STEPHEN BREYER

MAKING OUR DEMOCRACY WORK

A JUDGE'S VIEW

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Stephen Breyer

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Making Our Democracy Work

ALSO BY STEPHEN BREYER

Active Liberty

Breaking the Vicious Circle

Regulation and its Reform

To my grandchildren—

Clara, Ansel,

Eli, Samuel,

and Angela

Author's Note

My objective in writing this book is to increase the public's general understanding of what the Supreme Court does. The Constitution's framers and history itself have made the Court the ultimate arbiter of the Constitution's meaning as well as the source of answers to a multitude of questions about how this vast, complex country will be governed, and thus it is important that the public understands how the Court carries out its role. I try to facilitate that understanding by explaining how the Court first decided that it had the power to hold a federal law unconstitutional, by showing how and why it was long a matter of touch and go whether the public would implement the Court's decisions, and by explaining how, in my view, the Court can, and should, help make the Constitution, and the law itself, work well for contemporary Americans.

This book is the work of a judge, a member of the Court, and it essentially contains my own reflections about the Court and the law. When I read a case, including those decided long ago, I can try to imagine how its author might have felt or reasoned, but I cannot speak as a historian, a political scientist, or a sociologist. Thus, my historical descriptions rely on only a few, but well-accepted, historical sources.

Because I believe it important for those who are not lawyers to understand what the Court does and how it works, I have tried to make the book accessible to a general audience. A few chapters involve more complicated and technical matters, but there too I have tried to make the discussion accessible even to a non-lawyer who can grasp the general themes without following every detail. And, in discussing cases, I have often simplified considerably, abstracting from the many factors

that enter a judge's decision-making calculus, to highlight a few factors that I believe are key. I hope some readers will want to understand the cases more fully and read the cases themselves. They are easily obtainable on the Supreme Court's Web site, www.supremecourt.gov. (In discussing the cases, I have drawn what I say solely from the written record.) For those curious about how these opinions came to be, I have included in Appendix B a brief description of the Court's work, as well as a few essential points about our Constitution. I would urge all but expert readers to look through that Appendix before reading Parts II and III. I hope this book manages to be both interesting and informative to members of the public, lawyers and non-lawyers alike.

Introduction

DAY AFTER DAY I SEE AMERICANS—OF EVERY RACE, RELIgion, nationality, and point of view—trying to resolve their differences in the courtroom. It has not always been so. In earlier times, both here and abroad, individuals and communities settled their differences not in courtrooms under law but on the streets with violence. We Americans treasure the customs and institutions that have helped us find the better way. And we not only hope but also believe that in the future we will continue to resolve disputes under law, just as surely as we will continue to hold elections for president and Congress. Our beliefs reflect the strength of our Constitution and the institutions it has created.

The Constitution's form and language have helped it endure. The document is short—seven articles and twenty-seven amendments. It focuses primarily on our government's structure. Its provisions form a simple coherent whole, permitting readers without technical knowledge to understand the document and the government it creates. And it traces the government's authority directly to a single source of legitimizing power—"We the People."

Words on paper, however, no matter how wise, are not sufficient to preserve a nation. Benjamin Franklin made this point when, in 1787, he told a Philadelphia questioner that the Constitutional Convention had created "a republic, Madam, if you can keep it." The separate institutions that the Constitution fashioned—Congress, the executive, the judiciary—were intended to bring about a form of government that would guarantee that democracy and liberty are not empty promises. But what would enable the Constitution to work not only in theory but also in practice? How could the nation make sure that the Constitu-

tion's limits are respected, that our citizens enjoy its important protections, that our legal system resolves disputes fairly and impartially, and that our courts dispense justice?

Alexander Hamilton, along with many of the other constitutional framers, thought that a Supreme Court would provide part of the answer. The Court would interpret the law, thereby enforcing the Constitution's limits. It would help ensure a democratic political system, and it would safeguard individual constitutional rights and liberties. Indeed, as the historian Gordon Wood has pointed out, "by protecting the rights of minorities of all sorts against popular majorities," the Court would "become a major instrument for both curbing [American] democracy and maintaining it."[1]

In the framers' eyes, then, the Court would help to maintain the *workable democracy* that the Constitution sought to create. I have previously written about the Court and democracy, explaining the ways in which that constitutional concept critically affects judicial interpretation of much of the Constitution's language and also how the Constitution's democratic objective assumes a public that actively participates in the nation's political life. The present book focuses on the Supreme Court's role in maintaining a *workable* constitutional system of government. It discusses how the public and the Court can help make the Constitution work well in practice. And it shows why the Constitution necessarily assumes that the typical American learns something of our nation's history and understands how our government works.[2]

In particular, this book considers two sets of questions. The first concerns the public's willingness to accept the Court's decisions as legitimate. When the Court interprets the law, will the other branches of government follow those interpretations? Will the public do so? Will they implement even those Court decisions that they believe are wrong and that are highly unpopular? Many of us take for granted that the answer to these questions is yes, but this was not always the case. Part I uses examples from our nation's history to show how, after fragile beginnings, the Court's authority has grown. It describes how the Court was given the power to interpret the Constitution authoritatively, striking down congressional statutes that it finds in conflict with the Constitution. And it goes on to describe several instances where

Supreme Court decisions were ignored or disobeyed, where the president's or the public's acceptance of Court decisions was seriously in doubt. These examples of the Court's infirmity—perhaps startling today—demonstrate that public acceptance is not automatic and cannot be taken for granted. The Court itself must help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law.

Part II considers how the Court can carry out this constitutional responsibility. The key lies in the Court's ability to apply the Constitution's enduring values to changing circumstances. In carrying out this basic interpretive task, the Court must thoughtfully employ a set of traditional legal tools in service of a pragmatic approach to interpreting the law. It must understand that its actions have real-world consequences. And it must recognize and respect the roles of other governmental institutions. By taking account of its own experience and expertise as well as those of other institutions, the Court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government.

My argument in Part II takes the form of examples drawn from history and from the present day, illustrating the Court's relationships with Congress, the executive branch, the states, other courts, and earlier courts. Part of my aim is to show how the Court can build the necessary productive working relationships with other institutions—without abdicating its own role as constitutional guardian.

The Court's role in protecting individual liberties presents special challenges to these relationships, some of which are discussed in Part III. I describe how this protection often involves a search for permanent values underlying particular constitutional phrases. I describe a method (proportionality) useful in applying those values to complex contemporary circumstances. And I discuss the Japanese internment during World War II as well as the recent Guantánamo cases to illustrate the difficulty of finding a proper balance between liberty and security when a president acts in time of war or special security need.

Throughout, I argue that the Court should interpret written words, whether in the Constitution or a statute, using traditional legal tools, such as text, history, tradition, precedent, and, particularly, purposes

and related consequences, to help make the law effective. In this way, the Court can help maintain the public's confidence in the legitimacy of its interpretive role.

The various approaches that I discuss in Parts II and III fit together. They constitute a set of pragmatic approaches to interpreting the law. They provide a general perspective of how a pragmatically oriented judge might go about deciding the kinds of cases that make up the work of the Supreme Court. I do not argue that judges should decide all legal cases pragmatically. But I also suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively. It can thereby better achieve the Constitution's basic objective of creating a workable democratic government. In this way the Court can help maintain the public's confidence in the legitimacy of its interpretive role. This point, which returns full circle to Part I, is critical.

At the end of the day, the public's confidence is what permits the Court to ensure a Constitution that is more than words on paper. It is what enables the Court to ensure that the Constitution functions democratically, that it protects individual liberty, and that it works in practice for the benefit of all Americans. This book explores ways in which I believe the Court can maintain that confidence and thereby carry out its responsibility to help ensure a Constitution that endures.

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PART I

THE PEOPLE'S TRUST

PART I ADDRESSES THE ISSUE OF DEMOCRATIC LEGITIMACY—how the Supreme Court has come to gain public trust even when its decisions are highly unpopular. The Constitution's efforts to ensure a *workable* constitutional democracy mean little if the public freely ignores interpretations of the Constitution that it dislikes. We simply assume today that when the Court rules, the public will obey its rulings. But at various moments in our history, the Supreme Court's decisions were contested, disobeyed, or ignored by the public and even by the president and Congress.

This part describes the important power of judicial review—how the Supreme Court first came to assume the powers it now has to interpret the Constitution authoritatively and to strike down as unconstitutional laws enacted by Congress. Subsequent chapters present historical snapshots of how, in fits and starts, the Supreme Court came to be accepted and trusted as a guardian of the Constitution. The cases presented include an example in which the president and the State of Georgia refused to implement a Court decision protecting the Cherokee Indians; the example of *Dred Scott,* where the Court itself, misunderstanding the law, its own authority, and the likely public reaction, refused justice to an individual because of his race; and an example in which the president had to send troops to Little Rock, Arkansas, because so many people there, including the governor, refused to com-

ply with the Court's decision, in *Brown v. Board of Education,* holding segregated schools unconstitutional. These examples help us understand the importance and the value, the uncertainty and the pitfalls, that predate today's widespread acceptance of Court decisions as legitimate. They help demonstrate that public acceptance is not automatic, and that the Court and the public must work together in a partnership of sorts, with mutual respect and understanding.

Chapter One

Judicial Review: The Democratic Anomaly

The Supreme Court can strike down statutes that violate the Constitution as the Court understands it. Where did the Court find this power of judicial review? The Constitution itself says nothing about it. One can easily imagine a Supreme Court without the power to patrol constitutional boundaries.

Canada's Supreme Court, for example, can strike a statute down as unconstitutional, but it does not necessarily have the final word on the matter. The legislature, without amending the constitution, may in certain instances overturn the result and restore the statute. Similarly, the courts in Britain and New Zealand are charged with interpreting parliamentary statutes so as to ensure their compatibility with their nations' constitutional traditions and, more recently, bills of rights (in Britain's case, the European Convention on Human Rights). If a court in either country is unable to interpret legislation consistently with the bill of rights, the court can make a "declaration of incompatibility." But doing so does not invalidate the legislation. After a court makes a declaration of incompatibility, it is up to Parliament to decide whether to amend or repeal the legislation that the court found violated citizens' rights. Parliament could choose to leave the legislation in place, notwithstanding the court's ruling.[1]

Many commentators, scholars, and ordinary citizens have viewed the U.S. Supreme Court's power of judicial review as out of place in a