

## Justice Stephen Breyer on Reading the Constitution

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**[00:00:05.0] Tanaya Tauber:** Welcome to live at the National Constitution Center, the podcast sharing live, constitutional conversations and debates hosted by the Center in person and online. I'm Tanaya Tauber, the Senior Director of Town Hall Programs. In this episode, National Constitution Center, president and CEO, Jeffrey Rosen sat down with National Constitution Center honorary co-chair, justice Steven Breyer, to discuss Breyer's new book, *Reading The Constitution, Why I chose Pragmatism Not Textualism*. During the conversation, Justice Breyer deconstructs the Textualist philosophy of the current Supreme Court's majority, and makes the case for a better way to interpret the Constitution. This program was hosted live at the Center on March 28th, 2024. Here's Jeff to get the conversation started.

**[00:00:53.5] Jeffrey Rosen:** Hello, friends, please join me once more in welcoming Justice Breyer back to the National Constitution Center.

**[00:01:05.5] Stephen Breyer:** Thank you very much. Thank you. Thank you.

**[00:01:12.1] Jeffrey Rosen:** It is always an honor to welcome our honorary co-chair here to the NCC, and it's extraordinarily meaningful to convene this evening to discuss his new book, *Reading The Constitution, Why I Chose Pragmatism Not Textualism*. Justice it is clear from this powerful book, which better than any other, sums up the central methodological debate on the Supreme Court today between pragmatism of which you are the leading spokesperson and textualism, which is embraced by a Supreme Court majority. So I'm gonna begin with the obvious question: Why did you choose to write this book about why you chose pragmatism not textualism?

**[00:01:53.9] Stephen Breyer:** That's a good question because what many people say. I've been a judge for 40 years, 28 on the Supreme Court, and I want to get across, particularly to students and others, how do you go about deciding or how do I have gone about deciding these difficult questions and difficult statutory questions, constitutional questions, and there is a division of opinion. And this thing has come along out of the creature from the Black lagoon. I mean, this is

called Textualism or Originalism, and I don't think that's the appropriate way to go about it. And I think it'll cause a lot of trouble. And so I wrote, I want to write why. Not why from a scholar's point of view, there are lots of scholars and teachers who will be able to do this better than I could do it. But I will say, and I say it a bit meanly, but I say, I've had some experience to the scholars that you haven't had. And so I would like to write about it from the perspective of the cases and experience that I've had, and then you'll see why I go this way and maybe somebody else goes that way. But you can make up your own mind. So that's at least one reason why I wrote it. How many would you like?

**[00:03:22.0] Jeffrey Rosen:** You just used the phrase, it came about like a creature from the Black Lagoon.

**[00:03:23.5] Stephen Breyer:** Well, that was a bit, I hesitated about that because, I think the people who hold this point of view are sincere and I think they have honest perspectives on it. And that's another reason, if I talk to an audience or non-lawyers, I know that 40% are gonna say, why is he bothering writing this, is all politics? And if they don't think it's all politics, it's just the judges doing what they think is good or what they'd like to do. And I said, that's not been my experience. My experience over 40 years is, you can't say zero in politics. But no, that's not the main thing. The people who try to get the judge appointed, they may think that they have political views and this judge will carry them out in his opinion. But that isn't what the judge thinks when he's deciding a case.

**[00:04:18.3] Stephen Breyer:** What the judge is thinking is this is the right approach. This is the right result according to an approach that I believe is the proper way to interpret statutes like this or this Constitution of the United States. So they think they're doing it according to law and what others think that's not gonna affect them as much, in my opinion, as if I sit down, ugh, have you tried writing a book? Ugh. Alright. But if you sit down and I try to put on paper what I think I've learned over 40 years about how you go about interpreting these statutes and these phrases in the Constitution, you want an example?

**[00:05:04.2] Jeffrey Rosen:** That would be great.

**[00:05:05.3] Stephen Breyer:** No, I'll give you an example. First, what's the job? What's the job? The best thing I read on what's the job of an appellate court judge was in a French newspaper. I already discussed that with some of you. I read a French newspaper. It said, and this is when I'm talking to a bunch of high school students or fifth graders, even better with fifth graders. I say in that article it said, A high school biology teacher was traveling from Nantes to Paris on the train. And he had next to him a basket. And in the basket there were 20 live snails. What's that? Said the conductor. Which he answered, have you bought a ticket? For the snails?

This what? Have I bought a ticket for the snails? Are you crazy? He's No, read the book, read the Fair Book. The Fair Book says, no animals on the train unless they have a half price ticket.

**[00:06:09.4] Stephen Breyer:** He said, but they're talking about dogs, cats, rabbits, but truly not snails. You think you're talking about mosquitoes? Is a snail an animal or not? So I say to the fifth grade, what do you think? Perfect. I don't have to say another word. They get into the biggest argument you've ever seen, half of them say of course it's an animal. Well, what about a mosquito? So I can just leave. And they're happy for the rest of that and it's perfect. Now I say, we're not talking about snails. I don't know of a statute that says snails, maybe, could be, but the freedom of speech, the right to bear arms, any other police officer, that's an law enforcement officer it said in a statute. Now you see different words. Same idea. Judge, what do those words mean? How do they apply? And once you see that, you say, "Ah, ah, how am I gonna decide this one? How am I gonna figure it out because if this is a case in the Supreme Court of the United States, we only take cases or almost only take cases where different perfectly good judges in lower courts have come to different conclusions about the meaning or the application of the word, I wanna say snails, but that isn't the word.

**[00:07:53.3] Stephen Breyer:** The word is usually the freedom of speech or something in a statute or some other word in the law. So it's tough and now you have to figure out how to do it. And different people have done it different ways. And what I say, of course, as I've written these several hundred pages, which you've done too in a very good book, yes.

**[00:08:14.8] Jeffrey Rosen:** Thank you.

**[00:08:17.0] Stephen Breyer:** Pursuit of Happiness it's called, get it. Alright.

**[00:08:20.2] Jeffrey Rosen:** That was the last word. Last word.

**[00:08:22.9] Stephen Breyer:** Okay. In any case, how do we go about it? Nino and I, Nino Scalia, who was a good friend, we used to argue about it. We'd argue publicly, we were in Lubbock, Texas in a big stadium 'cause they'd never seen a Supreme Court Justice before. And they thought maybe it'll be like a football game. But in any case, there they were and they would come away from that discussion thinking one, those two are good friends. Which we were. Which we were. And then I'm trying to figure out, look, what can I say here that will make, Nino see that life changes over time. And those words in the Constitution that stood for so clearly X 200 years ago, they have to adapt a little bit in their application, not necessarily in the values they have. So I said Nino, George Washington didn't know about the internet. He said, I knew that. Then he says, well, the problem is really the two campers. That's that.

**[00:09:43.1] Stephen Breyer:** He says, there are two campers and one sees the other putting on his running shoes. He says, well, there's a bear in the camp. The bear in the camp. You can't outrun a bear. He goes, yeah, but I can outrun you. All right. That's at one level of slight bad comedy. But at the other level, he says to me that you have a method using what's the purpose of this statute? What are the consequences of this way or that way? What are the values that it embodies and how does that relate to the values that are in this document, etcetera? It's possible but complicated and you're the only one who could do it. He's trying to compliment me, but he really thinks nobody could do it. And then I say to him, and if we follow your approach, just looking at the words, just seeing what they meant to a reasonable observer at the time they were written, if we follow that approach, we're going to have a constitution that no one will want.

**[00:10:41.2] Stephen Breyer:** And in my own mind, that's the real argument, those two ideas. And if you say, well, you don't want judges going out there to substituting what they think is good for what is the law, I agree with that. And so does he. So what the real argument is, beneath that is, do you really think Nino Scalia, and there are two or three, he's one who really hold a tough view of textualism, which means you read that text and you say, what would it mean to a reasonable observer when it was written? They think they'll be able to better keep the judges under control. They promise you two things.

**[00:11:32.8] Stephen Breyer:** One, when you just read the text and follow it, you'll have a simpler system. You'll have a system that people can follow. You'll have a system that Congress can follow. You'll treat people in different courts alike. Simple, clear and more than that, as I've said three times already, you'll have a system that keeps the judges in check, that stops them from substituting what they think is good for what the law is. Now what do I say to that? I say, I think those promises are great and I also think you can't possibly keep them and you won't. That's what I think as an answer, alright, as one of the answers, am I right? I don't know how long you want me to go on, I wrote 200 names.

**[00:12:27.8] Jeffrey Rosen:** Well, I've got lots of questions for you. You just laid out very clearly the difference between pragmatism, which focuses on consequences and purposes and workability and textualism, which asked what was the meaning of the text at the moment of its adoption? And you said it's not all politics, but I got the strong sense from this book, It is about political philosophy.

**[00:12:58.1] Stephen Breyer:** That's not politics. Yeah.

**[00:13:00.4] Jeffrey Rosen:** It's not politics. But what would you say to this takeaway from the book, which is what I got, that presidents since the days of John Marshall have appointed justices to mirror their political philosophy that Marshall favored a broad national government, and the counter was the Jeffersonians who wanted strict construction in order to protect state's rights and

rein in federal power. And the current textualist are appointed for just the same reason. And they're trying to rein in federal power with their textualism.

**[00:13:30.0] Stephen Breyer:** Maybe, that's at a level of generality that's so high that it's hard to have an answer. Of course, lots of presidents have been appointing X and lo and behold, X turns out to decide cases differently than the president thought. Let's call X David Souter. No, but regardless.

**[00:13:53.8] Jeffrey Rosen:** Is he on X?

**[00:13:57.2] Stephen Breyer:** Yeah, but no. But there are many, many judges like that because when you're there the first few years you go around, oh my God, how did I get here? You don't tell anyone you thought that because you have to pretend you believe you're totally qualified. But, yeah, can I do this job? Yeah, I sure hope so. And then after two years, three years, Souter thought three. William O. Douglas, I think thought five. You say, well, I don't know, but I can do the best I can. And that's what you try to do the best you can. And that's true of all of them. And of course, there may be different outlooks. And I think this outlook textualism, originalism is not one of the most desirable. Let's try it. You wanna try it? Okay. We have a case. Are you ready for a textualist approach?

**[00:14:49.7] Stephen Breyer:** Yes. Okay, this is the case. There is a statute that says if you have a child and that child is handicapped, the public school system has to give him an appropriate education, I.e. A good education. And if you think they're not doing that, you can bring a lawsuit. And the plaintiff in that case did, and she won. She won. And they had to change it. Well, buried knee, he said we have most of the cases we have are pretty technical, a lot of them, and they're pretty far down and they don't get into the newspaper, but that's the majority. Alright. Down it says in the text somewhere, it says, if she wins, what she gets? Costs. And she says to the judge, "Judge, one of the things that I had as a cost was a \$29,000 bill from the educational expert." Does she get that from the school board? Is that part of the cost? Or do they just mean legal costs? And is that a legal cost?

**[00:15:52.6] Stephen Breyer:** Well, I'll tell you how we're gonna answer that. Let's read the word. Guess what the word was? Costs. Okay, we didn't read it hard enough. Let's say it twice. Costs, costs. Now we've got the answer. Oh no. Three times cost, cost, cost. Okay. Ah, you see, I say where are we in this? We're in mixed up at best. And that's not going to tell you the answer to that. Or did you know, you may not know, I shouldn't tell you this, but there are a lot of federal officers you can bring lawsuits against and maybe even recover some money. Don't tell anyone I said that, but it's possible. It's possible. And then there's some exceptions. You can't sue these people who have this job, which people?

**[00:16:47.0] Stephen Breyer:** One of the exceptions says that you cannot sue for keeping property. It was a officer of customs and excise or any other law enforcement officer, ah, who do they mean by that last phrase? The cop on the beat, a German police officer. No, they don't mean that, but a cop on the beat or those associated with customs and excise? So I say, oh, say it three times. Okay, I won't do it. But you see the problem, you see the problem, or let's go into the realm that the press will actually write about. Let's go into the realm of guns. That when I wrote a long dissent with Justice Kagan and Justice Sotomayor. New York has a law which says you cannot carry a gun outside your house, concealed or not concealed. Does that violate the second amendment, which says "A well regulated Militia, being necessary for the security of a free State, the right of the people to keep and bear arms, shall not be infringed." I don't expect you to memorize all that. But you see, in an earlier case, over our dissents, three of us, four of us, then.

**[00:18:00.7] Stephen Breyer:** He said, that has to do with militia. It doesn't have to do with holding a gun under your pillow to shoot a burglar. Five said it did, four said it didn't. I think that was the number. So we passed that. Okay, so now what about New York's law? And the court says, in the opinion, go look back at history and just history. Look at what, when this was passed, a reasonable person would've thought it meant, I said, oh, okay, that sounds good. What do I look at? So I started looking at a few of the old gun or weapon or what about a halberd? Does that count? A skill ladder? And then there was Asian fire, which you took and threw over the walls hoping to burn up somebody in. Was that the origin of artillery, got me. You see, I'm not very good at history, or at least not skill bar or skill ladders or whatever they are. And to ask the judges to decide on that way is not a good idea in my opinion, because they don't know.

**[00:19:24.0] Stephen Breyer:** They're not historians, and you'll get briefs. The briefs will go in opposite directions and the historians will disagree. And then you have to decide about what a skill ladder was or whether it's a relevant no. What I wanted to write about, and I did, I wrote about it, yeah. In dissent. I said, I'd like it to be relevant here, that the United States of America has 400 million guns. We are number one, number one. Number two is Yemen, I think. Okay? Look at the number of deaths and the policemen who are killed and the home accidents and the spousal problems. My God, it is endless, endless. I say, in my opinion, that kind of thing is relevant. I'm not saying you're just going to look at that. Of course, we'll look at the words. If the word in a statute or the word in the Constitution, it's not in the Constitution, but I suppose it was carrot.

**[00:20:25.3] Stephen Breyer:** If it's carrot, that doesn't mean a fish. I got that point. But I want to go beyond that. And I wanna say, when you can't get a clear answer from the statute, which is most of the time, don't try to say the word costs 14 times. Don't try to say any other police officer, any other law enforcement officer 18 times. Look for things people have looked to. Who are the people? Holmes Brandeis learned at hand, Thomas, Chief Justice Marshall and many others. Look at the purpose. Someone wrote those words. Somebody had an idea when the words

were written of what you were trying to do in Congress. Look at them. And when you're reading that Constitution, remember among other things, it has certain values here. Democratic society, basic human rights, a degree of equality.

**[00:21:31.8] Stephen Breyer:** We, separation of powers, rule of law. That's enough for the moment, but they're there. And take those into account too, and remember it. Who said this? I don't want Montaigne actually, 1584. You like these old writers.

**[00:21:50.6] Stephen Breyer:** And yeah, 1584. He said The worst mistake Justinian ever made. I read that I thought, Justinian, hmm, okay.

**[00:22:01.4] Stephen Breyer:** But in any case, he said The worst mistake these Roman emperors made is they wanted their legislators to write everything down in a statute. And we will have statutes and statutes and statutes and words and words and words. And now my judges won't be able to do the things that they really wanna do, but I don't want them to do it in the law. And Montaigne says that man must have been an idiot. He didn't say it quite like that. He was polite. But he said, didn't he realize that for lawyers, every extra word is just a basis for disagreement?

**[00:22:34.0] Stephen Breyer:** And instead of his discovering that more people will agree, he might discover fewer judges, will disagree, will agree or disagree with him, he will agree with him. They won't. You don't know because life changes and life has far more to it than a simple static process. And when these words are written, they have to be written in a way, as Chief Justice Marshall says, that they will have to apply and they will have to help us adjudicate. They will have to help us live with a world that is changing. And that's why the freedom of speech, however clear, what it applied to in 1789, is not going to be clear how it applies to whatever they call it, AI or those different things. And so you better think, judge, you better look not just at the words in many cases where those words just don't answer.

**[00:23:39.7] Stephen Breyer:** You better look at a few other things, purposes, consequences, values, and perhaps others as well. Will that let me just do anything I want? I never think I do everything I want. You try living with my children and grandchildren and you'll understand. Okay. But no, no, you try as a judge to do your best to follow the law. And so what I'm doing here is saying, assume with me that that's correct. And I think people should, because I've had to have experience in that. And now what do we do? And now what do we do about this tidal wave of textualism or originalism that seems to be coming along and replacing in the schools, replacing in the law schools, replacing in a lot of places, the tendency to ask once you read it, what's the purpose? What was the mischief that Congress was trying to stop?

**[00:24:48.7] Stephen Breyer:** What was the objective? Will this consequence fit within and help achieve that objective or the opposite, you see? And that's basically what I'm doing. What, telling people? No, I'm trying to show them here. I'm trying to show them with examples, with enough examples that they'll be able by they got time. If they get to the end of this book, they'll be able to say, he's asking me, which I am to make up my own mind. Of course, I hope you'll make it up in my direction. But nonetheless, nonetheless, it's something that people have to learn about and think about and decide about for themselves. And in my own view, I think we'll get a lot farther with the Supreme Court doing sort of what I think it ought to do than we will just by saying, oh, it's all politics. Oh, it's all politics. That doesn't help me very much.

**[00:25:47.7] Jeffrey Rosen:** Well, you do do it with examples. And the gun case is a perfect example of your defense of pragmatism and your critique of originalism for your defense of pragmatism. You say, this is what judges have almost always done. And it goes back to Marshall and it was Holmes and it was Frankfurter. And this is ordinarily the way the Supreme Court approaches cases and it leads to more workable results. And for the critique, you say, this was bad history. The scholars did a word search and they found that that's not what it meant in 1789. And you say that it's moving the baseline and that it doesn't constrain judges, which was the main promise of originalism. And you also say that it leads to a failure to defer to democratic outcomes, which is the other thing that was supposed to happen with originalism and is not happening. So that's all encapsulated in your defense of the gun case. And now I want you to talk about Dobbs and abortion, which is another of your major examples.

**[00:26:46.6] Stephen Breyer:** But I'm only gonna talk about a little bit of that. I did dissent in that case. And we wrote Justice Kagan, and so did I wrote a pretty long dissent. And we had a lot of different reasons why we thought the majority was wrong in that case. And one of the reasons I think is directly relevant to what I'm writing in this book, remember the two promises that the textualists made, this is gonna be a simple, clear method to which I give a wonderful response. I say, ha ha ha. Okay, that isn't a very good response. But nonetheless, alright, I try to explain, but remember the second promise. The second promise was that we have a system that will make it much more difficult for a judge to substitute what he thinks is good for what the law requires. Now, I said they try not to do that.

**[00:27:43.9] Stephen Breyer:** Nobody can do it perfectly. I did grow up in San Francisco, I went to Lowell High School. I've lived the life I've lived and yeah, we all have. And by the time we're in our '40s or '05s, we have sort of views about our profession and about the country and about our neighbors, about all kinds of things. And to try to hold any job and keep all that stuff totally out you can't, you can't jump out of your own clothes, but you can try to limit it. And I think judges too, they try to limit it. So don't take what I'm saying is 100% percent, but it's there. What the judge is trying to do is, be honest about the decision, decide it the way you just said.



But what about the textualism? Will that hold us in check when we slip back to the San Francisco School Board?

**[00:28:34.8] Stephen Breyer:** That's my father's watch. It says San Francisco School Board. But will it, and I found Dobbs interesting there because to my imaginary textualist opponent on that, I would say, hmm, why did you overrule Roe 50 years ago? Decided, why did you overrule KC Dipolino 30 years ago? I mean, isn't there a principle in the law called stare decisis? You see, he knows this Latin, so I have to be careful.

**[00:29:08.0] Stephen Breyer:** Stare decisis which means something's decided. It's decided. And don't change it even if it's wrong. Now, that's not 100%. The court did change. Plessy v. Ferguson, went to Brown versus Board. I'm glad they did. It's not 100% but you better limit it. So I would like to know, Mr. Textualist, what are you gonna overrule next? Hmm. Are you going to overrule or are they candidates for overruling any case that wasn't decided by a textualist method?

**[00:29:49.8] Stephen Breyer:** Well, if that's your view, every case is up for grabs because there are hardly any textualist cases before quite recently. So we're gonna have no law at all? Every case. What do you think? The clients will love it. They'll go into the lawyer's office and say, you tell me I'm gonna lose. But let's tell them overrule it. This is gonna be a mess. Oh, you don't mean that. And he doesn't. And they don't. What do you mean? Well, I think you mean the cases that not only weren't decided according to a textualist method, which is about all of them, nearly all. And you think, and you think they were very wrong. Ah, you think they were very wrong? And so we bring that in as a ground for overruling. Now let's step back to page one for a second, because you and Nino and the others criticize me on the ground, which I try not to do, that you just pick the cases that you think are good.

**[00:31:09.0] Stephen Breyer:** And now what you're gonna do is get rid of the cases you think are really wrong. Does that give you an opportunity to choose what you think is good when you decide what you're going to overrule? I mean, you think they're wrong, on what basis? On the basis of textualism? No. On some other basis. What basis? I mean, what is it? I mean, there you are in the same boat precisely that you say I'm in. And so you better have the conscience of a good judge in deciding what to overrule, just as I must do the same, okay? In cases that aren't there for overruling. And so I don't see much to choose there at best. So now we have two promises. Simple, clear, definite, huh? That one went by the boards. Promise number two, a better way of holding judges in check. Well, there it is by the boards in Dobbs, in my opinion.

**[00:31:57.0] Stephen Breyer:** And so now what we left with? I say what we're left with, nothing. That's what I wanna say. We're left with next to nothing. And more than that, I think there's something dangerous about this. Dangerous? Why? Well, I hate to admit it, but Congress

is closer to what the people of their constituencies need and want than the Supreme Court up on that hill there, with a lot of nice rooms and not very good food. I was in charge of getting the food ready for 11 years 'cause I was a junior justice. And I admit it wasn't very good.

**[00:32:37.8] Stephen Breyer:** But you see and they will try, not always successfully, but they're in a position because they know the past statutes to some degree, present statutes. They have to have campaign coherence. And they'll try, even though we may think sometimes they fail. And there are always people who think, yeah, they failed here. They didn't fail there, to try to help, try to make a better. And Senator Kennedy, whom I worked for, he said this a lot. He said, everyone in this building, the Senate, everyone in this building wants to help America. He said they have different ideas about how to do it, but you see their goal. And if they didn't somewhere have some goal like that, they wouldn't be here. All right? Now you think, oh, they wanna have America up in the Supreme Court, but they don't get around to the constituents and they shouldn't. And so the chances of an interpretation that doesn't further what is very often a desirable purpose in this law, the chances of that have just gone up. And the chances of interpreting this document, this constitution in a way that helps do what Marshall wanted to do, he said, we can see the future only dimly, if at all.

**[00:34:11.1] Stephen Breyer:** And we want a document here written in fairly abstract words because you can't, as Montaigne said, you can't just write everything into a constitution. And this is only 27 pages, I think, something like that. But risk here, risk that rather than when you just read the words at a time when as I said, the women and the slaves were not part of the system. When you just read what that ordinary person would've thought of at that time, those words meant, and how they should be applied, that you will eliminate something called the future. And so be careful and try to understand those basic principles, those basic values, and use them when they help use them when they help. And so, what is it that worries me so much, if we move in the wrong direction of what Henry Hart said and my professor and Albert Sachs, my professor, years and years ago, that the law is there.

**[00:35:16.3] Stephen Breyer:** It's a human institution. This law, it's a human institution designed to make 320 million people now live to be live together. Every race, every religion, every point of view. That's what my mother said. Don't tell anyone, we lived in San Francisco. She said, there's no sign of no point of view so crazy there isn't somebody who doesn't hold it in this country. And she said they all live in Los Angeles, but don't say she does.

**[00:35:41.7] Stephen Breyer:** But yeah, okay. You see we have to says Henry Hart, says Sachs. And these documents are designed to help us live together even though we disagree. And to weaken that is a risk, to weaken that is a risk to weaken the other, is a risk. Because if it doesn't help us enough, people might say, Hey, why follow it? Why follow the law? Why do what the law says when we disagree with it? And there, the rule of law itself is weakened. Now, do I think

that'll happen? No. Maybe. Who knows? Now you see why I wrote the book? That was a very short question and a very long answer.

**[00:36:29.9] Jeffrey Rosen:** It's an extremely serious answer because you just said that textualism, originalism had two original justifications. First, that it was gonna constrain judges, and second, that it would lead to deference to democratic outcomes. And it's done neither. In fact, it's done the opposite. And then when you come to the third reason, well, at least we're following the text, you say it's essentially random which decisions you're gonna follow because all of them are inconsistent with the text. And that would lead to overturning all of them. So given the power of that critique, I just have to ask, why shouldn't citizens conclude that it is all politics?

**[00:37:08.7] Stephen Breyer:** 'Cause that isn't politics. Politics, I mean, I learned politics. I'm in my office, in the Senate, working on the staff. I come back to my office and there's a young woman who's looking through all my papers and I say, excuse me, can I help you?

**[00:37:24.5] Stephen Breyer:** She says, yeah, I just wanted to find out. She says, what do people on the staff do here? So I thought the best way was to go into your office and look through all the papers. So I think that, hey, that's not a very good thing. But before I got angry at her, I thought the following, maybe she's a constituent. Now that's politics.

**[00:37:50.0] Stephen Breyer:** You say, and if a senator got a telephone call two one from the Secretary of Defense and one from the Mayor of Worcester, which will he take first, of course the Mayor of Worcester. It's obvious to anyone in politics, that's where the constituents are. And will I be able to get the Republicans and the Democrats to the executive session? And who's gonna be popular? Which party? And what will I do to keep my seat? And which constituents do I listen to and which do I not? And is a yes or a no here going to help me win the primary?

**[00:38:28.1] Stephen Breyer:** Oh, that's politics. Do I see that in the court? No, I don't see that. So that's why I hedge a lot. And I say you might find people with different political philosophies. Yes. And you might even find what I call real politics sneaking in occasionally, when Frankfurter said to the others during the terrible time they were having getting Brown enforced and they had a miscegenation case. And he said to the others, I bread, don't take it because this is what the south is afraid of. And if we take it and hold it unconstitutional, which we must do, God only knows what they'll do with Brown. No one's helping us, not the President, not the Congress. We've got to get that case enforced Brown. And they did take the miscegenation case but later, but later. And that's why I've always thought, I'm very glad that Earl Warren had some experience with politics.

**[00:39:28.2] Stephen Breyer:** You see, it was tough getting that Brown even partly enforced. And so I'm not saying never. I'm not saying never, but I am saying you have things like your own background that sneaks in and you have a political philosophy and you have listening to others and you have sometimes the real politics. So I ended up by, not a good quote, but I used to say, you ever read PG Wodehouse? I like PG Wodehouse. Very funny. In one of his statements he says, Birdie woke up one morning and he wasn't disgruntled, but he wasn't exactly grunted either. That sort of it. But I think Paul is better. I think it's better. No judge takes into account the temperature of the day. But all judges do take into account the season, the climate of the season. And that's where we are, which is not a real answer, not a definite answer, but an experiential answer.

**[00:40:38.3] Jeffrey Rosen:** Why, at the end of the book I would say you're very, you're famously optimistic and your optimism uplifts all of us. It certainly uplifts me in tough times, but I would call the end of the book studiously agnostic about whether optimism is merited. You say these are very serious times, you strongly oppose the Textualist project and you fear that it may be unstoppable. And yet you say in the end you think that they'll pull back. Why do you think they'll pull back?

**[00:41:12.0] Stephen Breyer:** Well, you're on the court for a long time. You are. And it takes time to adjust, as I say. And the longer I was told this by one of the presidents, he said, you'll discover something. The applause dies away very fast. You better like the job. And that's exactly what happens. And the job requires great seriousness of attention and effort. And that's true of everybody on the court. That's true of everyone. And so I think over time, over time, what's the job like in that sense? I'm at a three years and I'm some kind of meeting of young lawyers and one comes up to me and he says, oh Justice Breyer, I love your opinions. They're so good and so well reasoned. Would you mind signing my program? So I say, sure, I'll sign it. I said, okay. As he walks off, he turns to his friend and he says, that makes four.

**[00:42:13.2] Stephen Breyer:** Okay? But that's what it is. And said, the privilege of the job is having it and having to give your all to this case. And then that case, and it's sort of like a doctor. A doctor doesn't say, oh, I'm not gonna treat this person 'cause he has such a boring disease. No, no, that's not what it is. So I think over time the flaws in this particular approach will become more apparent. They'll have a lot of cases and it won't give them the answer. And they'll see it right there, and they'll know it when they see it. Or they'll think, good, this gets rid of all these appeals in this area, which keep coming. And they'll discover it doesn't and then they'll find that it doesn't give an answer that actually helps in terms of consequences for the people who have to live under that particular statute.

**[00:43:12.3] Stephen Breyer:** And they'll discover that it isn't so impossible as they might think some of the time to go back and see what the purposes were when Congress passed this statute or

what was at hand when this Constitution was written. And after the Civil War when slavery ended and a few of the other amendments got passed, like the right of women to vote and so forth. And they'll see that. They'll see it. And the climate of the era just will hesitate to make them hesitate. Hesitate to go too far with this textualism. No. 'cause you can use it in a way that doesn't hurt so much. You can say textualism means read the statute, well, okay, I agree with that. Yeah. Read the statute. Don't decide a case without reading the statute. I got that one. So you don't know quite where it will go. And so one of the reasons, as I said I wrote this, I want it to go as far away as possible. And that's one of the reasons that I wrote the book.

**[00:44:28.1] Jeffrey Rosen:** So that's one possibility. Might this be another, you say it's not politics, but it is political philosophy. And the political philosophy is strongly anti-regulatory and it's an effort to strike down the great society, if not the New Deal. And this is strongly held and maybe they won't pull back because they really believe it and therefore they will try to strike down the great society in the New Deal. Might that happen? And if it does, what would be the consequences?

**[00:44:56.2] Stephen Breyer:** Well, it could happen, and I wouldn't think they were good consequences. But remember when they change, the big movement towards agencies, towards big central government or bigger central government and shifting power to Washington came during the New Deal. And the New Deal was itself a paradigm shift from a previous way of looking at the court a way that made some sense at the time. That's sort of interesting. Alan Greenspan wrote a very interesting book to me about the history of capitalism in the United States. And he says, and he's pretty board documented, that before the Civil War, this country was very poor, really poor, in the South too. They couldn't afford to go to school, they couldn't afford a church. It was a very poor country. But after the Civil War, a boom, inventions, electricity, power, railroads, and moreover ways of financing those activities. So across the country they could spread and people became rich.

**[00:46:00.6] Stephen Breyer:** And from one of the poorest countries in the world, it became one of the richest. So in my imagination, I'm thinking of that Lochner court, the court everyone despises, but they're sitting there at a time when they're thinking the movement against property, the movement against contract, the movement against laissez faire, that's going to kill the goose that's laying a golden egg. And so they turned against it, but by the time you get to the New Deal, the season's changed. You want to believe in laissez faire and that all the businesses alone in a period of 24% unemployment when people are on the breadlines, when the Great Depression is right there. No, and who said this? Roosevelt said it, but I can't remember where I read it. He said, try something. If that doesn't work, try something else. And if that doesn't work, try something else again, but keep trying. Now, there's a season, there's a mood and that's going on in the New Deal. And that's going on in a movement away when you go to the court that it changes attitudes. And so even with what you say, maybe you go there and say the worst agency

in the world ever was OSHA, because OSHA's supposed to save people from working. And they have a rule which says, paint the top three rungs of a ladder red so no one walks off the top. Okay, they did have a rule like that.

**[00:47:42.5] Stephen Breyer:** So maybe they're not perfect, but by the time you try to get rid, I had a law clerk once who looked up every agency you could find where the people in the lower parts of the agency had tenure and they were appointed by the people in the higher part that had tenure. And that was an issue in the case. And we found pages and pages worth and all that's gonna change. Really, all that's gonna change. You see, I'm skeptical of how far they can go and how far they will go. And I think the world, I think life will catch up. I think life will show them. And I think by the way, that the changes in administrative law, and I'm so glad someone in this group took my administrative law class and, but in administrative law that isn't exactly textualism. The words there in the Constitution are legislative, executive, and judicial. And that doesn't tell you too much which way to go in these cases anyway. But they still might have the attitude you have, which is a different kind of a problem.

**[00:48:45.5] Jeffrey Rosen:** Those are such powerful points. You argue that the fight against the administrative state is not rooted in text. And you also show that previous transitions of the court from the Lochner era to the New Deal and the New Deal to the war in court, were driven by changes in society. But this move is not, the Textualist Revolution, which was inaugurated in the '80s by President Reagan doesn't arguably have the support of majorities of the country the way the previous shifts did. And that is, I guess, the argument that it's not gonna be constrained by public opinion because it's set up in defiance to public opinion.

**[00:49:23.5] Stephen Breyer:** Maybe that's, I'm not gonna disagree with that. But it isn't that, well, President Reagan believes this, so we'll do that. That's just not the court. I mean, you're appointed, you're there. You better do what you think is the right thing, and because there's nowhere else to go. And that's a more powerful impulse than while you were appointed by those groups of people who thought there was too much power in Washington. And then you couple that, couple it with, alright, let's get rid of agency X, Y, or Z. And you begin to think of what might happen, hmm, hmm, if you hesitate a little bit about going too far, too fast. So there are a lot of things in human nature and there are a lot of things in the judge and there are a lot of things in the court itself that prevents it or hesitates or stops. You're going in some of these areas too far away from what will make the country, and this is why I use this word 50,000 times, what will help make the country work and that work. I think they use it. I found a place where Marshall used it and I like it because making certain that the law is workable is certainly one of the ways you can describe the various things that I and others have traditionally looked at in order to interpret difficult parts of the Constitution or the statutes.

**[00:51:02.7] Jeffrey Rosen:** These are extraordinarily challenging times for democracy as we know an American around the world and polarization and social media have created the Framers nightmare of public discourse based on passion rather than cool reason. Why is it important that the court maintain its legitimacy during these extraordinarily serious threats to the rule of law? And will this court be moved by the remarkable times that we're in as it decides whether or not to proceed on this textualist path?

**[00:51:36.0] Stephen Breyer:** As far as the ultimate answer to that question, I say the reader's going to have to read what I try to put down and take it as one person's point of view and see what they think the other is and make up his or her own mind. But what you're saying there is what you've written pretty well in your book. Very well. You say, let's go back. Let's go back to see what the Framers read. They read things I was supposed to read in Latin but just bought the pony. But their Seneca Cicero, some of the Greeks, the stoics, they like the stoics, Marcus Aurelius.

**[00:52:15.0] Jeffrey Rosen:** And Epictetus, which is the epigram for your book.

**[00:52:20.8] Stephen Breyer:** Epictetus. Yes, for the book, it is.

**[00:52:21.9] Jeffrey Rosen:** Which I actually, I can't read without my constitutional reading glasses.

**[00:52:25.7] Stephen Breyer:** It says don't tell people, it says don't tell people about what you think. Do it.

**[00:52:30.8] Jeffrey Rosen:** Do not explain your philosophy, embody it; absolutely.

**[00:52:33.0] Stephen Breyer:** Yeah, I think that's true. So why did I write that? I don't know. But in any case, you say they read these things, they read the French Enlightenment, they read David Hume, which we never read in philosophy on moral views and the basic moral view of the Scottish Enlightenment, the French Enlightenment, and these other people, the Romans, Greeks, 'cause it was we're just filled with emotion. Ask Joanna, my wife, I am. And we're just, we remember the classical virtue of your stomach, temperance, courage, wisdom, injustice, and try to keep those passions under control. Try to keep them under control and try to use your reason. And that's what Madison says. Madison says, we won't have that much of a problem. There will be factions. See, I learned this from you. There will be factions all over this country, but it's a big country and the factions will all be different in different places and time. It will take time to get these mob views across where they can have an impact. And the government's complicated. Put those three things together and you will have time for people to reflect. And they, in the government, like they individually will be able to have reason in control.

**[00:53:58.2] Stephen Breyer:** Well, today geography means nothing or not much. In time, zero, in complexity, yes. But it's more complex in different ways. And so can we find that substitute? Can we find that substitute for those things that Madison and the others, and they're all over here in that room, Madison and the others thought would help bring the country under control? Jeff said the way to do it is get people to read and read deeply. I think that's true. I know what Kennedy used to say, Senator Kennedy, he would say that you're trying to work on a project, you have some opposition, find the person. And I think Mills said something like this, find a person who really disagrees with you and you think is intelligent and go talk to them. Wait, don't just talk to me, but listen to me. Listen and listen. And eventually they'll come up with something that you really agree with. And when they do that, you say, what a good idea you have. Let's see if we can't work with that.

**[00:55:19.6] Stephen Breyer:** And they will. And sometimes you'll succeed and if you succeed and get 30% of what you want, take it. Don't hold out for 100%. So all your followers will say, oh, how great you are in getting, oh no, you didn't get it. But, you say get the 30% and take it. And I saw a lot the press would go and say, Senator Kennedy, you did such a good job on this bill. And he'd say, don't thank me, thank Orrin Hatch. He's the one that came up with the idea there, that allowed us to get together and produce something that will be helpful. 'Cause he'd say to his staff, keep in mind this, credit is a weapon. It's a weapon. And use it. If you're a success at what you're trying to do or even a 30% success, there'll be plenty of credit to go around.

**[00:56:17.2] Stephen Breyer:** And if it's a failure, who wants the credit? Yeah, good point. So there, and when I tell this to the fifth graders or the seventh graders or the high school students, and I'll tell you something, you can hear a pin drop silence. They're listening. They're listening. Because I say to them when they ask me what I think they should do, I say, I'm very sorry. It's now up to you. It's not up to me. You are the ones who are going to have to figure out how to save this country. We just had its ups and downs like that. And where Churchill said the United States always does the right thing after trying everything else. But yeah, okay, but we're not so bad at getting people together. And COVID, they came around and saw how the old people were doing and did they have enough food and neighborhood groups were created and they were created and a lot of different cities and a lot of different places we can work together.

**[00:57:12.9] Stephen Breyer:** And we have a history of doing that up and down, up and down. But what's interesting to me is the attention that those seventh graders or eighth graders or ninth graders were paying to this, because they want to do something, they want to help. And that's what I came away with. And it's that mood in that room of the high school students, the mood in the room of the high school students that probably at the end where I say yes, no, moves me in the direction of being optimistic.



**[00:57:55.1] Jeffrey Rosen:** I have the same experience with this amazing job of convening high school students and students of all ages and listening to their thoughtful civil debates. It really is the way things are supposed to be. But I wanna go back to this remarkable book. You talk about Madisonian deliberation as a judicial virtue and using powers as a reason to tame passions. And you make a very strong case that Madison was a pragmatist and that he after all changed his opinion about the constitutionality of the Bank of the United States based on the fact that it had worked and people had come to accept it. When you think about changing the minds, not only of your colleagues on the court, but of law students and kids in high school today that are trying to figure out how to apply textualism and originalism, might you appeal to Madison and say it was this pragmatic approach rather than Jefferson's strict constructionism, which wasn't even supposed to be applied by the Supreme Court, but by people in constitutional conventions, that actually represents the true original understanding of the way the courts were supposed to function?

**[00:58:58.1] Stephen Breyer:** I can in the future. I think you brought that up and I think it's a good point. The way I put it in the past is I'll say to a graduating class, if I'm speaking to a graduating class college, I'll say, I can't really tell you what to do. I can hope. I can hope that you'll find someone to love. I can hope that you'll have a job that you find rewarding and I can hope that you will participate in public life, that you'll vote at least, that you may be library commissioner or a member of that board. You may work on the school board. There are a million ways you can do it. And the reason I can say with some authority on this last point is I have worked with this document here and I believe strongly that if you don't, if you do not, and I think Adams and Madison might've thought this, if you do not work in public life, if you don't do that, this won't work because it foresees you are doing that. So I hope you do. I can tell them that 'cause I've told them that, that work. Yeah.

**[01:00:09.0] Stephen Breyer:** I read this in Derek Bok's book if you want a quotation on that particular point. He wrote a pretty good book about education and he says, though I'm not sure it's true, he says that Pericles, in Athens, when describing the famous funeral oration, all the virtues of Athens. He said, the democracy and so forth. He says, and what do we say in Athens of the man who does not participate in public life? We do not say he is a man who minds his own business. We say he is a man who has no business here. Pretty tough.

**[01:00:52.3] Jeffrey Rosen:** Your remarkable and inspiring optimism in democracy rooted in an Athenian sense of the fact that our full potential is only achieved through political participation remains inspiring. Justice Breyer, I must thank you for embodying the Madisonian virtues that the Framers hoped for when they thought about judges who would thoughtfully listen to all points of view with a sense of the limitations of the role of the court in our society and modeling the very civil dialogue on which the future of the republic depends. We're here in this sacred space at the National Constitution Center. I want you to just gaze over on Independence Hall,

which we're about to celebrate the 250th anniversary of the Declaration of Independence. I think we all could benefit from your optimism. Are you optimistic that the Declaration and the Constitution will thrive for the next 250 years? And why should we be optimistic?

**[01:01:52.2] Stephen Breyer:** Up to a point, Lord Copper. We don't know. We don't know. It's an experiment. That's what Washington says. He says this is an experiment. He wrote that in a letter to a friend Lincoln. Joanna got our grandchildren. She said she'd give them \$20 each if they memorize the Gettysburg address. And what's that about? First two lines, our fathers four going seven years ago, our fathers came forth upon this continent to create a new nation conceived in liberty and dedicated to the proposition that all men are created equal. Today we are engaged in a great war to see whether that nation, I like these words, or any nation so conceived in liberty and so dedicated to that proposition can long endure. What's he saying? It's an experiment, you see, and it's my teaching that leads me to that. Why? Because I say to the teachers that the teachers think they're like the Lumiere.

**[01:02:55.3] Stephen Breyer:** Or they're like the enlightenment figures. They think we have a great theory, but it'll never work. And then they think, let's see, the United States is going to try it. Let's see how long it takes them to fail. And there we are, Washington, an experiment. The people in the room, if they could only talk now, we're writing an experiment. Franklin Constitution, if you can keep it Lincoln, Lincoln, long endure, we can't promise it. We can just try. And it's that experiment. And the reason that they should know it is why I think it costs you \$60 or it cost you some amount of money because they did memorize parts of that. And that's what we're living in and in living in that experiment, we're no different than people who live before us or people who lived after us.

**[01:03:49.4] Jeffrey Rosen:** Friends for his services to the Constitution and for inspiring all of us to keep the American experiment, please join me in thanking Justice Breyer.

**[01:04:14.1] Tanaya Tauber:** This episode was produced by Lana Ulrich, Bill Pollock, and me, Tanaya Tauber. It was engineered by Advanced Staging, Greg Scheckler, Dave Stotts, and Bill Pollack. Research was provided by Samson Mostashari, Cooper Smith, and Yara Daraiseh. Check out our full lineup of exciting programs and register to join us virtually at [constitutioncenter.org](https://constitutioncenter.org), as always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at [constitutioncenter.org/media-library](https://constitutioncenter.org/media-library). Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts or follow us on Spotify. On behalf of the National Constitution Center, I'm Tanaya Tauber.