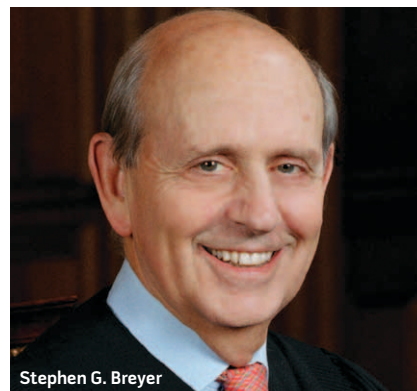




Setting Boundaries

Stephen G. Breyer is often described as one of the Supreme Court's more liberal justices. Yet he's also thought to be both cautious and pragmatic. As legal scholar Cass Sunstein once observed, "There is nothing in Breyer to show that he thinks there are many areas where the Constitution is properly used to renovate American society, no indication that he wants to move society or constitutional law in novel directions. Today, it's the conservatives who want to use the law to make big changes in American society." In November, Justice Breyer spoke with UC Hastings law professor David Faigman in his native San Francisco.



Stephen G. Breyer

▶ For the full interview video, go to callawyer.com.

Legally Speaking is a series of in-depth interviews with prominent lawyers, judges, and academics, coproduced by *California Lawyer* and UC Hastings College of the Law.

Q. As a sitting justice on the United States Supreme Court you have now published two books for a general audience. Why was it important for you to write those books?

Well, the serious and truthful reason is because I think we're all living in a world where people are pretty cynical about government, and particularly about the Court. We have nine unelected people up there, and sometimes we're doing things that are pretty unpopular. ... So why, why in this somewhat cynical world should people accept an independent judiciary, not elected, unpopular, and sometimes quite possibly wrong? Now that's an important question.

Sometimes, though, what you do is popular, depending on the outcome.

Yeah, but you know Hamilton says the reason not to give the power of judicial review to Congress is because this constitution is really there to protect the unpopular as well as the popular. Congress knows popular. But can we trust Congress to strike down a law that is very popular when it is unconstitutional and unpopular to strike it down? Hamilton says, I'm not too sure about that. ... So our basic

job is to apply a document that sets boundaries. And those boundaries are sometimes tough to define. Is abortion in or out? Are the handguns in or out? You know, when I was growing up here in San Francisco there was a great radio program called *Sergeant Preston of the Yukon*. He was always at the boundary and it was freezing cold up there. And the thing I took away from that program was that life at the boundary is tough. And that's not such a bad metaphor.

A case that many people point to as pushing the limits of those boundaries was *Bush v. Gore*. What was it like at the Court when you had to decide that case?

It was stressful. Very stressful. People understood the seriousness of that question. Important? Of course it was. Unpopular? With at least half the country. Wrong? I thought so. But in spite of all that—and this is something that I heard Senator [Harry] Reid say—people did follow it. There were not riots. There were not killings in the street, there were no machine guns, and there were no stones and bricks thrown with intent to injure. Now when I'm talking to an audience and I say there were no riots, depending on

the audience, I know that there's a percentage of people who are thinking: *And too bad there weren't*. So I talk to them. And I say, before you decide that, go turn on the television set and look at what happens in countries where people choose to resolve their major differences on the street with guns instead of in a courtroom.

This idea of the rule of law is a strong theme in your latest book, and you do a very nice job of developing that theme. But aren't there times when even in a constitutional democracy people refuse to follow unjust laws? Certainly Martin Luther King did that, albeit in a non-violent way.

Martin Luther King is part of a big story. And it's a story where I think courts get some credit. *Brown v. Board of Education* is probably the key decision here. I can remember what it was like before *Brown*. I was here in San Francisco, and even in San Francisco there was a kind of segregation. It maybe wasn't there literally under the law, but it was there.

You write in your book that the Constitution contains unwavering rules that

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must be applied flexibly. Would you liken that to a living constitution?

The words “living constitution” lend themselves to parody. But if you say we take permanent values and apply them to changing circumstances; well, that is what we do.

You mention Guantanamo and human rights in your book. And so my colleagues aren't going to forgive me if I don't raise with you the question of executive power and what the Court's role is in checking that.

In one of the Guantanamo cases Justice O'Connor wrote that you can't say that the Constitution writes the president a blank check. Now why did she say that? Well, because historically I think the case that people had in mind was *Korematsu*, which challenged the internment of 70,000 American citizens of Japanese origin during World War II. ... The case gets to the U.S. Supreme Court in 1944. Black, Douglas, Frankfurter—all who were pretty good civil libertarians—sided with the government. And so for me the interesting question is, why did they do that? This is just my personal view of it, but I think they're sitting there thinking, 'Well, even if the plaintiff is right in this one there'll be others, and somebody has to run this war, and it's either us or Roosevelt, and we can't. So we've got to approve this.' And there's some power to that reasoning. So the challenge in the Guantanamo cases is how to avoid that, because *Korematsu* is a very discredited case, and I think rightly so. And that's where the blank check comes in. ... Read the Guantanamo cases with *Korematsu* in mind and you'll get an idea of the challenge here. I was in the majority in those cases, but I don't think I can prove we were right. Nor do I think that others can prove we were wrong. It's really history that will decide. But I do want people to see the nature of the thinking here, because it casts light on the nature of the job. 🗣️

Watch the full interview at www.callawyer.com.