

The Court and the World:
An Interview with
Associate Justice Stephen G. Breyer

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On Monday, January 25, 2016, U.S. Supreme Court Justice Stephen G. Breyer visited Harvard Law School to discuss his new book, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES. In the following edited transcript, the Harvard International Law Journal sat down with Justice Breyer for a wide-ranging interview about his book, legal academia, and the changing legal profession.

HILJ: You write in your book that the legal profession has three parts—the judges, the lawyers, and the academics—and that the system works well when it works iteratively. Does the role of academics increase in cases that require courts to delve into foreign law and international law? And, if so, why?

SB: Yes. Take any area of law. Particularly if it's international in scope, there will be academics, and perhaps lawyers, who will know far more about it than I do. The academics may know more than the lawyers. Unless they talk to each other and write so each other can understand, they're going to get lost. That's why this book is not just about international law. I'm not saying there's an international law specialty. I'm saying problems that come up in ordinary law require people to look abroad and know something about foreign law, practices, or institutions—because they will affect the proper decision that we make under American law. For example, what is the international scope of the antitrust statute? You have to understand U.S. antitrust law to answer that question, and you also have to understand something about the European Union's enforcement powers and the communication between American and European enforcement agencies.

HILJ: Law differs from other professions in that many journals are student-run and not necessarily peer-reviewed. What role can and should student-run journals like the Harvard International Law Journal play in this iterative process?

SB: Ask different professors or others you meet—what do you think is important and what do you need? I was Articles Editor of the *Harvard Law Review*. It was a great job. When we got articles submitted, we used to

divide the piles of articles into stacks, and we'd give them to faculty members. We'd ask, what do you think we ought to print? We didn't follow their recommendations one hundred percent, but their input certainly helped. You're not going to figure it all out by yourself, but you do want to get better articles. Peer review plays an important role. You need to have in your own mind some substitute for that, I think.

HILJ: On a related note, a theme that emerges in your book is the information gap at the Supreme Court. The Court is not expert in foreign legal systems, and you express concern that the Court sometimes doesn't have all of the information that it needs to make the right call. What do you see as potential solutions to this problem?

SB: Academics and practitioners need to understand that they're cooperating in their efforts. I think you can have some academics who want to write about water law on Mars, but you can't have an entire faculty that does that. We need people who are interested in explaining to generalists. It used to be treatise writers. It may still be. Without good treatises, the system won't function very well.

You also need to have a specialization without devoting yourself entirely to the specialization. Everyone goes back to his own experience. The first book I wrote with Paul MacAvoy was called ENERGY REGULATION BY THE FEDERAL POWER COMMISSION. Now that was specialized. (You can buy it, by the way, still now for a penny on Amazon.) We interviewed an electricity manager, a GS-15, in the depths of the Power Commission. Why? Because we learned she was the person who actually determined what the rate of profit ought to be. People delegate to others, and she was the end of the line. By interviewing her we were able to determine how the Power Commission actually set the permissible profit, which very few people knew. That turned out to be a very useful bit of information that allowed me and others to write about rate setting in general. Rate setting in general became part of the process for regulating industry, and regulating industry is a huge question as to how to do it, under what circumstances, when, and where. So you use your specialized knowledge to answer broader questions.

HILJ: You've been doing a bit of that in your international rule-of-law advising. Some people are more enthusiastic than others about this practice. Do you think such advising should be systematized beyond one Justice or two Justices?

SB: Justices don't matter. In a sense they do. In a sense they don't. A point that I want to come across in this book is that what's changing at the Court is not the nature of the Justices. It doesn't matter if one Justice thinks this, the other thinks that. What's changing in the world is the world. The world is forcing certain questions upon us. Everyone is going to have to answer

those questions. And we can do it better or we can do it worse. I believe the more you know the better chance you'll get it better.

HILJ: Does the Committee on International Judicial Relations play a special role in this process?

{The Committee on International Judicial Relations coordinates the U.S. federal judiciary's relationship with foreign judges and works to promote the rule of law.}

SB: I don't know. I do know that when I see the word "international" I think (a) good and (b) bad. The thing that I think good is that there are people interested in these areas and they're working on them. They'll learn a lot, and it will be helpful. The thing that I think bad is that they see themselves as a specialty. I hope that they are talking to others. I hope that in the course on contracts or the course on corporations or the course on tax, that those courses—which when I was in law school were devoted one hundred percent to the law of the United States—will today have an international component. That means law in Europe or law in China or law wherever.

HILJ: We're excited that you're here today to discuss these issues because the Harvard International Law Journal's Symposium topic this spring—International Law in Domestic Practice—marks the ten-year anniversary of the reform to Harvard Law School's first-year curriculum to include international law classes. What do you think law schools need to do to adapt to the trends you identify in your book?

SB: I don't teach in law school anymore, and I haven't for twenty years. So it's hard for me to answer that. I think it has to be up to the teachers. They'll be interested in what the students think. They also have a specialty. It's the same as it always was. You have a specialty. Charlie Wyzanski, who was a pretty good judge here in the First Circuit, liked to quote a great Spanish liberal during the Spanish Civil War, Salvador de Madariaga. And it's a little corny, but it's true. He said, "If you are nothing but, you are not even." Law is a wonderful profession because it gives you the opportunity to be something more than nothing but.

HILJ: Law is a field where you can be both a generalist and a specialist.

SB: Yes, you have decision making by generalists, which I have tended to favor despite the tendency to make errors.

HILJ: Part one of your book deals with war powers, particularly as they relate to civil liberties.

SB: Yes, the traditional conflict of the needs of security versus civil liberties. My point in this book is to show the evolution of those doctrines, to point out that the Court *is* involved, and to also point out that if the Court's going

to make sensible decisions then the Justices need to know what goes on in the world. And that includes what other courts are doing. It includes how other countries are dealing with the problem. That's all helpful. The lawyers provide help. It might be on you and others like you to start thinking about how to inform judges.

HILJ: Many of these issues don't reach the Court and must be interpreted by the Executive.

SB: Yes, of course. Though I don't think it will work for the government to make an argument and believe the Court will just defer to the Executive. That's the *Steel Seizure* case [*Youngstown Sheet & Tube Co. v. Sawyer*]. In conference, the other Justices said to Justice Jackson, "But when you were attorney general you were in favor of virtually complete power for the president." Justice Jackson said, "That was then, and this is now."

HILJ: Historically, though, the judiciary has often deferred to the executive branch's interpretations of treaties and matters concerning foreign relations law. Do you see the trends of globalization and greater interdependence affecting that relationship?

SB: Yes. I was the only one to dissent in *Zivotofsky I*, a recent case. I thought the political question doctrine applied. I don't see our Court as a referee between the other two branches; that's not the job. Sometimes it has to be, but not too often—so stay out of that one. The political branches have plenty of weapons to defend themselves. That was my view. Eight other Justices thought not. The case involved the question whether Congress has power to inhibit the President when he does not want to write the word Israel after the word Jerusalem in a passport. Can Congress do that or not? Well, I thought that's a classic political question because it has all kinds of foreign policy implications. Maybe peace and war. Who knows? I know that whoever knows is not me. I don't know. Therefore, let's stay out of this kind of question. Eight other Justices said the opposite. And that to me is the proof of what I am trying to say.

The questions that are coming up now are driving the Court toward answers. More questions require judges to look abroad or to know what is going on in the world outside the United States. Questions of the kind I mentioned or talked about in the book. You will see the Court responding. I was the one wanting to respond least in that case. But the other Justices responded.

HILJ: And you were willing to invoke the political question doctrine.

SB: Yes, but they weren't. That tends to show that it is personality independent.

HILJ: You write, “As to the ‘political question’ doctrine, as expressed in Curtiss-Wright and Korematsu, the Guantanamo cases did not overrule these decisions directly, but it is as if they (and also Steel Seizure) drained those earlier cases of their persuasive force—though like icebergs lurking underwater, they may perhaps reemerge another day.” What events might cause those icebergs to reemerge?

SB: I don’t know, but I think that generally about Supreme Court opinions. There are those that seem to have more carrying power and those that don’t. I love to think of the cases in the regulatory area where Justice Brandeis, who was a great expert on this, wrote all kinds of opinions about rate setting. They’ve disappeared. The need isn’t there anymore. They’re gone. But they could be back. What about the old cases that gave constitutional rights to electricity companies to assure reasonable profit—were they ever overruled? No. They’re there. We just don’t use them anymore.

HILJ: As we encounter new problems, perhaps we’ll need to draw on those legal tools.

SB: Conceivable. There are some terrible ones that you hope have disappeared forever.

HILJ: Korematsu?

SB: Yes.

HILJ: You argue that the Court’s understanding of comity has shifted: the Court no longer seeks only to avoid direct conflicts among laws of different nations but also to harmonize the enforcement of what are often similar national laws.

SB: Yes, I have a few examples. I thought it was interesting to show those examples in the antitrust area, in the securities fraud area, and in the area of copyright.

HILJ: Do you think there are areas where it might not serve the interest of the American people to try to harmonize those laws? And how do judges decide?

SB: Yes. Judges have a lot of things in front of them. José Trías Monge was the Chief Justice of Puerto Rico, a great judge, and a brilliant legal scholar. When I was starting out on the First Circuit, he explained this to me, and I’ve always thought he’s right. He said, “A judge is like a sculptor who is working in granite, and there’s very little room to move. But maybe, if he’s knowledgeable and makes an effort, he can find where there is give.” That metaphor is about the best you can do. It depends on the cases. I’m not sitting on the bench free to do what I want. I rarely if ever do what I want. I’m bound by the law. But the law is not a computer. It is not computer science. It is not even hornbook, at least by the time the cases get to us. So

there is room to maneuver. But how much? Not too much. You have to find those cracks in the piece of granite.

HILJ: When you find those places that give, it seems like you tend to prefer context-specific standards where possible.

SB: Yes.

HILJ: The difference between bright-line rules and standards appears in cases throughout the book. Do you think your preference depends on the specific area of law or your nature?

SB: It depends on the case. Partly nature, partly case. It's partly that I'm more cautious because I think the world comes back and hits you in the face when you say something too broad. Be careful. Experience is such that you can't capture it in a single rule. But sometimes bright-line rules may be appropriate. Let's try rules of procedure. Let's try rules of jurisdiction. You'd better be clear so that everyone can follow them. Beware of too much departure from bright-line rules in those areas. In antitrust, it may be the opposite, though. Or the First Amendment—that's an area where there is a lot of disagreement about how bright-line you want the rule.

HILJ: You've been talking about your book for several months now. Have you heard any reaction to your book that gives you pause?

SB: Two reviews in Europe seemed to get what I was trying to do. One was in the *Economist*, and the other was in a French magazine called *Europe*. (The book came out in France as well.) The difference between those reviews and the reviews here, which have been perfectly nice, is that the reviews here want to make this book into an argument between me and Justice Scalia about whether American judges should refer to opinions written by foreign judges in foreign cases. That's a part of the book, but—as you can see—it's a very small part. The reviews from Europe, both in England and France, said that isn't what the book is about. Rather, the book is trying to give a report about the nature of the work in the Supreme Court in fifteen or twenty percent of cases. Show people; don't tell them. If you tell them, it's a cliché. If you show them, they can learn something. Show them how global interdependence affects the cases now in the Court. Then you can begin to get specific. It's called the case method.

HILJ: You deliberately structured the book for that purpose—to go from national security to commerce and then only later introduce the issue of cross-referencing to foreign cases.

SB: Yes, that's right. I think that by the time people see what the cases are, the idea speaks for itself. Exactly.

HILJ: In Medellín, the Court made automatic incorporation of treaty provisions into domestic law more difficult. You dissented from that opinion. How do you think about self-executing treaties?

SB: I thought Chief Justice John Marshall worked it out properly. He said that what you do is look at a particular provision of a treaty. If that treaty or that particular provision seems to address itself to the political branch—war, peace, warships in Nicaragua, or something like that—judges are supposed to stay out. If, on the other hand, the provision addresses itself to technical matters where there can be standards and judges are more used to dealing with them, then it's probably self-executing. That's the simple idea. It's the idea the Dutch use, I later learned.

In *Medellín*, the Court had a different set of standards. They seemed to think hardly anything is self-executing. But they didn't say nothing. And I wanted people to see that—not just the substance but also the way the Court operates. Be very careful of making things absolute. Not even the majority in that opinion made the rule absolute. I think it was an important case.

HILJ: In your dissent, you argued that erecting a “clear statement” rule for treaties to be self-executing was “misguided.”

SB: I did.

HILJ: What do you think are the consequences of Medellín for the United States' ability to negotiate treaties?

SB: That's interesting. There are ways you can deal with it. You could get Congress to make a treaty self-executing. If you have two-thirds of the Senate, getting a majority of the House shouldn't be too difficult. It could be in a particular case, but it shouldn't be too difficult. Or you could try to get Congress to pass a law in advance saying what kinds of treaties are self-executing. Or you could try to take advantage of the parts of the majority opinion that gave exceptions. For instance, put in a codicil that says, “In the United States, this treaty will be self-executing.” I don't think it's impossible to deal with. I don't think it's an absolute disaster. Probably when I wrote the dissent I was thinking it was a disaster.

HILJ: In another case, Roper v. Simmons, you note in your book that the majority opinion cited foreign laws to confirm the holding and that this generated criticism from the dissenting opinion and the public. Do you think there are ways to incorporate insights from foreign laws that would not draw such criticism?

SB: I think the subject of that case was what drew the criticism. That case involved the death penalty. The other controversial case [*Lawrence v. Texas*]

involved gay rights. Those are the cases that proved most controversial. I recently wrote a long opinion on the death penalty in which I said we should reexamine it. [Justice Breyer wrote this dissent in *Glossip v. Gross*.] It's forty-six pages long. It has all kinds of reasons, charts, and studies. In the opinion, I devoted only two pages to what other countries do. The Founders don't say what the words "cruel and unusual" mean. Does the word "unusual" mean "unusual" in the United States, or does it mean "unusual" in the world? They don't say. Some people think yes. Some people think no. I wrote about the death penalty with respect to the world. Those who find it convincing can say that's a good argument. And those who find it not convincing can say they don't think it's a good argument. But there are forty-four other pages in my discussion.

HILJ: You also discuss how administrative law developed into a wholly new field after the New Deal. In response to the surge in delegated powers to international organizations, do you think the legal profession will need to create a new field—the law of international organization rulemaking?

SB: When looking at the literature, I would start with Sabino Cassese, who is a great expert in Italy. Cassese had his research assistants look up how many agencies there are with little bureaucracies that write rules that affect citizens in more than one country. There were some 2,000! It's a huge number. We belong to at least 700 or 800, though nobody keeps accurate count, I don't think. What's the status of those rules?

HILJ: Who's regulating the regulators?

SB: That's right. That's the very old question. So you look at academic articles. Look at what Dick Stewart has written, for instance. There are going to be changes. How do we square this development with the constitutional obligation for Congress to write the laws? There are ways of doing it under administrative law and under other forms of law. These developments may present enough change that we'll have to find modifications.

HILJ: Thank you for sharing your insights.

Following this interview, Justice Breyer addressed students, faculty, and staff in conversation with Professor Vicki Jackson at the Milstein Conference Center at Harvard Law School. Later, Dean Martha Minow hosted a lunch in honor of Justice Breyer. Editors-in-Chief Rebecca Donaldson and Daniel Severson, along with HILJ Symposium Chairs Chris Mirasola and Marissa Yu, joined Professors Gabriella Blum, Noah Feldman, and Vicki Jackson, Assistant Professor Mark Wu, and Visiting Professor Ruth Okediji.