

A Conversation with Justice Stephen Breyer

interviewed by Alan B. Morrison,
Lerner Family Associate Dean for Public Interest & Public Service Law
George Washington University Law School
AALS Annual Meeting
January 7, 2016

Alan Morrison: When I told Justice Breyer that we were going to have this conversation I said there were three things we were not going to talk about: 1) cameras in the courtroom; 2) collegiality among the members of the Court; and 3) the presidential election. I want to begin by asking, why do you write books at all? This [The Court and the World: American Law and the New Global Realities] is your fourth book now that you've done.

Justice Stephen Breyer: I could ask everyone here the same question!

Alan Morrison: You have life tenure!

Justice Stephen Breyer: They [the audience of law faculty] understand it. I was a professor for a long time. I wouldn't have been in that job, and you wouldn't be in your jobs unless you like explaining things to people. Isn't that true? We learn things, and you like to explain them. We can't control it if they want to benefit or not from what we explain—that's their problem. But, my goodness, that's what we do. So stop me before I write again!

Alan Morrison: You get to explain things in eight to ten majority opinions every year, and as many concurring and dissenting opinions as you choose, right? But this is more.

Justice Stephen Breyer: In a sense. What Harry Blackmun told me—I was his successor in that particular seat—he said, "You're going to find this an unusual assignment." And he was right. It is an unusual assignment. And so what I can do, or what I can try to do, is, I see things in our profession—because of luck and a lot of other things—from an unusual position in an institution that is important in this country. That's what I want to explain. And the best way to do it, given my own abilities or background or whatever,

is not necessarily to go out and say, “This morning I got up and went to the Court then I open up my word processor and said ... etc.” It’s not “my day at camp.”

The best way for me to do it—as is often the best way for you to explain law in general to a first-year class—is to take a subject and go through the whole thing. What you are doing in teaching that subject, you are really teaching something about law, you’re teaching something about American life, and you’re teaching something about how we live today, yesterday, tomorrow in this country. All right, I’ll try!

And so I’ve written three books about the Court. I’ve written on administrative law. You know, the *Los Angeles Times* got hold of my book on regulation—I’m very surprised you can’t just cite the title of that immediately—but the *Times* got hold of that book and the review started as follows: “In *Alice in Wonderland*, the dormouse and Alice emerge from the pool of tears and the dormouse begins to read from Hume’s *History of England*. ‘Why are you reading that?’ says Alice. The dormouse says, ‘Because I am wet, and this is the driest thing I know.’”

Alan Morrison: I believe I wrote a blurb for that book that said to read it.

Justice Stephen Breyer: Right, you did. It was a true act of friendship and I appreciate it, as we’ve known each other a long time.

Alan Morrison: It’s an over-the-counter sleeping pill.

Justice Stephen Breyer: It’s a very interesting book! But these three [books] I have written about the Court—from different points of view—are for you. They’re for your students. They’re for ninety-nine percent of the public who are not lawyers. And I want them to know.

Alan Morrison: Tell me about the decision to write the book *The Court and the World*—I happen to have a pre-publication copy.

Justice Stephen Breyer: It’s a rather unpretentious title, *The Court and the World*.

Alan Morrison: It has a much prettier cover now. And, by the way, Justice Breyer will be signing books in the back after the program is over, so take advantage of the opportunity. What made you decide to write a book about the world and the Court?

Justice Stephen Breyer: I've seen something happen in twenty years that I think is interesting, that I think reflects the world, and I can only write about it from a very narrow point of view. It is a point of view that we share: that there are a lot more cases in the Supreme Court that require us, in deciding them, to know something about what's going on beyond our shores. I say that with some vagueness because I don't want to say "citing foreign cases" or "not citing foreign cases." That's an aspect of it, but it isn't the whole aspect. What's the aspect? Put it this way: In the very good novel *Charterhouse of Parma*, the hero, Fabrice del Dongo, at the opening, is at the Battle of Waterloo. Bullets ... horses running back and forth ... smoke. Napoleon is going back and forth, and he's thinking to himself, Fabrice del Dongo, "something very important is happening here. I wish I knew what it was."

When I hear words like globalization, interdependence, the shrinking world, or whatever cliché you want, I have the same kind of feeling. And so I thought it might be helpful to be quite specific by showing different categories and problems, all the cases that do arise with increasing frequency, through subject matter highlighting how they're decided, and what the problems that I see are with the way in which we've decided them. Why? Do I have any answers as to how to improve it? I don't, actually, and that isn't false modesty.

I'm trying to stimulate conversation among people who will know ... more about an individual case than I know because they'll be specialists, but who won't necessarily be seeing the relationship to—if it's over here with human rights in the Alien Tort Statute, over there with copyright and the question of whether you have the power to sell the books you want when you bought them from Thailand and brought them over here and the publisher stops you from cutting the price. What's the relationship? Foreign, that's the relationship. And [it is] more than that. So, I do see something you don't see, which is because of my daily job. That's what I want to explain, and I hope by the end of [the book] you will think, "There's something rather big going on here." That something rather big, at this time, for you, perhaps, or for others, will lead you to say or think about the openings there are to reproduce what has been the traditional relationship between professors, judges, and lawyers.

Alan Morrison: If you had your druthers, what would you suggest law professors do with this book and how they use it in their classes? Recognizing that we have people teaching virtually every subject here, and the book covers substantively a number of subjects, but it also covers them all in a global context.

Justice Stephen Breyer: The first thing is ... my cellphone is ringing and I know what it is: It's a call from my publisher, who says, "Tell them the first thing is to buy the book!" What I'd like is people at least to look at it, look through it, and to think about, does this affect me? Does it affect my students? If I'm teaching contracts, is there something in a contracts course that it might

be helpful with? To be able to give my students the ability to understand the possible importance, in their practice or later, of the contract law of France, or the contract law of Europe, or the way in which they interpret a contract, or the way in which they use expert witnesses and the power that the judge has to decide who will be the expert and listen to that expert. Look at the Yahoo case, a great case involving France and the United States, and whether or not—I mean, it involves everything. To be familiar with that, if you’re teaching a tort class or if you’re teaching whatever class it might be. It’s not something that I used to have where we had Roger Fisher, who was a great teacher, in a course called international law. And everybody took it because it was viewed as a gut. And that’s not a reflection on Roger Fisher—he was a great teacher. But that isn’t today’s world, those boxes. At least it shouldn’t be, in my opinion, insofar as something international is an issue. The most I can do is present to a public that’s too ready to put things in boxes a general picture of what’s going on in the Court in cases—maybe fifteen percent, maybe twenty percent—that require you to look beyond our own shores in many different ways. And there, it’s the examples that matter.

Alan Morrison: In a number of instances you talk about foreign law being relevant. In the *Hamdi* case, you talked about how practices in Israel and in the United Kingdom were bearing on your decision. Both with respect to the actual practices and with respect to the law, do you worry about getting it right? That is, we have enough trouble understanding what’s going on with our own legal system. How do you get the facts about foreign practices, and how do you get the law about foreign countries, and do you worry that maybe they’re coming in through parties that have an axe to grind on one side or the other, and you may not be getting them right?

Justice Stephen Breyer: It is important to get it right, and it’s hard to do, but there is a sense in which it isn’t quite as important you might think. Very rarely—though sometimes—is the decision of a foreign court going to bind us. Particularly not in the cases you mentioned. You would like, were you to understand, I think, in those kinds of cases—which is the case of security versus civil liberties, which is a very important case—you would like to be able to understand what practices are relevant that are going on overseas, and it is important to get that right. But that is a different problem from the problem getting the ERISA law correct. When someone is in a state court—and I’m just thinking of a particular case which I can’t remember the name of, but my god, it was a complicated ERISA case—and I felt that I didn’t understand it until I read a brief filed by a section of the California State Bar that specialized in ERISA and real property law. When I read that I thought, my god, that’s the answer! And of course I was in dissent. But why didn’t they get that sooner? Up to the Secretary of Labor, who would have told the Solicitor General, and maybe the whole thing would have turned around.

In other words, that's an endemic problem. You want to go back to your problem, the big problem, and what I've done in the book is, I've set it out in a way where—I want people in that particular kind of problem, security, who are constitutionally given the power, to protect us. The President and Congress, they're in charge of security, constitutionally speaking, but their actions conflict with traditional civil rights. And their judges certainly have a role to play, and so what happens when these two conflict? That's a very old question, and the reason that I put it in is because, until fairly recently, the answer to that question was Cicero. Cicero said, "In time of war the laws fall silent." I actually had a better translation. I used to translate it as "When the cannons roar, the laws fall silent," but somebody pointed out the Romans didn't have cannons. But still you see the point.

Now go through the Civil War. Lincoln and his Cabinet put tens of thousands of people in prison. The Secretary of State calls in the British ambassador and says, "I can push this bell here and put any person I want in New York in prison. This one, any person I want in Indiana. Tell me, tell me, does the queen of England have such power?" Of course the courts got into the act after the war was over.

World War I, see what Wilson did. World War II, we know the instance of the 70,000 Americans of Japanese origin taken from their homes with zero evidence, zero, and put into camps for two or three years. And it comes to the Court—I once met Fred Korematsu, the hero of this *Korematsu* case, and he had thought, of course, this is America. They can't make me, a citizen, go to a camp. He was certain he'd win. Charles Horsky represented him. He lost six to three. Why? It was Black, Douglas, Frankfurter, the civil libertarians—the ones who later decided *Brown v. Board*. I think—this is my own view—that this wrong result reflected the fact that someone has to run this war. Us, or the President? We can't, so Roosevelt has to, therefore he wins. That went a little far. Perhaps very far.

So now we have a great case—I'd love to see this taught a lot, a fabulous case, the case of the steel seizure. Incredible case, because, there Jackson, who really took the laboring oar in this, is going to cut off Roosevelt's power. It's much easier to do now—

Alan Morrison: Truman.

Justice Stephen Breyer: No, that's why it's easier to do, you see! Roosevelt isn't there anymore and Truman isn't quite as popular. So they said, "No, you've gone too far. You've gone too far." Very interesting. Well, in conference he says, "When you were Attorney General, Justice Jackson, you said the President could do this kind of thing." He says, "Yeah, but I was in a different job then." Ah. Why go into all that history? Because of steel seizure, and because steel seizure and other things, perhaps, turned something around. So that when we get to the cases, starting with *Hamdi*, the four Guantanamo

cases—they're all won by the inmates, the detainees. The government loses every one.

Think of those four—not the most popular. Bin Laden's chauffeur, not the most popular guy. All right, so he wins, President loses, but the key line, Sandra O'Connor: "The Constitution does not write a blank check to the President. Not even in time of war."

That's what all this long thing has been leading up to, those six words or seven words. Why? Because I want to say that's where we are. As soon as I say those words, what immediately pops into your head "No blank check? Fine. What kind of a check *is* right?" And that's where we are. What a pity that I can't really answer that question very well. People criticize our decisions on that nonstop. "Why didn't you lay down a list?" Why? Because I don't know what should be on that list. "Well, why didn't you let the President do what he wants?" Really? Do you want to go back to *Korematsu*? Is that what you want? "Well, is there an intermediate choice?" What? What is it?

So I'm trying to set the stage, and there we are. And I said, I am in a profession [of] which I am not the only part. The judges are there, the professors are there, the practitioners are there. Traditionally, the judge makes a decision, the law professor reads it—we hope, I'm keeping my fingers crossed—the law professor reads it, writes the treatise or article, puts it up against other things because he or she is a specialist, and criticizes. That's your job, you criticize and say, do it this way, do it that way. The practitioner reads the article, takes whatever's going to help his case. There are some other ones helping the other side. We're re-presented with what's been done, and then perhaps you reach a better decision which will then go through the same iterative process. That's the classical thing.

So, long answer, but I'm throwing this book into that whirlpool, and I hope that it has a little traction, if I'm lucky, and it will lead somebody to start thinking about how to improve that situation.

Alan Morrison: When you discuss the *Youngstown* case here in your book, you spend a lot of time talking about the backstory. Do you think that law professors should spend more time talking about the backstory in cases when they're trying to explain what the outcome is? I know it wasn't just *Youngstown*. *Youngstown* was the most pronounced example because it was the largest one. In a lot of other cases in the book, you talk about things that don't readily appear on the opinion, or you've got to dig for them, and really did influence the outcome. I've always thought that, for example, in *Youngstown*, the fact that Truman could have stopped the strike by letting the steel companies increase their prices the next day always had a bearing on the willingness of the Court to go along with Truman.

Justice Stephen Breyer: Truman was told by his people in charge—Charlie Wilson, electric Charlie—he was told that if you do this and break your price

controls, you will see prices going up all over America, and that's going to create a pretty bad inflation, which we don't want at the time of the Korean War. So yeah, maybe, maybe not. I mean, the story there to me shows there's nothing obvious. Truman's decision wasn't that unreasonable, in my opinion. But the Court did think that. Now why tell the backstory? There, I think the backstory is important. Why is it important? There might not be an ERISA case, probably isn't, but it probably is there. I think the truth of that area of the law was well said by Justice Jackson. He said—I've had to look up a few of these, as many of us have—he says, "When you look to see what the founders thought" (and I would add to that "what prior cases hold in this big area, security versus the inherent powers of the President") "when you look to see what the President said, what the founders thought... it's like Joseph interpreting the dreams of Pharaoh." Yeah, that's right. I mean, you try it. We had a case not too long ago that was something like that, that was the case of the President's recess appointment power. What law is there on that? All I can say is, no matter how little you think there was, there was still less than that.

Alan Morrison: Well, there's plenty of law now!

Justice Stephen Breyer: And that's the job! But that isn't true in an ERISA case. So I'd say that depends on the area, and it depends on what you do in your class with this material. That's why I say I'm part of a moving system and that system includes the teachers and the practitioners. Somehow through that interaction we've done all right so far. Does that mean we will do all right tomorrow? I don't know. That's a little corny, but it's true; it's what I think. My contribution to this in writing the book is the same as when you teach a class. You're trying to throw out material, put ideas in front of people, see how they react, modify accordingly, et cetera. This will, I think, produce a number of areas, a number of cases, a number of concrete examples. My hope, by the time someone finishes reading it, is that he will understand better than before what this term globalization, internationalization, looking beyond your own shores, what it might mean for an institution like ours.

Alan Morrison: You generally approve of the movement of the Court away from Cicero and *Korematsu* to greater involvement in the Guantanamo cases. Before the book was finished, the second round of the *Zivotofsky* case had not been decided yet. *Zivotofsky* is the case in which the Congress passed a law requiring that the State Department put on passports of individuals who are born in Jerusalem that they are born in Israel at the request of the parents, in this case of the child. They made such a request, but the State Department refused to honor it, said it was unconstitutional. In your first opinion you were all alone in saying it was a political question, and then you agreed with the President. We'll come to that in a moment, but I'm curious as to why. It seems to me to be that everybody, including those who are most inclined to find ways

not to decide cases on the Court, went along and said it was not a political question that the Court had to face. Is that consistent with your general views that it's better that the Court rather than the President have the final word?

Justice Stephen Breyer: You could draw the conclusion in a case where I am alone in dissent that I am possibly wrong.

Alan Morrison: I would never say that.

Justice Stephen Breyer: I hesitate to draw that conclusion, but nevertheless I think it's an example in my own mind—

Alan Morrison: You were the lone dissenter in *Clinton v. Jones*, if I recall.

Justice Stephen Breyer: It wasn't quite a dissent.

Alan Morrison: Close.

Justice Stephen Breyer: Holmes had a good perception when he says I think every legal principle, at some point, runs into some other legal principle and then you're stuck. I mean I didn't think the political question is dead. I certainly don't think it has a case in anything coming even close to traditional civil liberties. This [the Zivotofsky case] was nothing to do with traditional civil liberties at all. Nor is it so much less the case of Guantanamo, or something like that. This is a pretty narrow case involving whether Congress has the power to tell the President to put in a person's passport if he is an American citizen born in Jerusalem, to put in Israel. My point on that—how odd it is, as I usually remember my own points better than I remember the points of the other judges—but my point in this was that the substitution could have a significant effect on the Arab-Israeli situation. I don't know. I mean, who knows? I don't know how the law is working out or what they take seriously or what they don't. But maybe that would be viewed as some kind of serious change in the situation of the American recognition of the borders of Palestine, Israel, et cetera, or maybe it wouldn't.

What I did know is that the Department of State would tell us that it would and the people on the other side would tell us that it wouldn't. I read both of those and I thought those are their honest opinions, and that's fine. It means I still don't know. So I think this is the kind of question where you see the possibility of a significant foreign affairs impact where there was virtually very little at stake. I agree that Mr. Zivotofsky would have been happier if it said Israel, and I agree that people in Congress did want that to happen, but it

is not a question, if we stay out of it, that there are some individual rights, protective rights, that would be injured, et cetera.

So I thought it was, in a way, Custer's Last Stand. There we are. I thought the political question did play a role and I did not see that as inconsistent: We are saying that indeed we should be in the business of protecting major civil rights even in wartime. And how they're protected in wartime, to what extent words like "reasonable search and seizure," to what extent a deprivation of liberty without due process of law, even to what extent something does or does not fall within the words "the freedom of speech." All those are questions that will have to have answers, if you take my approach (which is the majority approach) there, and therefore we will have to have ways of answering them other than just listening to two people who say opposite things and were paid by their clients to write these opposite things. Now that is a problem. That's the problem that I'm posing, and that's the problem I don't want to have answered by saying -- take that political question and go back to *Korematsu*—I think it would be a terrible answer. I think to answer too much too quickly would also be very risky.

And, by the way, it's not going to come up, I suspect, not just with putting people into prison in Guantanamo. I mean, I do read the newspapers. There are questions of Fourth Amendment, obtaining information from people. There are questions that are going on, certainly in other countries, of what you could or could not say on the Internet. There are questions that conceivably do bring into new contexts very old constitutional dilemmas that have been solved in some situations but not others. In that area, that kind of question, I think, is important. We're getting answers. And that isn't the only one; there are commerce problems, there are treaty problems, there are problems after problems. I don't know what else you want to go into.

Alan Morrison: Well, I'd like to talk about your approach to interpretation. On Page 240 in the third paragraph, you say you use "text, history, precedent, purposes and values, and consequences." Is there anything you don't use?

Justice Stephen Breyer: That's a good question. I'm glad you read this so carefully.

Alan Morrison: I had a big assignment here. And do you think that your fellow justices use the same list? Use them all the same way, in the same cases? Do you put more, as you suggested a moment ago, in terms of consequences, than some of your colleagues might? And how should we think about that as teachers trying to teach our students how to think about how these cases get decided and how to argue in the next case?

Justice Stephen Breyer: Well, we're a statutory court. We deal with statutes, and most courts do now. And we're interpreting a text, we're interpreting some words on a piece of paper. And there are, at least in our Court, several different interpretations that are pretty difficult to say which is which. We take cases where lower courts have come to different conclusions on the same matter of law. They're good judges, but they've reached different conclusions as, in all likelihood, there are going to be different reasonable interpretations of those words. I do believe all judges—if you look into it, I think all judges do, in fact, use those six factors.

The first thing they look to is the text. The text doesn't always answer the problem; I think it usually doesn't in our Court. But if the text says fish, that does not mean a carrot. A carrot is not a fish. The text does put limits on what you can say. And history, tradition—what's *res ipsa loquitur*, I mean, what is *habeas corpus*? Indeed. And what was the history from which this statute emerged? Indeed. Precedent. Again, the precedent doesn't answer the question, normally, because, if it did, why is this case here? Consequences, I think, are very important. Not any consequences in the world. I want to know purposes first. There was some human being who wrote those words. Why? What was the object? Given the statute, what was the object? Purposes. They always have a purpose, those words.

Alan Morrison: Is that Hart & Sacks, do you think?

Justice Stephen Breyer: Of course it's Hart & Sacks. You want to know what a judge thinks, go find out who his teachers were, and that's what he thinks. And the fact is that those—some people, like Nino Scalia, for example, put more weight on text, history, tradition, and precedent. And he says, "I never use purposes or consequences," and I say, "But I found a whole article here where you wrote about the use of purposes and consequences, and you seemed to think sometimes that was good!" And he'll say, "Well, sometimes. That was good sometimes."

Absolutely I use the first four. Absolutely. So I think the differences between us within the Court, insofar as they're general, are often a question of how much weight you tend, over time, to put on purposes and consequences compared with tradition, history, texts, and precedents. How much weight you try to put on the first four. He'll say to me, "You know, the way you act and put all this weight on the purposes and consequences, it's just doing what you think—I'm not saying *you* do it, Stephen, but I'm saying—is there a risk in this approach." We've talked publicly about the risk in this approach. It's that the judge will substitute his subjective opinion of what is good for what the law is. And that way lies chaos and politics, which is a way of, eventually, earning disrespect for the courts. And I'll say, "Yes, I understand that risk, but I think by explaining things and what I do, I can stay away from it or stay far enough away, at least, not to run into the other problem"—which is to

create a set of statutes and interpretations that is so rigid and so far removed from the problems that people have today that who would want that statute or constitution if they had a choice?

There are risks on both sides, and there are arguments on both sides. And we'll talk about it—it turns up, those differences will often turn up in individual cases, but I think those kinds of differences really play a much greater role in reaching different results than anything that would normally be called politics.

Alan Morrison: You mentioned earlier on the copyright case involving the first sale—the Chinese student from Thailand who bought U.S.-published books, which are sold in Thailand for much a lower price, brought them back to the States, and sold them for profit. He got sued for copyright violation and you, the majority, upheld his claim that the first-sale doctrine applied and that he was entitled to do that. In your discussion you talk about the consequences of the opposite result, what would have been, and that seemed to be to be a factor in your decision. There's a suggestion there that if you are wrong about the consequences, Congress would step in and fix it. My question is, do you think about Congress stepping in and fixing things? Is that a realistic thing these days? Is Congress paying any attention to these kind of statutes? Or should you put that off to the side because they can't fix anything these days?

Justice Stephen Breyer: You know, I don't think these days comes into it.

Alan Morrison: So you have to think, who has the legal authority to fix it?

Justice Stephen Breyer: That's a good question to which I think there's not a precise answer. The copyright case was a case in which a student from Thailand, at Cornell, discovers the same textbooks are being sold much cheaper in Bangkok. So he writes to his parents and says send me a few. They sent far more than a few. He began to sell them. The publisher got a little annoyed and brought a lawsuit. The question was, does something called the first-sale doctrine mean he has every right to do that and sell them? And the words that are going to answer this—well, you turn to those words, and my god, they're pretty hard to work out. So ultimately the thing that I found interesting, particularly interesting for precedent purposes, is the fact that I received a stack of briefs like this [indicates large stack with hands], and they're from lawyers all over the world, governments of foreign countries. I'm thinking, "Why do I have all these briefs in this technical case?" The answer, which one explains, is copyright today is not just a question of books or films or music. It is everywhere. Cars, automobiles, software, copyrightable, here—go into any store you want and the products have labels and the labels are copyrighted. We're told in there that our answer in this case is going to

affect 3.6 (maybe it was 3.2) trillion dollars' worth of commerce. That's a lot of money.

Alan Morrison: A prior case on that involved jewelry, I think, that was copyrighted. It was deadlocked four-four before your case came back.

Justice Stephen Breyer: Consider that amount of money! Of commerce in today's world! And of course we have to have those briefs, and of course you have to know something in a copyright case of how foreign countries behave, their publishers, et cetera, et cetera. So you say now, "Did the consequences matter?" Yes. I wrote the opinion in that—actually, Ruth and I, usually we're at odds on that one [copyright], and I thought that those consequences matter a lot, and you can see why. And the question is—well, could Congress fix it up if we're wrong? I mean, we've always thought—for example, I used to teach antitrust, and I think antitrust is an area where, if the Court made an error, Congress wouldn't fix it. But I've always thought that, since 1967. Probably because Don Turner told me that!

Alan Morrison: Why antitrust?

Justice Stephen Breyer: Because it's such a basic statute, and it's been around for such a long time, and it so much depends on the maintenance of competitive markets in this country, that I think Congress would hesitate a lot to start monkeying around with anything fundamental in that statute. Try section 1983. Or try portions of the Social Security Act. On the other hand, ERISA may be an easier one. The question, I think, only has a vague answer. And because it only has a vague answer, what you find in the opinions, I think, are people hesitating to say "well, Congress could fix it up," because the answer is sometimes I think they could and sometimes I think they couldn't. Ruth, for example, in the *Ledbetter* case, made a huge point of that. And she was right, and they did change the statute. So I don't have a good answer. The answer is sometimes. I think sometimes it is a factor that goes into people's minds and sometimes I think it isn't.

Alan Morrison: In the last section of the book you talk about the judge as diplomat. That is in both directions: foreign judges coming to the United States and U.S. judges going abroad. Do you do a lot of that work yourself, both here and abroad? Tell me what you hope to gain by participating in those kind of processes—not gains for yourself, but in terms of exporting our legal system.

Justice Stephen Breyer: I think it's important, but you can't really make much of a dent. I'll give you an example of why I think it's important, trying to make a dent. What are you trying to make a dent in? I mean, sometimes

I'll actually learn something, sometimes information is exchanged, I have given some examples of that. But I think it's more than that. I think it's the same kind of thing if we're, say, a practitioner or if we're, say, in the world of teaching, wherever we are in the law. I do believe that there is an incredible need in this country as well as abroad to explain to the high school students or the college students why we do what we do, and why it's important to them, and why they have to be less cynical, and why they have to accept what we call the rule of law. All of which is terribly corny!

But, example: In Washington, the State Department now, through Skype, can connect me all over the world. They did ask me to give a talk, a Q&A with a law school class in Tunis. I sat there for an hour and, as you know, when you start talking to groups of students, after a while, after maybe fifteen, twenty minutes, you can get something going. The barriers begin to fall and you begin to communicate more directly with them. That was going on and I thought we were making some headway here, it was interesting. But then one of the women came up and she said, "You protect religion." And I said, "Yes, the Constitution does." "Well, what if the religion is very closed, it's sort of basic, and they don't want you to do things you think you should do?" The light began to dawn. "You mean you are afraid a group of fundamentalists will get into power in Tunisia and they'll stop you from going to law school." Exactly. And then a few of the other women came up and we got into a pretty interesting discussion. Of course I'd say, you know, I don't know what to tell you! I can tell you I certainly hope you win this one. I'm on your side. That isn't going to help you, but you're going to have to figure out how to do that. That's a problem you have. You have millions of people here sympathizing with you who will do what they can. And we were talking about rule of law, we're talking about what problem they have, we're talking about them writing a new constitution. I came away from that sort of thinking, "oh my gosh." But also thinking, well, I've done something. I don't know what, maybe to suggest to a few people that this rule of law that we have does work sometimes. It's certainly an important value. It's certainly something that we're all in the business of trying to explain to people. Just as when I heard Harry Reid talk about *Bush v. Gore*—which, I was dissenting—and he said the most remarkable thing and I understood this and I agree with. Despite the fact that it affects a lot of people—important? Yes, absolutely. Popular? No. At least not with half the people. But wrong, in my opinion. People did not throw stones. They did not shoot each other. They were not out there rioting.

When I tell that to an audience of college students, I say, I know 20 percent of you are thinking too bad there weren't a few riots. I know that's what you're thinking. So turn on the television set and see what happens in countries that decide things that way as opposed to accepting a decision they might think is unpopular, wrong, et cetera. I tell that story a lot, and I told it to the woman who is the Chief Justice of Ghana, who wants to know why people in the United States follow what we the judges say. And I say, I don't know!

But I do know that it's our history and it's a history with a lot of ups and downs.

Alan Morrison: You wrote about that in the Cherokee case.

Justice Stephen Breyer: Correct. You see, I want her to come away with the idea that it's not the lawyer and judges which you have to convince. It's the ninety-nine percent who aren't. That means sometimes you have to follow a decision you don't like, which could even be wrong—I'm not saying always, but sometimes. And then I say we have the same problem here. I hate to tell you, it's not so clear that—we don't know the future, so we have the same kind of educational problem, we have the same problem going to the editorial boards, we have the same problem of convincing the journalists who aren't lawyers so that they will understand what they're writing about, or high schools, or colleges, or grammar schools. That's everybody's problem. That's the kind of thing I think you can make that much progress on [indicates small amount with fingers], sometimes, if you're talking to a foreign audience. But I think making even that much progress on that subject is worth it.

Alan Morrison: The last question I'm going to ask you is not about the book but about an issue that has been raised, which is, should the Supreme Court Justices continue to have an, in effect, life tenure? Have control over when they resign? Or should there be an eighteen-year term, as has been proposed, with the President having an opportunity in the first and third year of his or her term to appoint one justice so that you can't decide, for example, when you want to retire because of whom you think the President might appoint or not appoint. What do you think about that as a proposition?

Justice Stephen Breyer: I don't want to say a particular plan, but I do think that if there were a long term—eighteen, twenty years, something like that—I would say that was fine. In fact, it'd make my life a lot simpler, to tell you the truth. It would!

Alan Morrison: No one would ask you when you're going to retire.

Justice Stephen Breyer: Correct. The thing you don't want is a term that is so short that the person is sitting there thinking about his next job. Absolutely out. And as long as you can overcome that, fine. But the problem is, would it require a constitutional amendment? You don't want to open up a whole lot of things that might lead to other things. So I haven't, you know, put that on the front burner. But nonetheless, the answer is: fine.

Alan Morrison: Well, I want to thank you again on behalf of AALS for coming here and being so forthcoming and frank with your opinions. And now you're going to have an opportunity to sign books in the back! Can we all give Justice Breyer a big hand?