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Making Our Democracy Work: A Judge's View. By Stephen Breyer. New York: Alfred A. Knopf, 2010. 270 pp. \$26.95 cloth.

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Over the last several years, scholars of the United States Supreme Court, as well as interested Court watchers, have been entertained by a series of public discussions between Associate Justices Antonin Scalia and Stephen Breyer regarding the nature and process of appellate decision making and the interpretation of the United States Constitution. These friendly debates pit one of the Court's strongest advocates for the use of originalism, Justice Scalia, against Justice Breyer, a vocal supporter of a methodology of interpretation that views the Constitution as a living document with the capacity to adapt to the changing needs of the nation. In *Making Our Democracy Work: A Judge's View*, Breyer synthesizes many of the ideas expressed during these conversations and his career as a jurist into an explanation regarding how the Court makes the law and the Constitution work for the American people.

For those familiar with Justice Breyer's earlier book, *Active Liberty: Interpreting Our Democratic Constitution* (2005), the central theme of his current work will be familiar. In *Active Liberty*, Breyer offered his thesis concerning the proper approach to constitutional interpretation, suggesting that judges rely not only on language, history, tradition, and precedent to decide cases, but also on the purposes of legal text and the consequences of decisions. This approach, he argues, helps to restrain judges while emphasizing the democratic nature of the Constitution and political process. In *Making Our Democracy Work*, Breyer adapts his theoretical discussion for a more "general audience" in an attempt to "increase the public's general understanding of what the Supreme Court does" (p. ix). Specifically, Breyer notes that "the present book focuses on the Supreme Court's role in maintaining a *workable* constitutional system of government" by describing why the public supports the decisions of the Courts as legitimate and illustrating how the Court goes about participating in and maintaining the democratic functions of the nation (p. xii).

The work is divided into three parts. Part I attempts to unravel the reason why the public supports the Court's decisions as

legitimate—even when those decisions are generally unpopular. Using brief cases studies of *Marbury v. Madison* (1803), the Cherokee Indian cases, *Dred Scott v. Sandford* (1857), *Cooper v. Aaron* (1958), and *Bush v. Gore* (2000), Breyer argues that despite the varied objections voiced by opponents to these decisions, in the end the public and officials alike acquiesced to the holdings offered by the justices. He concludes that the legitimacy of the Court and its decisions exist because “the public has developed a habit of following the Court’s constitutional interpretations” (p. 71). He warns, however, of the potential fragility of public trust. Careless use of judicial review or the weakening of civic education would erode the tradition of support for the Court. This argument is directly related to the central purpose of the book—to educate and inform the public about the processes of decision making. Unfortunately, Breyer never makes clear in his discussion how or when this habit formed and what prompted the public to accept without question the Court’s popular and unpopular holdings.

Part II is a brief primer on the various methods of constitutional interpretation, offering pragmatism as his favored approach. For Breyer “pragmatism . . . requires the Court to focus not just on the immediate consequences of a particular decision but also on individual decisions as part of the law” (p. 82). To further illustrate the approach, he demonstrates how pragmatic decision making works in practice through examples of its application in cases in which the Court must evaluate the constitutionality of action by various political actors. His claim is that pragmatism helps to insure judicial modesty by forcing judges to reflect not only on traditional elements of decision making, but also on outcomes. This includes reflections by judges on the impact their decisions may have on the operation of democratic institutions whose representatives are elected by the public.

Finally, in Part III Breyer describes the process of protecting individual liberties using the tools of values and proportionality. Values are “the deep, enduring and value-laden nature of the Constitution’s protections,” while proportionality “involves balancing” various fundamental rights when they conflict (pp. 163–4). Again, focusing on a number of case studies, Breyer argues that by relying on the core values inherent in constitutional rights, the Court will produce decisions that, while not universally accepted by the public, will be considered legitimate.

To evaluate Breyer’s work, it is best to describe both what the book is and what it is not. The argument is clearly not a full-blown theory of judicial decision making—a fact to which Breyer readily admits. The book also does not break any new ground, repeating much of what the justice has written or said in other forums. It also does not provide deep or detailed examinations of cited case law,

presenting instead brief and routine discussions of doctrine. As a result, the book offers little for the serious scholar of the Court or judicial process. But in Breyer's defense, that was not his stated intention. He makes clear in his author's note and introduction that the central purpose of the book is to provide the general public with an explanation of how and why the Court produces decisions that are considered legitimate. Breyer argues that proper civic education and engagement is essential to maintaining the legitimacy of the Court. Breyer contributes to this process by offering an accessible and readable review of the role of the Supreme Court in American democracy. As a result, it would serve as a useful supplementary text for most introductory-level undergraduate American politics courses.

Reference

Breyer, Stephen (2005) *Active Liberty: Interpreting Our Democratic Constitution*. New York: Alfred A. Knopf.

Cases Cited

Bush v. Gore, 531 U.S. 98 (2000)
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