A Report from the Front

An Interview with Justice Stephen G. Breyer

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In the spring of 2016, I interviewed Justice Stephen G. Breyer in his chambers at the Supreme Court. He had recently published his latest book, *The Court and the World* (Knopf 2015). The book, widely acclaimed as original, far-reaching, and timely, examines the work of the Supreme Court in an increasingly interdependent and globalized world. Breyer, analyzing several key decisions of the Supreme Court, points out that as the world grows smaller—or, to quote Thomas Friedman, "flatter"—the Court's horizons have inevitably expanded. Issues that used to or could be considered as "other people's" problems are no longer considered as such; what happens in Thailand may very well have real consequences—monetary or otherwise—in Washington. And for that reason, the "foreign" aspect of the Supreme Court's docket is on the rise. Breyer's book attempts to answer the following question: How can America's highest court decide American cases and interpret American laws so that they might work efficiently and in harmony with similar laws in other nations?

Justice Breyer received a BA in philosophy from Stanford University in 1959. He studied philosophy and economics at Oxford as a Marshall scholar and earned a law degree at Harvard. From 1964 to 1965, he clerked for Justice Arthur Goldberg. He was a special assistant to the U.S. Assistant Attorney General for Antitrust from 1965 to 1967 and an assistant special prosecutor on the Watergate Special Prosecution Force in 1973. Breyer taught law at Harvard Law School from 1967 until 1994. He was chief counsel to the Senate Judiciary Committee from 1979 to 1980 and was then confirmed to a seat on the U.S. Court of Appeals for the First Circuit. After serving as chief judge of that court, he joined the Supreme Court in 1994.

Although the issue of American jurists citing foreign courts' decisions continues to raise controversy in political debates, our nation has a well-established legal tradition of learning from foreign sources. After all, Abraham Lincoln learned law from Blackstone's *Commentaries*, and our Supreme Court justices from John Marshall to Felix Frankfurter have referred to foreign courts' decisions in their opinions. Judges routinely refer to and cite various sources in their judicial opinions. Why not a foreign judge's decision? Justice Breyer disarmingly puts it this way: "[I]f someone with a job roughly like my own, facing a legal problem roughly like the one confronting me, interpreting a document that resembles the one I look to, has written a legal opinion about a similar matter, why not read what that judge has said? I might learn from it, whether or not I end up agreeing with it." Stephen Breyer, The Court and the World 240.

The premise of Breyer's book is straightforward: Judicial isolationism in an interconnected world is not the way forward. In fact, it's not even a realistic option. America's apex court cannot stand aloof and isolated from the legal universe beyond the

Published in *Litigation*, Volume 43, Number 2, Winter 2017.

country's shores. As John Fabian Witt, professor of law and history at Yale, wrote when reviewing Breyer's book for the *New York Times*, "democracy has never been a nativist straitjacket. Breyer's book offers a powerful description of the price we would pay for allowing it to become one." John Fabian Witt, *Stephen Breyer's "The Court and the World,"* N.Y. Times, Sept. 14, 2015, www.nytimes.com/2015/09/20/books/review/stephen-breyers-the-court-and-the-world.html?_r=0.

ASJ: *The Court and the World* is a fascinating read. What made you write this book? Was there an "Aha!" moment?

SGB: Yes, I can't tell you at what time, but I suddenly began to realize that the number of cases in which, in order to decide them correctly or reasonably, you *have* to know something about what's going on abroad was growing rapidly. When I first came to the Court, you hardly saw such a case. They existed, but there weren't too many.

I would say, when I started writing the book, there probably were 15 or 20 percent, perhaps. That's a lot. And these are cases where you must know what's going on beyond the borders. And for the most part, it is not controversial. If you involve a treaty, you have to know how other countries are interpreting the treaty in order to have a sensible interpretation yourself. There's unanimity in this Court on that statement that I just made. And we had more and more cases involve requirements to know something about terrorism, which is international, and how other countries treat it; cases involving human rights, such as the Alien Tort Statute; cases involving commerce; cases involving international organizations; everything under the sun. . . . It became, once I started thinking about it, obvious. And I think people should know that.

ASJ: Recently, we've had a political debate about the practice of American judges referring to foreign courts' opinions in their decisions. But if you really think about it, referring to a foreign case, or a foreign legal system, is by no means a new phenomenon. In the *Steel Seizure* case, for example, Justice Robert Jackson cited legal systems that were foreign, and he wasn't the first judge to do so by any means. Chief Justice John Marshall referred to decisions in foreign courts as well. So why does this practice continue to generate controversy?

SGB: Well, I think your statement of the facts is correct. It was around the 1980s when people began to say that we should not refer to foreign courts. In my own opinion, that controversy has arisen in the context of two kinds of cases—death cases and gay rights cases. Now, those are very controversial cases, and it is all too tempting for some people, whom I don't agree with, to think that foreign law and references to foreign law in those cases had an influence on results that they may think were wrong. So that's where I think the controversy comes from.

And my response to that is, first, that is a small number of cases. That is not the whole story, and to think that's the whole story is to misunderstand how the courts are going to have to deal with and argue with foreign law and foreign practices.

Illustration by David Brinley

And my second response is I know I will never convince you by simply pointing out that John Marshall and many others *did* refer to foreign law. By pointing out that we refer to all kinds of things, including law review articles, including magazine articles, including all sorts of things; why not refer to foreign law? By saying that the judges in foreign countries are judges too. They have jobs like mine. More and more have documents like our Constitution—why not read what they say? I might learn something. But I won't convince people with those arguments because I have tried and they don't usually work.

So, I say that I have a different approach: I understand what you, the critic, are worried about. You are worried about our paying too much attention to what foreign courts say or foreign lawyers or those involved in foreign practices of different kinds say. And we will, if that happens, lose our own American values. All right. I understand that. I sympathize with that. I respect and think our very important American values—and they're very particular to democracy and human rights, equality, fairness—all of those are very important. Of course, other countries have them too. But they are important. We keep them.

Now, I would point out what is going on in the world and why are there now 2,000 organizations in the world created by some form of agreement—Blue Fin Whale Commission, the International Olive Oil Council, hundreds of them that we belong to, which make rules that in practice bind people in more than one nation. *Why*? Because the great problems of the world today go beyond one nation's borders.

The great problems are problems of environment, problems of terrorism, problems of commerce, problems of health. All kinds of problems are, in today's world, international problems. And we either participate through law in helping to resolve those problems, or we don't. And if we don't, the world will go its way anyway and we will have to live with the result. If we do, we can help show that our system, like any system based on rule of law, can produce not perfect solutions, but it can help. And the alternative to rule of law is something much worse—rule by the mob.

If I can convince you that this is the nature of what's called interdependence or globalization today—that by being very specific about what's in front of us—I might convince you that participation by the United States is the best way to preserve our American values. It doesn't undermine them. It is indeed in today's world a *necessity* for us to look beyond our own borders and to participate if we are to preserve them. That's the object of the book.

ASJ: Interdependence. You just mentioned the term, and in your book you frequently use the term. What do you mean by that term? Is it that American courts are interdependent with their brethren in foreign countries, or is it just a fair exchange of views, some sort of a conversation?

SGB: You see, it depends. It is three different things. One, people talk about interdependence and globalization. But those very abstract words tend to produce a cloud of buzz in the mind of most people. The example I often use is from *The Charterhouse of Parma*. The hero, Fabrice del Dongo, is at Waterloo. He is fighting, there are bullets, there are clouds of smoke, Napoleon is rushing back and forth, and he thinks to himself, "Something very important is going on here. I wish I knew what it was." And that is how people feel when they hear the word "interdependence."

So part of that word as used in this book is to say: I am giving you some specific examples. I think it might help you to take one small institution, but an important one, the Supreme Court, and by being very concrete, give you some idea of what interdependence can involve.

Second, it suggests that the problems—not all problems, but some problems of great importance—are interdependent. Terrorists do not all live in the United States. And indeed other countries have problems with terrorism. And cooperation in trying to deal with such problems can help with the security of all, and working out how to reconcile the need for such security with the traditions of civil liberty is a problem everyone faces.

Third, those solutions are sometimes interdependent as well. If we have a case involving the Alien Tort Statute, where a person from abroad, an alien, who suffered torture by another alien abroad but shows up in the United States and finds the torturer here, we have to interpret the words of the Alien Tort Statute. We have to figure out whether she has a case, whether she can bring it or whether she can't—we have to have a solution that others could adopt as well. Why? Because if not, they might adopt a solution which, to use the joke everyone uses, they're all going to put Henry Kissinger in jail. We don't want that.

So our solution has to be one that will work if adopted by many or all countries. That's called universalism. And it's called comity in the law: Pay attention to what you do, to be sure that other countries could do the same. So the word sometimes has something to do with solutions, sometimes something to do with problems, and sometimes something to do with the state of the world.

ASJ: What do you have to say to the skeptics whose argument appears to be that consideration of foreign courts' opinions or foreign legal systems could lead to watering down of our American values?

SGB: This is exactly what I would say: that all I am doing, in a sense, is giving you a report from the front. I am giving you a report. You read it. And then you answer yourself the question. What I believe they will say is participation and an understanding of the kinds of cases I am talking about, of what happens abroad, is the best way to preserve our American values.

ASJ: On a practical note, have you seen a significant increase in the filing of amicus briefs before the Supreme Court that highlight how the rest of the world has decided on a particular issue?

SGB: Yes, absolutely! For example, I was surprised on a copyright case [*Kirtsaeng v. John Wiley & Sons*] where a young student from Thailand, who was a student at Cornell, discovered the price of books is less expensive in Thailand. Same books, same words, written in English, but done abroad under license from the publisher, much cheaper. He told his parents, "Send the books," and they sent quite a few, and he sold them. Does he have the right to do it or not? That is a very technical question, in fact, in copyright law.

And so I was surprised to see in my office dozens and dozens of briefs, including amicus briefs from lawyers in England, from lawyers in Asia, from governments all over the world, and quite a few briefs from foreign lawyers or American lawyers representing foreign institutions of various kinds.

My point here is: Why? Because we are told that copyright today does not simply affect books or even books, films, and music. Automobile software is copyrighted. Go into any store and look at the goods. They have labels. The labels are copyrighted and many of those goods come from abroad. At the end of one the briefs, it said your decision will affect 2.3 trillion dollars' worth of commerce. That's huge, isn't it? That's why we get the briefs, because that's today's world and it has nothing to do with the philosophy of a particular judge. It has everything to do with the nature of the world today.

ASJ: But was that case an outlier? Or is there a trend here that you can see?

SGB: No, I can find similar cases. We had, which I wrote about in the book, a question of a vitamin distributor from Ecuador who says there is an international cartel illegally raising the price of vitamins. And he sues a Dutch member, or who he claims is a Dutch member, and he wants this suit, with an Ecuador plaintiff and a Dutch defendant, to take place in New York. Why? Not because he was so weak lacking vitamins that he couldn't get to Europe, but because we have treble damages. That's why. So that is going to affect, by the way, lots of other countries' antitrust laws. So we have briefs from the EU, we have briefs from Japan, Canada, all over the place, telling us how our decision will affect their law.

Similarly, we had a discovery case involving two companies in Los Angeles. They wanted to get discovery A against B to send it to the EU. Again, briefs by the EU telling us what the effect will be, which they thought would be bad. They didn't want it.

And cases involving an effort to apply our securities law to a purchase of a foreign security in Australia. The plaintiff is Australian. He bought securities in Australia over an Australian exchange of an Australian company, but the fraud involved alleged that the Australian company bought a company that had overstated its assets in Florida. It isn't surprising that we got briefs from many countries explaining how their securities law worked and why it was or was not a good idea. They basically thought it was not a good idea to extend our securities law, and we didn't in that situation.

Henry Friendly, I think, would have come to the opposite conclusion. He was a great judge, Second Circuit, one of our greatest judges, but he was writing at a different time. And the problems of the world were not the same. And it was not true that all of the countries at that time had their own securities law. Today they do.

So, today, cooperation through this notion called comity does not simply mean stay out of it America if you're going to interfere. It means try to find interpretations where American law, through its language being not clear and uncertain, will promote a kind of harmony among the enforcers, for example, or other laws of other countries. Look for the harmonious interpretation as a plus, not just "stay out of it." Again, that's a change in the nature of the world. Because so far we have had antitrust, we have had discovery, we have had human rights, we've had copyright, and there are a lot of areas.

ASJ: Are you aware of a similar change ongoing in courts of foreign nations?

SGB: Yes. When I was in England, I went to the Privy Council and they had a case of an Italian company suing a Russian company, or vice versa. And I said, "Well, why are they here in England? Why are you hearing it in the Privy Council?" And my host said, "Well, because they are incorporated in Barbados." And I said, "Well, why are they incorporated in Barbados?" He said, "So they can come to us in the Privy Council."

ASJ: Interesting.

SGB: Yes, very interesting, but it's all over. Go look at who's in the Inns of Court. Go see who's having dinner there in London. Quite a lot of people who were not born in England.

ASJ: Right. Here I am, in America.

SGB: Yes, that's right. America always has lots of people coming over from abroad, but it's all over. It's all over.

ASJ: The part of your book that deals with the power of the executive during wartime is fascinating. It shows how the legal landscape has shifted. From the time of the American Civil War to the present war on terror, the pendulum seems to have swung from the Court's attitude of utmost deference toward the president to refusing to give the executive branch a "blank check." How did that change come about?

SGB: In my own opinion, I think it really shows a couple

of things. It came about because Cicero said, "in time of war, the court should stay out of it." Just don't decide; let the other branches decide in time of security crisis, in times of war. But that led in World War II to 70,000 American citizens of Japanese origin removed from their homes and put in camps. And the Supreme Court approved that 6–3. Three justices—Jackson, Murphy, and Roberts—were horrified at this. There was no rationale for it. There was no basis. But Justice Black, who was a great civil libertarian, wrote the opinion, and he said in conference, "well, somebody has to run this war, either us or Roosevelt. And we can't, so Roosevelt has to." That's Cicero for you. And it led to, however, a result that most people feel is just terrible.

So the *Steel Seizure* case is very interesting—a fascinating case. It is during the Korean War. And Jackson writes the best-known opinion, and he says, no, there has to be a limit. There has to be a limit. He was trying to limit President Roosevelt. Of course, President Roosevelt was dead, and it was much easier at that time to limit President Truman because he wasn't as popular as President Roosevelt. And they did limit President Truman. Given that, the Guantanamo cases, where our Court did interfere and said there is no blank check, are not surprising to me.

ASJ: Why?

SGB: Because we only have a couple of choices. You want to put 70,000 American citizens of Japanese origin for no reason in camps? Absolutely not. That's one thing that's changed. And your choice is either do that or write what Sandra O'Connor said in those cases—no blank check.

The trouble with that is, well, *what kind of check does it write?* And the court will have to be involved to decide that kind of thing. But today, perhaps because of desegregation, perhaps because of *Brown*, perhaps because people have more confidence in courts, for that or other reasons, they are more willing to do what courts say.

And I think that is true throughout the world because people as a general matter since the end of World War II have come to the conclusion that the rule of law does mean sometimes accepting cases you don't like and following them. Why? Because the alternatives to the rule of law are worse.

Not everyone thinks that. There are vast areas of the world where they don't. So it is in a sense an intellectual battle, or a battle for the hearts and minds of people, between those who have some confidence in the rule of law and those who do not. And part of this is, again, aimed to describe what the problems are for those who have confidence in the rule of law and say we better win.

ASJ: You write about the intellectual battle and about the clusters, or pockets, of legally like-minded nations, where judges learn things from one another. Given that these exchanges are taking place and increasingly so, do you think there is a danger that this is going to increase polarization? Say liberal-minded nations versus fundamentalist regimes?

SGB: Your clusters will differ depending on the questions. As I said at the outset, one of the nations that is most interested in looking abroad is India. Another is South Africa. Another is Canada. And we do sometimes, and sometimes we don't. And they will shift over time. It depends on what the issue is. It also depends on who's written on this issue.

Even when writing on the death penalty, I have found one of the most interesting opinions years ago written by a judge in what was then Rhodesia. It is now Zimbabwe. Well, Zimbabwe, by the time I wrote, was no longer a democracy. But the opinion that I wrote about was done in a country that respected the rule of law. My point is that members of a cluster can change; things change over time. I would hope that it would not promote polarization.

The great problems of the world today go beyond one nation's borders.

ASJ: Part four of your book is entitled "The Judge as a Diplomat." How do you see yourself and your colleagues as diplomats in this world?

SGB: Well, sometimes it means, as Woody Allen said, just showing up. Sometimes it means sitting around and talking a bit. The Indian Supreme Court has been here several times; I've been there several times. And sometimes you find we have the Canadians, who were just here. Sometimes in those discussions, you find something very practical. We talked about amicus briefs, and they have a process somewhat different. We talk about the shape of the table. We talk about a lot of different things.

It also means if you read some foreign opinions—you don't have to have to read them all the time, but if they are called to your attention by the lawyers—you learn something. And that's helpful.

An appellate judge mostly has a job where he sits in a room and he reads and writes. And what he reads and writes is in part affected by the lawyers. Though this is written from the point of view of the judge, it is absolutely apparent to any attorney that the judge isn't going to know anything about anything unless he tells him in the brief. And, therefore, it is imperative that the lawyer knows how to find out what is relevant and what is going on beyond our shores. And lawyers won't unless the law schools teach them where to look and how to find it. And the law schools

won't do it unless they know lawyers use it. And lawyers won't do it unless they know that the judges feel it could be significant.

Therefore, it is a circle. I think a virtuous circle. The circle of our profession is law professors and lawyers and judges. The judges write the opinions, the lawyers help them write the opinions, the law professors evaluate. Each reads the work of the others and, gradually, we hope for improvement.

ASJ: In your book, you discussed India's experiment of incorporating alternative dispute resolution mechanisms into its legal system and the procedural changes that the country made thereafter. Justice Sandra Day O'Connor and you had several meetings with Indian judges on this issue. Do you think those meetings had a role in the development of the Indian system?

SGB: You'd have to ask the Indian judges. From afar, I thought they may have because I think they might have given some of the judges of their court more confidence in the various procedures that exist in different states, in the federal government, for alternative dispute resolution. The lawyers were very nervous about it in India. And I think this led to different trips by Indian judges and lawyers to see where it was working, such as to the United States. I think all that interchange may have given them some confidence that it would help, and I think they are trying it now, and I think it was a success story for international cooperation.

ASJ: Indeed. On a different topic, you have been an outspoken advocate for the need of judicial education in science, that judges need to be trained in how to evaluate scientific testimony.

SGB: They're going to have cases where there is science in front of them, and they are going to have to deal with it.

ASJ: Do you think it's time our judges will have to develop a similar understanding or outlook about how foreign legal systems work?

SGB: Yes, in this sense: Judges are generalists, almost all of them. And therefore they have to be able to solve legal problems that can touch on almost anything. There is a vast difference between a tort case involving a drug that someone says was not adequately checked and a case of human rights involving misbehavior in Ghana, for example, with the parties back in the United States. Both could come before the court in certain circumstances. And that is why generalist judges depend upon not their own knowledge of everything but how to deal with the arguments of the lawyers. It's the lawyers who have to understand. The trial lawyers are experts at being generalists.

Good trial lawyers can teach anything. They will break it into parts. They will explain it so a jury could understand it. And that's what they are good at. And so they are the ones that have to in part be convinced so when judges say, to quote Dickens, "Barkis is willing," they say, OK, fine, we'll help.

You're not going to turn judges into scientists, and you're not going to turn judges into experts on the law of South Africa. But you will make them open and receptive to knowing what's going on in these places that is relevant when the lawyers tell them.

ASJ: It's just one more tool in the toolbox.

SGB: Correct.

ASJ: Your book makes such a strong case about American law and the new global realities that I am wondering whether American courts really have a choice in the matter?

SGB: No, I think they don't.

ASJ: There was an incident that you mentioned in your book—about watching the unfortunate events of 9/11 unfold on television during your and Justice O'Connor's visit to India. You saw that Indian judges were as horrified as the two of you were. And you realized that their reaction represented more than empathy. You remarked that the important divisions in this world are not geographical, racial, or religious, but are between those who believe in the rule of law and those who do not. Can you please elaborate?

SGB: I mean the same thing I said when I said we have a choice. Those who believe in the rule of law as a way of solving human problems, the problems of people who live together in communities, had better be on their toes to demonstrate that we can help with those problems after all.

Some time ago, I told that to the chief justice of Ghana, and she said, "Well, what is the secret to getting people to do what you want?" She's trying to bring about more democracy and more protection of human rights through the courts. I said there is no secret. I don't know the secret. I can just give you examples over the course of 200 years. We did have the Civil War, we did have slavery, we did have legal segregation—we had all kinds of things in this country. But gradually we overcame some of them, and gradually the rule of law has taken hold. That's what we're trying to do. Why? The alternative is you go turn on the television and you see people killing each other. That's a very bad way to solve the problem.

ASJ: Right, and we didn't have it overnight. We did have the [*Cherokee Nation v. Georgia*] case, and then we gradually arrived at *Bush v. Gore*—a decision many Americans found to be seriously flawed but accepted nonetheless.

SGB: That's correct.

ASJ: Justice Breyer, thank you very much for this opportunity. It has truly been a privilege.

SGB: Thank you. ■