American Research Journal of Humanities & Social Science (ARJHSS)
E-ISSN: 2378-702X
Volume-07, Issue-08, pp-61-62
www.arjhss.com

Book Review Open Access

Reading the Constitution: Why I Chose Pragmatism, Not Textualism

[Stephen Breyer. New York: Simon and Schuster, 2024.]

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During his combined 41 years of service on United States federal courts, Stephen Breyer claims that he utilized a phethora of means to interpret statutes and the Constitution. In this book, penned just two years after his retirement from the U.S. Supreme Court, Breyer defends that kind of flexible or pragmatic approach against a textualist orientation to legal interpretation. He relies on totally public and accessible information, especially previous court rulings, to critique the textualist stance.

Breyer graduated from Stanford University and Oxford with BAs, then earned a LLB degree from Harvard University. He served in the Army Reserves in strategic intelligence during this period. Following law school, Bryer served as a law clerk for U.S. Supreme Court Justice Arthur Goldberg. He taught at Harvard Law School from 1967 to 1980. Simultaneously over that span, he had a diverse array of other posts, from fact-checker on the Warren Commission, to a special assistant to the Assistant U.S. Attorney General, to special counsel and later chief counsel on the U.S. Senate Committee on the Judiciary. He was appointed to the U.S. Court of Appeals for the First Circuit in 1980 and to the U.S. Supreme Court in 1994.

Over the past half-century, Breyer has written or co-authored 11 books, covering topics from government regulation to the death penalty. The current text contains 20 chapters divided into five parts, along with a Preface at the start and Conclusion, Acknowledgments, Arthor's Note, Notes, and Index at the end.

In the Preface, Breyer rejects the textualist approach to legal interpretation in favor of a flexible method which integrates several considerations, including purposes, consequences, and values. Far from ignoring the views of the Constitution's Framers, Breyer believes that his approach is more consistent with their desire "to establish a workable framework for long-lasting government" (p. xvii).

Part I encompasses the first two chapters and presents a contrast between the purpose-based and textualist approaches. Breyer finds the latter deficient in several ways. First, textualists hold firm that there is only one correct way to interpret statutes, with a clear set of rules to follow. Second, this orientation does not appreciate the vague and ambiguous language inherent in many statues and in the Constitution itself. Regarding the latter, the specific form of textualism for interpreting the Constitution is originalism. Finally, those proclaiming to follow textualism have not been consistent in adhering to previous rulings.

Part II of the book includes Chapters 3 through 10. These chapters apply the pragmatic method to interpretation of statutory law. For instance, Chapter 6 discusses considering consequences when interpreting statutes; Chapter 7 notes the merits of legislative history for understanding statutes; and Chapter 8 covers values. In summarizing the utility of the purpose-based approach, Breyer asserts that laws emanating from such interpretation work better for both Congress and the people which the laws affect.

Part III deals with the interpretation of the U.S. Constitution. Incorporating Chapters 11 through 15, this section critiques how constitutional textualism and originalism fail to fulfill the desires of the Framers or the needs of judges. Alternately, Breyer points to the research of Cass Sunstein and others who have detailed various ways used over American history to interpret the Constitution. In Chapter 15, Breyer proclaims that the 2022 Dobbs v. Jackson Women's Health Organization decision violated the tenant of following precedent, or *stare decisis.*

Part IV comprises Chapters 16 through 18, all with the theme of workability. Each chapter applies a component of Breyer's purpose-based interpretation to a recent Supreme Court case. For instance, Chapter 16 looks at the 2014 NLRB v. Noel Canning case; Chapter 17 assesses the 2008 District of Columbia v. Heller case; and Chapter 18 reviews two 2005 cases, McCreary County v. ACLU of Kentucky and Van Orden v. Perry.

Part IV is made up of Chapters 19 and 20. In Chapter 19, Breyer identifies three "paradigm shifts"—major changes in the way Supreme Court justices interpreted the Constitution. The first period started with the decision in the 1905 Lochner v. New York case, which solidified protection of property and contractual rights. The second period, which began in 1937 with the ruling in the NLRB v. Jones and Laughton Steel Corporation, upheld New Deal policies. Finally, the third period coincided with the appointment of Earl Warren as chief justice of the Supreme Court in 1953. Under his leadership, the court expanded civil rights and liberties along with enlarging the protections against the criminally accused. Conversely, in Chapter 20 Breyer contemplates whether the Supreme Court's current direction can be regarded as a new paradigm, furnishing arguments on both sides of the proposition.

In the Conclusion, Breyer again reminds the reader why his practical method of statutory and constitutional interpretation is more workable than relying only on a textualist approach, and repeats the basic elements of interpreting law which he identified initially in the Preface: a combination of experience and "judicial instinct."

During the 21st century, there have been four types of books focusing on originalism as a technique for interpreting constitutional cases. For instance, publications by Jonathan O'Neill (2007) and Patrick Charles (2014) offer a general overview of the topic. Further, Robert Bennett and Lawrence Solum (2016) advance dueling perspectives on originalism in a debate-type format. Alternatively, some books argue either for or against originalism: those by Jack Balkin (2014), Ilan Wurman (2017), Lee Strang (2019), and Russell Rucker (2024) clearly support that interpretive tool, while others by Frank Cross (2013) Erwin Chemerinsky (2022), Madiba Dennis (2024), and Johathan Gienapp (2024) decidedly oppose originalism. The current text is closest to the last of these formats.

Breyer admits that his judicial views have been influenced by law professors and previous justices alike. Likewise, his cosmopolitan background traversing law and politics imbued him with a more diverse approach to interpreting statues and the Constitution.

While text material is presented in a sequential manner, Part IV on workability was unnecessary as a separate section; the cases found in the chapters comprising that section could have been integrated into the text elsewhere. Further, there is an inordinate consecutive number of cases analyzed from the dissent perspective at the start. Lastly, while Breyer deserves credit for clearly identifying the sources of his information—all public—there is certainly continuing curiosity over what could additionally be learned from private sources.

Just as with Stephen Breyer's other publications, this book has immense value as a teaching tool. Too, the former Supreme Court justice states that if he is right in his criticism, "judges will find it difficult to maintain informed support for abandoning traditional, purpose-based methods of interpretation and substituting newer, textualist-based methods instead" (p. 259).

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