have wanted in every instance, Justice Breyer diminishes both the role of the Executive in implementing statutes and the judiciary’s role in interpreting statutory text. In doing so, he promotes “the

103. Fed. Mari. Comm’n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002).

104. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

105. BREYER, *supra* note, 16 at 108 (emphasis added)

106. *Id.* at 85–101.

107. *Id.* at 102–08.

108. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998). Over a century and a half ago, the Supreme Court explained:

In expounding this law, the judgment of the court cannot, in any degree, be influenced by . . . the motives or reasons assigned by [legislators] for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is the act itself; and we must gather their intention from the language there used . . .

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). As Justice Scalia noted in another context:

[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than what the lawgiver promulgated. . . . Government by unexpressed intent is similarly tyrannical. It is the *law* that governs, not the intent of the lawgiver. That seems to me the essence of the famous American ideal set forth in the Massachusetts Constitution: A government of laws, not men. Men may intend what they will; but it is only the laws that they enact which bind us.

SCALIA, *supra* note 22, at 17.

109. BREYER, *supra* note 16, at 99.

110. *Id.* at 101.

111. Chevron, USA v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984).

112. BREYER, *supra* note 16, at 106.

113. *Id.*

accumulation of excessive power in any one branch.”¹¹⁴

Third, Justice Breyer elevates the “Constitution’s democratic nature”¹¹⁵ while diminishing “the individual’s right to freedom from the majority.”¹¹⁶ His discussion of racial preferences illustrates the point.¹¹⁷ Although racial classifications “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality”¹¹⁸ and, thus, “call for the most exacting judicial examination,”¹¹⁹ Justice Breyer focuses on whether racial preferences are “necessary to maintain a well-functioning participatory democracy.”¹²⁰ Similarly, while the motivation for racial classifications is irrelevant,¹²¹ and while the history

114. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

115. BREYER, *supra* note 16, at 5.

116. *Id.*

117. *Id.* at 75–84.

118. *Shaw v. Reno*, 509 U.S. 630, 643 (1993) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). *Cf.* *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 172 (1977) (Brennan, J., concurring) (“[A]n explicit policy of assignment by race may serve to stimulate our society’s latent race consciousness.”); *Wright v. Rockefeller*, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting) (“Here the individual is important, not his race, his creed, or his color.”).

119. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J., concurring). *See also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500–01 (1989). Consequently, the Court has declared that racial classifications

are constitutional only if they are narrowly tailored to further compelling governmental interests. “Absent searching judicial inquiry into the justification for such race-based measures,” we have no way to determine what “classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”

Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (citations omitted). *See also Croson*, 488 U.S. at 493. Moreover, “the government has the burden of proving that racial classifications ‘are narrowly tailored measures that further compelling governmental interests.’” *Johnson v. California*, 543 U.S. 499, 505 (quoting *Adarand*, 515 U.S. at 227).

120. BREYER, *supra* note 16, at 82.

121. Indeed, the Court has “insisted on strict scrutiny in every context, even for so-called ‘benign’ racial classifications, such as race-conscious university admissions policies, race-based preferences in government contracts, and race-based districting intended to improve minority representation.” *Johnson*, 125 S. Ct. at 1146 (citations omitted). *See also Adarand*, 515 U.S. at 226 (“[D]espite the surface appeal of holding ‘benign’ racial classifications to a lower standard, because ‘it may not always be clear that a so-called preference is in fact benign.’” (quoting *Bakke*, 438 U.S. at 298 (Powell, J., concurring))); *Croson*, 488 U.S. at 500 (“But the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”). As Justice Thomas observed:

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the

of racial classifications suggests that great deference to governmental findings simply leads to further discrimination,¹²² Justice Breyer contends that “invidious discrimination and positive discrimination [are] not equivalent.”¹²³ Justice Breyer’s discussions of free speech¹²⁴ and the right to privacy¹²⁵ reveal a similar emphasis on finding an interpretation that “would facilitate the functioning of democracy.”¹²⁶ In the speech context, Justice Breyer wishes “to preserve speech that is essential to our democratic form of government while simultaneously permitting the law to deal effectively with such modern regulatory problems as campaign finance and product or work place safety.”¹²⁷ In the privacy context, his focus is not on “eighteenth-century details” but on “the effect of a holding of a certain breadth on the *ongoing policy-creating process*.”¹²⁸ In sum, interpretations that may vindicate the rights of the individual, but which do not promote “the perspective of the Constitution’s basic democratic objectives,” are rejected.¹²⁹

CONCLUSION

Justice Breyer’s “theme” is entirely appropriate for the Constitution—the Constitution of South Africa.¹³⁰ When the white minority in South Africa voluntarily

heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.

Adarand, 515 U.S. at 240 (Thomas, J., concurring). In other words, if the government “denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race,” the rights of the citizens “to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.” *Croson*, 488 U.S. at 493.

122. *Cf.* *Korematsu v. United States*, 323 U.S. 214, 235–40 (1944) (Murphy, J., dissenting). Indeed, the entire notion of underrepresentation “rests upon the ‘completely unrealistic’ assumption that minorities will [make a particular choice] in lockstep proportion to their representation in the local population.” *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 494 (1986) (O’Connor, J., concurring in part and dissenting in part)). Consequently, in only rare instances will there be sufficient evidence to justify a finding of present day effects of prior intentional discrimination. *See Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

123. BREYER, *supra* note 16, at 78.

124. *Id.* at 39–55.

125. *Id.* at 66–74.

126. *Id.* at 83.

127. *Id.* at 55.

128. *Id.* at 73 (emphasis added).

129. *Id.* at 83 (referring to the Equal Protection Clause rather than privacy rights, Justice Breyer does so as an example of how valuing active liberty and a well-functioning democracy can resolve competing interpretations of constitutional provisions).

130. The South African Constitution embodies deference to the will of democratic majorities. This is expressed in a number of constitutional provisions. First, the Constitutional Court—the highest judicial body—is commanded to “promote the values that underlie an open and democratic society based on human dignity, equality, and freedom.” S. AFR. CONST. 1996 § 39(1)(a). Second, a two-thirds majority of the National Assembly (along with a supporting vote of at least six provinces of the National Council of Provinces) can amend most provisions of the Constitution at any time. *Id.* at § 74. Since one party—the African National Congress—currently holds more than two-thirds of the seats, revision of the nation’s fundamental law can be accomplished by a single political party. Third, the National Assembly (the legislature) is elected by proportional representation, which allows parties

surrendered its control of the government to the black majority in the early 1990s,¹³¹ all segments of the multi-racial society negotiated a constitution¹³² that effectively embodies the Pelagian vision.¹³³ Yet, in America, our society chose a different path.¹³⁴ Our Constitution embodies an Augustinian vision.¹³⁵ Consequently, an interpretative vision based on Pelagian assumptions is inappropriate. Even if he were

with low levels of support to obtain seats. *Id.* at § 46(1)(d). Fourth, because the president is the leader of the party or the coalition that has a majority in the National Assembly, there is neither a legislative check on the executive nor an executive check on the legislature. *See id.* at § 86. Fifth, although South Africa is nominally a federation, the individual provinces are subordinate to the will of the national government, which, as explained above, is controlled by democratic majorities. *See id.* at §§ 103–141.

Of course, South Africa does have a comprehensive bill of rights and the Constitutional Court vigorously enforces those rights. Indeed, the Constitutional Court invalidated the initial Constitution. *See In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC) (S. Afr.). However, this judicial check is the only real check on the power of a democratic majority. South Africa's bill of rights creates limits on government rather than merely confirming the limits that are implicit in the structure. In that sense, South Africa is fundamentally different from the Augustinian vision embodied in the United States Constitution.

131. For a comprehensive account of those events, see ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY* (Univ. Chicago 1996) (1994).

132. For a discussion of those negotiations, see I.M. RAUTENBACH & E.F.J. MALHERBE, *CONSTITUTIONAL LAW* 17–19 (4th ed. 2004); ZIYAD MOTALA & CYRIL RAMAPHOSA, *CONSTITUTIONAL LAW: ANALYSIS & CASES* 1–11 (2002).

133. It is not surprising that South Africa's majority chose a Pelagian rather than an Augustinian vision for their Constitution. One of the intellectual foundations of the Apartheid regime was a perverse and erroneous interpretation of Kuyper's theory of sphere sovereignty. *See* ALLISTER SPARKS, *THE MIND OF SOUTH AFRICA* 156–59 (1990). However, as observed above, Kuyper's theory of sphere sovereignty—when properly interpreted and applied—is a clear application of the Augustinian or, more precisely, Calvinist perspective. *See* Cochran, *supra* note 14, at 487–88.

134. Of course, the fact that America has chosen a different path has enormous consequences. As I have related elsewhere, the principles of decentralization and judicial restraint undermine the ability of our society to achieve quality education. *See* William E. Thro, *The School Finance Paradox: How the Constitutional Values of Decentralization and Judicial Restraint Inhibit the Achievement of Quality Education*, 197 EDUC. L. REP. 477 (2005) (noting that, although the United States acknowledges the importance of education to the survival of a democratic nation, judicial restraint and decentralization make financing public education a difficult task).

135. More precisely, our *constitutions* embody an Augustinian perspective. America does not have one constitution, it has fifty-one constitutions—the national charter and the state constitutions. Of course, from a jurisprudential standpoint, state constitutions are significantly different from the Federal Constitution. First, the Federal Constitution represents a delegation of power, while the state constitutions represent a limitation on power. *See, e.g., Bd. of Educ. v. Nyquist*, 439 N.E.2d 359, 366 n.5 (N.Y. 1982). *See also* *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 785 (Md. 1983). Second, state constitutions are far more reflective of the values and aspirations of the citizens of the several States. *See* Charles G. Douglas, III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U.L. REV. 1123, 1144–45 (1978). Third, unlike the Federal Constitution, which has been amended only seventeen times since 1791, State constitutions are regularly amended, often completely rewritten, and frequently revised. For a review of the factors that should be considered in revision of a state constitution, see Janice C. May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT'L CIVIC REV., 64 (1977); A.E. Dick Howard, *Constitutional Revision: Virginia and the Nation*, 9 U. RICH. L. REV. 1 (1974).

not a sitting jurist, Justice Breyer's book would mark a significant contribution to American constitutional law. Anyone who is interested in constitutional interpretation should read it. However, it should be read with the understanding that Justice Breyer's assumptions are not those of the American Framers.