A Darkness Descending on the U.S. Supreme Court

BY HON. JOSEPH R. GRODIN

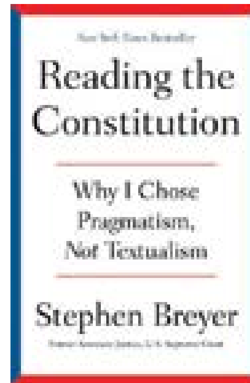
Stephen Breyer
READING THE CONSTITUTION: WHY I CHOSE PRAGMATISM, *NOT* TEXTUALISM
New York: Simon & Schuster, 2024

> *But where are the clowns, send in the clowns*
> *Don't bother, they're here.*
> — Stephen Sondheim, 1973

THERE IS NO shortage of books and articles that critique the Supreme Court's seeming fascination with textualism and originalism, but in several respects former Justice Breyer's recent book, *Reading the Constitution: Why I Chose Pragmatism,* Not *Textualism*, stands alone. Breyer, who served as associate justice from 1994 to 2022, was "in the room" while these theories of interpretation were first advanced by Justice Antonin Scalia and adopted by other justices, and he played a leading role in debating them, both on and off the court. His book continues the debate through examples of cases in which he participated, as well as by recounting verbal bouts with Scalia. Breyer does so in a style that eschews legalese and takes into account the arguments on the other side, apparently guided by the admonition from Epictetus, which he quotes: "Do not explain your philosophy; embody it."[1] The result is an enlightening critique of what Breyer views as a wrong-headed, and indeed dangerous, approach to the interpretation of statutes and the Constitution.

Looking for the meaning of statutory language in the text itself, Breyer argues, is wrong-headed insofar as it ignores "other judicial tools that might point the way toward a proper interpretation."[2] Chief among these is consideration of the statute's purpose, which may entail looking at the statutory context, relevant precedent that may have guided the legislature, as well as legislative history, and the likely consequences of particular readings. Although acknowledging the potential for the misuse of legislative history, Breyer relies upon his experience as counsel to the Senate Judiciary Committee to argue that ignoring what transpired in the process of drafting and considering statutory language is, on balance, likely to lead to worse results for the public.

1. Breyer, *Reading the Constitution: Why I Chose Pragmatism,* Not *Textualism* (page preceding table of contents).
2. *Id.* at 17.



Such a flexible, pragmatic approach, he insists, is more likely to provide accountability and "work better" for those affected, than the more rigid approach decreed by textualists.

Breyer brings similar criticisms to bear upon textualism in the interpretation of the Constitution, and then confronts the current court's reliance upon originalism, which is described by its proponents as how the words of the document would have been understood by ordinary members of the public at the time of enactment. Such an approach, Breyer argues, misunderstands the normal use of language, and it renders the Constitution overly rigid, not serving its basic value-laden objectives. Moreover, he insists, it will not deter judges from substituting their own views of what is good for the law.

Rather, what he advocates is a return to the "traditional approach to constitutional interpretation,"[3] as exemplified by Chief Justice John Marshall's opinion in *M'Culloch v. Maryland*,[4] upholding congressional power to incorporate a national bank through consideration of history, text understood in light of its purpose, the unique nature of a constitution ("we must never forget that it is a *constitution we are expounding*"[5]), and above all "workability."[6]

Breyer's arguments are persuasive, and doubly so because they are supported by example, but I nonetheless find the net impact troubling, not because of anything he says in the book but because of what he doesn't say. As an institutionalist, Breyer is justifiably concerned about politicization of the court. In a prior book (*The Authority of the Court and the Peril of Politics*[7]) he warned against depicting the court as a political institution, and on that basis opposes suggestions for structural reform, such as term limits. That perspective seemed to me unrealistic in

3. *Id.* at 117.
4. (1819) 17 U.S. 316.
5. *Id.* at 407, italics added.
6. Breyer, *Reading the Constitution*, at 122.
7. Breyer, *The Authority of the Court and the Peril of Politics*, Cambridge: Harvard Univ. Press, 2021. See Joseph R. Grodin, "Justice Breyer and the Crisis of Confidence in the U.S. Supreme Court" (Spring/Summer 2022) *CSCHS Review* 28.

that it ignored the extent to which that ideological predispositions on the part of judges, unavoidable in constitutional adjudication, were already in evidence. Now, in light of last term's decisions, that perspective seems to me not only unrealistic but quaint.

In short, Breyer is simply too nice. He assumes that his colleagues are as worried as he is about politicization. He refuses to acknowledge that the interpretive methodologies that he criticizes have been chosen by a majority of his former colleagues *because* they will yield, or can be used to yield, results more in keeping with their conservative ideologies, and that such methodologies (textualism and originalism) will be abandoned if they do not produce the desired result. In *Trump v. United States*,[8] decided at the end of the term and after the book's publication, the court's majority showed its true colors. It held — without textual support and almost certainly contrary to the assumptions of the founders that no person is above the law — that a former president may not be charged with committing crimes while in office if his conduct was within the scope of an ill-defined category of official acts.

In his preface to the book, Breyer expresses concern that the textual methodology he criticizes may have become too deeply embedded in the judicial enterprise for the more traditional methodology that he advocates to win the day. In his more pessimistic moments, he says, he thinks of the illuminated Book of Kells, produced by monks in the ninth century and on display at Trinity College, Dublin, "because they thought a great darkness had fallen over Europe and the Book of Kells could preserve a ray of light."[9]

Indeed, a great darkness has descended upon the court, but I fear it will take a more fearless and less forgiving critique than Justice Breyer provides to make it disappear. ✯

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8. (2024) 144 S.Ct. 2312.

9. Breyer, *Reading the Constitution*, at xxix.