

Book Note

MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW, by Stephen Breyer¹

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IN SHAKESPEARE'S *HENRY IV*, Hotspur listens as Owen Glendower boasts, "I can call spirits from the vasty deep." Unimpressed, he replies, "Why, so can I, or so can any man, *but will they come when you do call for them?*"² This simple yet weighty question frames and unites the discussion that is central to Justice Stephen Breyer's new book.³

Making Our Democracy Work is the second work in recent years by Breyer, one of four members of the US Supreme Court's more liberal wing. Here, his focus is on explaining and defending "the democratic anomaly" that is judicial review.⁴ Why do the other branches of government accept the Court's interpretation of the law as final? Why does the public? Will they accept even those decisions that they believe are wrong and unpopular? "Many of us take for granted that the answer to these questions is yes," Breyer notes, "but this was not always the case."⁵

Breyer's answer to these existential questions is part history lesson and part theoretical exposition, though, unlike his Originalist colleagues, he eschews any grand theory of interpretation. Instead, Breyer's focus throughout the work is on developing "workable" and "pragmatic" answers that are sensitive to evolving societal needs,⁶ often via the multi-factored analyses for which he is famous.

1. (New York: Alfred A. Knopf, 2010) 270 pages.

2. As cited in *ibid.* at 11.

3. *Ibid.*

4. *Ibid.* at 3.

5. *Ibid.* at xii.

6. *Ibid.* at xi-xiv.

In part I, Breyer surveys the mixed history of American fidelity to judicial supremacy from the deft logical acrobatics of *Marbury v. Madison* to the tragedy of *Cherokee Nation v. Georgia* to the triumph of the rule of law in *Brown v. Board of Education*.⁷ The book is at its liveliest here thanks to Breyer's focus on the oft-neglected stories of the human beings behind these seminal cases—on lives destroyed and lives defended. His point, though, is simple: public trust in the Court is not axiomatic; it must be learned by each generation anew. On this front, Breyer evinces concern for the future of the Court's democratic legitimacy, noting that only one-third of all Americans can name the three branches of government, though two-thirds can name a judge on *American Idol*.⁸

Part II attempts to suggest some of the ways in which the Court can help earn its rightful place in the American system of government. Breyer points to traditional interpretative tools, including text, history, tradition, and precedent, but he places special emphasis on having regard for “purposes and related consequences.”⁹ Such an approach, in Breyer's view, firmly rejects the “dead hand” of Originalism and is sensitive to the need to defer to the other branches of government where appropriate. The moving narratives of the first part are replaced here with somewhat dryer treatments of technical concepts, such as decentralization, subsidiarity, and *stare decisis*, each of which is nonetheless described lucidly.

In part III, Breyer seeks to illustrate how he would put his approach to work in contemporary contexts. While stressing the importance of eschewing absolutist interpretations of constitutional rights in favour of contextual balancing, he concedes that any such proportionality analysis—which is, of course, anathema to Originalists—is “complex and difficult.”¹⁰ Breyer reasons, however, that there is no alternative if the Court is to produce answers that resonate with modern societal values. Finally, Breyer points to the recent quartet of Guantanamo Bay cases (where he notes he was in the majority) as typifying the Court's ability to craft pragmatic, workable solutions that other branches and the public find “natural and appropriate to abide by.”¹¹

7. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the principle of judicial review); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (declining to recognize the autonomy of Indian tribes); and *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (overturning the doctrine of “separate but equal,” which permitted racial segregation in public schools).

8. *Supra* note 1 at 219.

9. *Ibid.* at 74.

10. *Ibid.* at 170.

11. *Ibid.* at 214.

This is a highly unusual book. Breyer is the only sitting justice among the Court's liberals to have published a book-length work articulating an alternative theory of constitutional interpretation. Those who desire a bolder rebuttal to the seductive elegance of Originalism may be left hungry for more. Nevertheless, at a time when legal thinkers on the left are struggling to articulate an interpretive approach with sufficient vigour to match those on the right, *Making Our Democracy Work* serves as a welcome and effective counterpoise.