The American Law Institute
Reasonably Speaking Episode Transcript: "A Conversation with Justice Stephen G. Breyer: The Authority of the Court and the Peril of Politics"

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Disclaimer: The views and opinions expressed on *Reasonably Speaking* are those of the speakers and do not necessarily reflect the policy or position of The American Law Institute or the speakers' organizations. The content presented in this broadcast is for informational purposes only and should not be considered legal advice. Please be advised that episodes of *Reasonably Speaking*, explore complex and often sensitive legal topics and may contain mature content.

David F. Levi: Hello, and welcome to a special edition of two podcasts: *Judgment Calls*, produced by the Bolch Judicial Institute at Duke Law School, and *Reasonably Speaking*, produced by the American Law Institute. I'm David Levi, and I am so pleased to welcome United States Supreme Court Justice Stephen Breyer to our program today.

Justice Breyer grew up in San Francisco and eventually made his way east, graduating from Harvard Law School. He served as chief council of the Senate Judiciary Committee, and then he taught many years on the Harvard Law School faculty. In 1980, he was appointed to the United States Court of Appeals for the First Circuit, eventually becoming chief judge of that circuit. I think that may be the first time that I met you, when you were the chief judge. And then in 1994, he was appointed to the United States Supreme Court by President Clinton.

Justice Breyer has written numerous books and articles. And today, we are going to talk about his timely new book, *The Authority of the Court and the Perils of Politics*. Justice Breyer, thank you for joining me today. So good to see you.

Justice Stephen Breyer: Well, thank you for inviting me.

Levi: Let's start with the book title, and why you decided to write the book. What is it about the authority of the Court that intrigues you, and what are the perils of politics for the Court?

Justice Breyer: Well, I decided to write it really — I've been on this Court now for more than 27 years — and I wanted to look it back and see, how did I think it really worked in ways when it worked well, when it worked well, and that were important, and that people should know about? So that was one of my motives. And just to explain what I see, and from when it's at its best, when it's doing what it's supposed to do. And the perils are of course that people will think that judges on the Supreme Court, if not generally, are junior league politicians. I mean, really, if they're junior league politicians, why don't we get senior league politicians? And anyway, if they're politicians, why do we do what they say? And that's the key question.

I mean, that's the question that was asked me by the woman who was president of the Supreme Court of Ghana. She's trying to improve the situation, or was, there — more human right protection, democracy protection. And she said, "Why do people do what you say?" Now, that's a very good question. It's an important question because the rule of law depends on it. And the rule of law is an important part of our ability — with 310 million diverse people, every race, religion, point of view under the sun — the rule of law is an important way in which we stick together and see ourselves as a nation, a society, with all of us.

So I think it's an important question. And I wanted to write my part of it, from my perspective.

Levi: Well, it's extremely important. When you wrote the book, who did you imagine as your audience or your typical reader?

Justice Breyer: When I wrote it, I really wrote an original version because I was asked by a group of academics in various disciplines in France, scholars and others, to explain. It was called "Le Cour Suprême, pouvior et contre-pouvoir." And what they meant was: "The Supreme Court of the United States, where does it get its power, and why the president and why do other parts of the government do what they say?" That was what I was supposed to do and lecture. So I wrote it for them.

And then along came COVID. I couldn't go to France. That was a disappointment. They were disappointed that I couldn't give my lecture. I was disappointed that I couldn't sit in their cafes and talk to them. Then the Scalia Lecture came along at Harvard, and I thought, "Why waste this lecture?" So I modified it and I gave it as the Scalia lecture. And I thought it would be topical here, because people were discussing the Court and they were discussing whether they should modify how it works, and if so, how? And I thought, "Well, I can't answer that question, but I can shed light upon my own experience at our Court."

Levi: I think one of the great things about the book is it's so accessible. It's an easy read. It's very clearly written. And I think non-lawyers, non-academics, people who are just interested in the Court and what you think about the Court can pick this book up and learn a lot.

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Justice Breyer: Well, I hope so. Now by coincidence, I have a copy. And I always show you, but that's one way, and that's the other, you see. It's very, very short. It's only a hundred pages. And so you can read it or anyone who wants to can read it twice.

Levi: I've read it twice on Kindle. And I enjoyed it tremendously.

So let's talk about this term "politics," which is in the title, *The Perils of Politics*. It's not so easy to define when we're discussing judicial decision-making. You and I have a mutual friend, a very distinguished judge, Michael Boudin, who was on your court on the First Circuit. And he's written that, and I'm quoting now, "Policy often matters in deciding cases, but it is usually policy attributable to Congress or to public policy reflected in case law, common sense, and the values of the community." And he then goes on to object to the use of the term "political" to describe this kind of decision-making process. And he in fact calls it mere provocation to talk about that as if it were political. So what are your thoughts on this term, "politics," and what did you mean by the perils of politics?

Justice Breyer: Well, I agree with Boudin. I think he's right on that. And most of my career before being a judge, I was a law professor. And then I worked for a couple of years, a few years, for Senator Kennedy, when I was chief counsel of the Judiciary Committee. I got a pretty good exposure to politics, I thought, working in the Senate. And to me, politics meant this: Who has the votes? Are you a Republican or a Democrat? What's popular or not? We sometimes on the staff would pose this question: "Suppose Senator Kennedy received two telephone calls at the same time: one from the Secretary of the Interior, the second from the Mayor of Worcester. Which one will he take first?" The answer is obvious. He'll take the call from the Mayor of Worcester. That's where the votes are. Those are his constituents.

Well, *that's* politics. Nothing wrong with politics in its place, but its place is not the Court. And people who think that the junior league politician correctly describes the judge have that model somewhere in their mind. And that's what I think is wrong.

Now, the reason it's difficult is, well, what do you do about … let's call it values, which are in this Constitution? The word liberty doesn't define itself. The freedom of speech — Congress shall make no law abridging the freedom of speech. Justice Black used to say, "That's easy. It says, 'No law,' doesn't it?" That isn't the difficult part. What is 'the freedom of speech?' Those words don't define themselves. And there are a lot of cases that are pretty hard as to whether

it is or whether it isn't or how it applies. Now at that point, things come into play, but the question has not yet been authoritatively answered.

What do you think of the country? I mean, where did you grow up? I grew up in San Francisco. Where did you go to school? I went to high school at Lowell, a public school. My father worked for the San Francisco Board of Education for 40 years. I mean, I've lived the life I've lived. And you have, too. And at a certain age, that affects us, how we see the United States of America, and those values will come into play in some opinions. Well, want to call that politics? I wouldn't.

But suppose you really think that what's important is free enterprise? Or suppose you think what really is important is the ability of the government to control free enterprise? Or something else? Will that affect how you sometimes see "the freedom of speech" or liberty as defined? Yes, it will. It will. We could call…Well, that's a political philosophy or that's basic jurisprudential views, call it what you will. It isn't politics in the Mayor of Worcester sense. And I think, I used to think, "Why doesn't everyone agree with me, who's so reasonable?" And after a while, I began to understand this is a big country, and people think all kinds of different things. And it is not such a terrible thing to have a Supreme Court with nine members where different presidents appoint different judges. And over longer periods of time, there will be differences of basic underlying jurisprudential view. Call it political science view? Maybe. I like jurisprudential. Call it Mayor of Worcester? Absolutely not.

Levi: That's a terrific answer, and you covered a lot of ground in that. Maybe we could break it down a little bit. So what you're calling the Mayor of Worcester, this is partisanship, one would say. And you and I certainly agree, judges should not — must not — be partisans. Probably neither of us could say that never happens, because it's a big judicial system out there, but it ought not to happen. And so Supreme Court justices, in your experience, they do not try to rule to help a political party or to help a particular president of a party. We would all consider that to be improper, and that would violate the judicial oath. And it's not in fact what they do. In fact, I'll go even further. They wouldn't even know how to do it.

Justice Breyer: Correct.

Levi: What's going to help the president? Who knows? It's hard to say. So we agree on that. I'll tell you a little story, because I don't know that everybody agrees on this. I once debated Judge Richard Posner, he goes by Dick. This was a few years ago. And he'd written a book called *How Judges Think*. And I had written a review of it. And he asked me toward the end of this debate, he asked me

whether I thought it would make a difference — and he was thinking of your Court, by the way — if the justices appointed by a Democratic president wore blue robes, and the justices who were appointed by a Republican president wore red robes? Did I think that would make any difference whatsoever? And I said, "I think it would make all the difference in the world."

And he said, "Well, that just doesn't cut it." And we kind of left it there. That's the way the debate ended. But I still think I was right. And I think you think —

Justice Breyer: I agree with you. That would be a terrible thing because it would reinforce divisions and people would begin to think that political science views held by one party as opposed to another played a greater role than they should play. Ultimately, the country has to suffer from, or rejoice sometimes, or in any case live with the decisions and interpretations of the Court. What Justice Scalia happens to think, or Justice Breyer or Justice O'Connor, about the Constitution is of great interest to many law professors, but not to most people in the United States. It is the Constitution as interpreted by the Court that matters. And the more you can get together, the more, greater harmony there is in that, I think better for the Court. It's not always going to be perfect. It shouldn't be. It can't be. But don't reinforce differences.

Levi: I want to talk about that at length, because I think that's such an interesting topic, is how the Court can generate — if it can — and does it value consensus, and does it have a leadership role to play in our society in showing how disputes can be moderated and mediated? I'm sure the answer is yes, but I think it's pretty complicated getting to yes. Could I just stay with the robes for a second, because this has gotten so complicated recently.

You're under a microscope as a justice in a way that few of us are, but it seems that each one of us now has a brand. What we do — at least in our time, in such a politically divided society — everything seems symbolic: what we wear, whether we wear a mask, whether we don't wear a mask, what color our tie is maybe, everything, whether we go to this event or that event, what we eat. Everything seems to have sort of a political connotation to it. And I'm wondering, do you feel you have to live differently in order not to send signals of allegiance or as if you were cultivating a base or something of the sort?

Justice Breyer: Well, the one virtue of tenure … My father, before he died, his number one advice, "Stay on the payroll."

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Levi: That's good advice.

Justice Breyer: I'd say it's the insulation from my personal pluses and minuses. And you really learn that after a time. A person who lives by the press will die by the press. I mean, don't worry about it. "Do your job." That was his second piece of advice. And you do your job as best you can. And of course, people like to be praised more than they like to be detested, but put that as far away from what's affecting you in making decision as any human being can. That's the object.

That takes time to understand, that that's a driving force in this institution. And it takes three years, four years, five years before you get used to this place. Harry Blackmun told me, "You'll find that this is an unusual assignment." And it is. Justice Douglas said five years, David Souter was great, he said three years, he thought. But everybody says years. It takes time to adjust to the mores of the institution, which are an effort by an institution to live up — an effort; you can do more than no more than make an effort — to live up to what it's supposed to be. And what it's supposed to be is an interpreter of the law that governs this very complex country.

And of course, it's going to be hard, the simplification that you're talking about. I don't like it. You don't like it. And when I talked to the students, I think it was at Stanford, I really was pretty blunt about this. And I said, "You're sitting there being cynical. Don't be cynical. You don't like what's going on? Participate." I mean, I could go on for a few hours on this. And I won't. But I say to them, "Oh, yeah. Yeah, I understand what you're thinking. It's them." I say, "It's them." I learned this from Senator Kennedy: when you're trying to get some bill through Congress, and there are people who oppose it, talk to them, listen to *them*. Don't see it as a great opportunity to present your views. And that's our conference. I mean, present your views. Fine. But listen to what other people say, because if you talk long enough, you'll discover they'll say something you actually agree with. And then what you say is, "Let's work with that."

That's what Kennedy would say: "We'll work with it." And then maybe you achieve something. You don't get all of what you want. Maybe you only got 30%, but 30% getting it is better than 100% of getting nothing and your supporters saying what a hero you are. Forget that. Try for the achievement. And if you get something, then okay! Don't worry about the credit. If it's something good you've gotten, there'll be plenty of credit to go around. And if it's bad, who wants the credit? Give the other person the credit. And I saw him so many times, senator so-and-so, he did such a good job on this. You see? "Don't worry about it." Try to suppress that difficult thing in human nature called the ego, and then you will discover that maybe you can get along. You, who are feeling you're

right and the others are wrong, maybe you are, but the first place to look is how to achieve something. I'll tell you where. And it isn't very nice for me to say this, but I suggest you look in the mirror, and then you try and start talking to other people.

And you'd be amazed, because it isn't really true, in my opinion, that we're so divided. I mean, we look divided when we read the newspapers. But I saw in Cambridge, Massachusetts, neighbors of different kinds forming groups during COVID to go out and see whether old people had enough food, and whether they were all right. And that wasn't just Cambridge. That was St. Louis. That was San Francisco. That was Michigan. That was everywhere in this United States because Americans are still pretty good at getting together to achieve an objective. If it isn't in Congress, it can be in the state or it can be at the local level. And remember all those things which we learned in high school because they're true.

So we have something to work on. I don't like reading every word I say in the paper; an oral argument is suddenly picked up and, I say, taken out of context sometimes. And you wouldn't like it either. Nobody likes it, but there we are. So we have to do our best in that world. And the best is not that I should sit there and play to the press or watch what I say. I don't watch what I say. I try to ask a question, but I want to hear the answer. That's what. And that's called the judge doing his job, and you did plenty of it. You ask a question in that Court, you want to know the answer because it's going to help you make a decision. That's what it's about. That's not about politics.

Levi: Before we move on from this question of judges and partisanship, judges and politics, I have just two questions for you, really. One is to pick up on your statement that it takes a while to adjust to the Supreme Court. You'd been a judge for quite a while before you came onto the Court. And I'm wondering how it's different, and different in the respect of the perils of politics? And then my second question on this, is you mentioned the cynicism that you think was in the room when you spoke at Stanford. I've experienced this as well. We can say, you and I and others and people who've been judges or are judges have a view of this, that they are not partisan. But other people, other citizens, they don't believe it. They just don't believe it.

Justice Breyer: Yeah, that's exactly right. That's exactly right. And on the participation part, which is where you began on this, I'll come to the other part, but on the participation part, I love one of [*inaudible*] Bogg's books. He quoted … He didn't say it was necessarily totally accurate, but I wish it was. Pericles' famous funeral oration where he's praising Athens, which is a democracy. He says this or

something like it: "What do we say here in Athens of people who do not participate in public life? We do not say, 'There is a man who minds his own business.' We say, 'There is a man who has no business here.'" Okay?

And that's what I want to tell those students. I say, "It isn't me anymore. It's you who are going to decide whether this experiment, this great experiment that Lincoln talks about at Gettysburg, and George Washington wrote about, the experiment of will a democratic society work … It's up to you to see that it works. And that's not a mean lecture. That's just saying a fact. And so you better get into this and you better learn how the institutions do work. And you better learn how you can participate in making them work." That to me, and I bet the 99% of the people in public life, say that's the most important thing we can do for this country.

And as to taking a while on the Supreme Court, it takes a while because there's nowhere to go if you're wrong. I mean, you can always say as a lower Court judge, "Well, the Supreme Court decided this. We have no choice." You can't say that really here so easily because if the thing were all decided by precedent and everything, what's the case doing here? That doesn't work 100%, but you're nervous because you want this thing to work. It's not some great chance to press your own view on everything. It is a great chance to participate in the courts, creating a view of this as-yet undecided issue. And to do that, it is the Court. And to do that, you listen and you go through the things that I talked about.

And a lot of the hardest parts of it are written in no treatise. When is the view of nearly a majority of the Court something — "Well, I don't like it, but I can accept it"? And when is it, "No, I just can't go along with that"? What Holmes called the 'can't helps.'" I have written, and what I used to say before I was on the Court, is, "All these divided Court opinions, just ego, just they want to have their own view." And then I got here, within three years there was an opinion, 4, 4, 1. Guess who was the one? I was because it was the subject antitrust, which I taught for 10 years. And I just couldn't go along with either side. I just couldn't. And so I wrote the one, you see. And how to reach those compromises and when you can go along and when you can't and who you're talking to in your opinion. Is it something everybody's going to read? Then you better write it with the greatest clarity. Is it something that only the bankruptcy specialists are going to read? Well, then maybe we can be a little technical.

And there are lots of questions like that. How long should the opinion be? How much depth should you go into? And do you, above all, take this third way, which we thought of to avoid the great question that everybody thought we were going to answer? That's a good way sometimes of overcoming disagreements.

Don't say too much. "Oh, they didn't decide the issue." Well, yeah, I guess we didn't. And there we are. And often, but not always, that's better than having the total divisions — not always, but some of the time. There are many ways. That's why I put in here what I find five, six, ways of reaching the deliberation, the effort to compromise, the remembering that this constitution has as a basic principle — one of the things that I think most important — is the principle that it works. The principle that this society does hold together, the principle that this society has certain basic values, and they work. And that requires adjusting over time, to a degree. I could go on for a long time.

Levi: Of course, of course. Well, in the first chapter, you talk about how the Court has built up trust in the American people over time. And this is the authority of the Court in the title. And you explain that obedience to Court decisions, even decisions that the president and the Congress disagree with, has increased over time. And you bookend this discussion with *Brown v. Board*, which was defied initially in many places in this country, and *Bush v. Gore*, which was accepted, despite the fact that so many people saw it as an improper intervention into the presidential election.

As a consequence of acceptance, you say that the Court's authority has grown over time. And I think this is in part what you were mentioning before, when you said that the Chief Justice of Ghana asked you, "How have you built up this authority? How has this happened?" There are other examples of this trend that you describe, and you probably left a few cases on the cutting-room floor. I'm wondering whether you have some other sort of favored examples besides *Bush v. Gore*?

Justice Breyer: I wanted to start earlier, because I wanted people to know that it isn't God-given. And I wanted the Chief Justice of Ghana to know that it's not God-given that people would follow what the Court says. I mean, I like the case of when Andrew Jackson was president, and we had treaties that gave Northern Georgia to the Cherokee Indians. And gold was discovered and the Georgians grabbed the land. And they were pretty civilized, those Indians, so they did what we think, the two of us, is a civilized thing to do; namely, they hired a lawyer. And he was a great lawyer, [William] Wirt, one of the best of his day. It got to the Supreme Court. The Supreme Court said, "Of course this land belongs to the Cherokee Indians."

And Andrew Jackson said, as many know, "John Marshall, the Chief Justice, has made his decision. Now, let him enforce it." And he sent troops to Georgia, but not to enforce the law. Rather, he sent troops to drive the Indians out. And they did go out. Their great Chief [John] Ross led them to Oklahoma across what was

called the Trail of Tears, because so many died. And their descendants live in Oklahoma to this day.

Now, the next case I talk about and told her about is not really *Brown v. Board*. I mean, because the question is not *Brown v. Board*. I mean *Brown v. Board*, it says equal protection of the law. And anybody in 1954 looking to the South and elsewhere too, there's no equal protection of the law for people who were Black and not white. So the Court just said, "Do it, do it." The case that I rather liked was *Cooper v. Aaron*. And why? Because in *Cooper v. Aaron* … What happened after *Brown v. Board*? The first year, you know what happened? Nothing, next to nothing. Second year, 1956, nothing again. 1957, oh, a judge down in Little Rock said, "Integrate."

Then it was the Little Rock Nine. And you and I both know who they were. They were brave. They were Black. They were school children. And they were told by the judge, "You go into Central High School." In September, they went up to Central High School, and the white citizens councils were surrounding that school. And Governor [Orval] Faubus in effect said, "Huh. You may have a court order, but I have the state militia." And [Brooks] Hays, the Congressman from Little Rock, arranged to talk with President Eisenhower. And Hays and Faubus went up there to Newport where Eisenhower was in the summer. And he said, "Oh, I'll let them into the high school." And Eisenhower said, "Good." And then he went out and told the press the opposite.

And that made Eisenhower pretty angry. And so what should he do? Should he send troops? Well, Jimmy Byrnes, who was governor, had been on this court, and had resigned because of the war — he wanted to run the economic part of the United States — he was governor of South Carolina and a "moderate" on race. He said, "Mr. President, if you send troops to Little Rock, you better be prepared for a second reconstruction. You better be prepared to reoccupy the entire South. At best, they'll close all the schools and nobody will be educated."

Herbert Brownell, attorney general, wise counselor of Eisenhower, said, "Mr. President, you have to send troops. They can't defy the law. Don't let them do it." And Eisenhower sent the troops, a thousand paratroopers from Fort Bragg. And everybody knew who they were in 1957. They were the heroes that had gotten hung up on the steeples of D-Day invasion and were shot down and were the heroes of the Battle of the Bulge. And they took those nine children by the hand and they walked them into that school; a great day, a great day for law, for fairness, for justice. Yes, a great day.

But they couldn't stay. And after a few months, they had to leave. And when they left, this new Little Rock school board, a white citizens council school board, closed all the schools. The Governor, [the board], said no integration. And that case went up to the Court. That's *Cooper v. Aaron*. And all nine judges said, "Integrate, now." And then as soon as they said that, Governor Faubus closed all the schools, okay? Read David Margolick's book on that. You will see the suffering that went on, black and white alike.

I'd like it to have ended sooner when they were integrated, but it didn't. It didn't because — there were nine judges. There could have been 900 judges. There could have been 9,000 judges. But Governor Faubus still had those troops, the militia.

And well, he closed it. But it couldn't last. It couldn't last. Why not? Because a lot of the country that had previously been ignoring this woke up. Those were the days of Martin Luther King. Those were the days of the bus boycotts. Those were the days of the freedom riders. Those were the days when people went to the South, and they understood that this was wrong, what was going on. And with all that, gradually, over a long period of time, *Brown v. Board* became accepted as applying to segregation.

I wanted her to see that — the woman who's president of the court of Ghana — because I want the conclusion that she has to draw from that: If you want a rule of law, if you want it in *reality* and not on paper, you can't just talk to the judges and you can't just talk to the lawyers. Everybody thinks they want a rule of law. That's how they make their living. But it is the people in the towns, in the villages — and, contrary to popular belief, of our 331 million people, 330 million are not lawyers. And *they're* the ones that have to be convinced that it is in their interest to follow decisions, even when those decisions affect them in a way they don't like, and when those decisions are wrong — because if, after all, it's five to four, somebody's wrong.

I heard [Sen.] Harry Reid at a dinner say something like this about *Bush v. Gore*, because Harry Reid — and I was in dissent in *Bush v. Gore,* and I'm sure he thought it was wrong. Wrong! It affected people adversely maybe, or not — half the country thought they didn't like it, maybe a little more than that. I mean, they didn't like it, but they followed it. That was his point. He said, "That's the great point that is remarkable, and the point that is not normally remarked about *Bush v. Gore*: no stones thrown in the streets, no guns, no riots."

And again, I'm using Stanford as an example, but there are others. I said to the students, "I know that about 20% of you, or at least, are thinking, "Too bad there weren't a few riots. Too bad there weren't a few paving stones thrown." But before you reach that conclusion, my friend, you go turn on your television set or your screen or whatever you have now, and you look at countries that decide their differences that way. And maybe you'll think twice. And maybe you'll think the rule of law is not such a bad thing.

And that's what I'm trying to get across as to why Americans have reached a point where they don't even think about the decisions of the Court, not following them. They think it's like the air we breathe. People do. They do. And that doesn't happen by magic. That happens by people understanding the country, by living a history, by having examples. Why, we've had ups and downs throughout this country. I mean, the Civil War, slavery — I mean, my goodness, difficult times. And so, I think it's important to get to that understanding of how our institutions work.

And I'll tell you something that very few people know, and I figured that I get some kind of a very small medal for discovering this. What I discovered was you go to Little Rock and you will find, if you start at Central High School, which is a big school there still, which is where integration began, really, after *Brown*, you need to walk less than a mile and you will find the grave of the wife of the Cherokee Chief Ross, who was expelled because people *wouldn't* follow a rule of law, who took the Trail of Tears, and who died on the way to Oklahoma. There's a certain irony or something good about those two things being together, because there has been an advance. And I simply want to show, through my experience, in this book why this long history remains pretty pertinent right now.

Levi: It occurs to me that that part of the story is in the political leadership, as well as the people sort of in general. So you start with Andy Jackson who says, "Let the Court enforce its own order," but in the modern period, you have Vice President Gore who accepted the judgment of the Court and encouraged his supporters to do the same. And in the Nixon papers case, a president who was facing impeachment, he didn't bat eye. He complied with the judgment of the Court. He didn't try to . . .

Justice Breyer: So did President Bush, George W. Bush, when we had decided four cases involving Guantanamo, the prisoners there. And the prisoners won every one of those four cases. And he said, "I don't agree with the Court's decisions, but I'll follow them."

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Levi: Of course. So, that's very important. In the second chapter, you look at the Court as a check on the two other branches. And you point out, first of all, that occasions for conflict are not so frequent as we might think. And then you use the example of wartime decisions to show that the Court has become somewhat less deferential to the other branches, even in wartime. And my question to you is whether it is possible for the Court to become too much of a check?

One of your predecessor law professors at Harvard, James Bradley Thayer, he thought it was enervating to the other branches when the Court took on too much authority. If the Court were to routinely overturn acts of Congress, then Congress would say, "Well, why should we even bother to show up and do our job? The Court's going to decide all these things." And he thought it was their responsibility as well to consider the Constitution.

So my question: Can the Court become too much of a check?

Justice Breyer: Yes, of course. And the easiest historical examples to think now — one, for many, many years, 1920s, 1910s, 1890s, the Court was checking all kinds of social legislation and saying it violated the Constitution; minimum wage laws, the minimum hour laws, etc. And you can go back to, probably the worst decision in the Court's history, *Dred Scott*. *Dred Scott* was the case in which the Court said, the majority said that Dred Scott, who was a slave and he lived in a free state or free territory — and the law was at that time, basically, if you're a slave and you lived in a free territory intending not to come back, you're free — but the lower courts had held, no, that wasn't so. He was still a slave, and he couldn't bring a case. And that's what the Supreme Court said. Oh, my goodness.

You read the dissent by Benjamin Curtis, a great dissent. He really tore it apart in legal terms. It wasn't right at the time, it was seriously wrong, but it caused a tremendous reaction. The only reason I think that Judge Taney, the Chief Justice, could have written this is he thought it would end the Civil War. There wouldn't be a Civil War. He would find a political way of solving it.

Well, this illustrated what you said — judges are terrible politicians, among other things, and why they should stay out of. But if he thought that he was going to end the Civil War possibility, he did the opposite. Lincoln read that *Dred Scott* opinion, and he said, that's an illegal "astonisher." And he used it as the basis for his Cooper Union speech in New York, which vaulted him to the head of the Republican party, which helped assure his nomination, which made him president. And the South wouldn't put up with that. And if anything, it led to the

Civil War — or helped lead to it, or had the opposite effect if Taney was trying to get some kind of peace.

Sure, the Court can go too far. Absolutely. But the question, there's no treatise that tells you how far to go on things like that. Frankfurter, who sat in an office just a little way away from where I'm sitting, and after *Brown v. Board*, when the case came up for miscegenation — was a miscegenation statute preventing Black from marrying white? Was that constitutional? Pretty clearly, it wasn't. But he said, "Don't take the case. We don't have to take every case. Don't take it. It's too soon. We're having trouble getting *Brown* enforced. God only knows what'll happen in the South if we take this one." And that's a political argument, to say, "Wait." And they did wait.

And then they took it in *Loving v. Virginia*. And they said miscegenation laws are unconstitutional. And it was accepted. Fine. Fine. Well, you see, is there a treatise that tells you when to take something and when not? No. In my opinion, no. And after all, if judging were just like chemistry or something, why do they need judges? Judges are supposed to have judgment. And they do have a job in trying to work out things like that, when it goes too far, when it doesn't. Look at the Civil War, look at the War of 1812, look in the history, look at World War I. And I think what you find mostly is the Court saying, well, the Constitution is not a suicide pact. That's what Arthur Goldberg said and also Justice Jackson. They bide their time. If Lincoln, who didn't follow the rules on habeas corpus and suspended it — *after* the war was over the Court took the case and said he was wrong (or a different — similar idea).

So timing has been important, but they've moved in the direction of taking cases, even during a period of war. That was the Steel Seizure case. That was, in fact, also the four cases in Guantanamo. But there are not mechanical rules on this. These are rare cases. You can't forget that. I mean, about half the cases, nearly, we're unanimous. It used to be they were maybe 10% or 15%, 20% of the decisions, not always the same five, not always the same four at all. So there is not a mechanical rule, but the Court, the judge, has to be aware of what's going on. This is an institution that is part of American public life. It is not, I'm sorry to say — or glad to say — it is not a professor's desk. We are an institution that is a part and a living part of the American government.

Levi: Could I come back to your comment about Frankfurter, when you said he made a political argument? And I understand the example, we now would view as, of course, the Court should take that case, and it should reach the result that it reached. But if we fast-forward, not necessarily to our time, but let's just say to a time where a justice or maybe a chief justice thinks that, look, the Court is

becoming — it's fraying its relationship with the other branches, because it has had a run of cases in which it has set aside very important either executive branch or legislative actions. And we should have a cooling off period here. That's the kind of argument you might make on whether to grant cert. And would it be an improper argument? I mean, do you see that as political in the sense of improper, or is it, no, that's part of the judgment that you exercise in thinking about which cases we should take and when should we take them.

Justice Breyer: No. I think in terms of which cases we should take, it's a legitimate concern, and it's a legal concern, in a sense. It's an institutional concern, because there is not a mechanical way to do it. And very often we won't take a — usually we'll take a case if there's a split among the lower court judges on the same question of federal constitutional law. If they've reached different conclusions, they probably need in the system a single answer, because it's federal law that should be uniform. If the lower court judges have all reached the same answer, what need is there for us?

Sometimes there is a need. If somebody's held a statute of Congress unconstitutional, we'll probably take that case. But those rules are not absolute. We'll sometimes say let this issue percolate for a while. Sometimes we'll say we better take it even though there isn't much of a split, because there's a need for an answer. And those kinds of judgments are — you have to make them. They should be made. You'll talk about it, and discuss it, particularly in what cases we take, and sometimes in how we decide.

Levi: So in the third and final chapter, you address threats to the rule of law, and you suggest ways that all of us, judges, non-judges, can support it. And you highlight two challenges. You point to growing distrust of all government entities and a tendency to see the Court and the justices as political actors. We've talked about that a little bit, junior league politicians.

As to the Court, and I think all judges, you list five guidelines that might help, or maybe these are goals. You've mentioned some of them already today. Don't pay attention to the popular reaction to a decision. Seek clarity. Engage in deliberation. Be willing to compromise where that's appropriate and to achieve a majority opinion. And finally, in controversial cases involving deeply held values, you suggest that judges should rely on core constitutional principles and purposes. And this is a quote. You say, "Because the Constitution itself seeks to establish a workable democracy to protect basic human rights and to help hold together a highly diverse society, reference to those purposes also moves Court decisions in the direction of Justice with the capital J." And I'm wondering, can you expand on that last point, the quote that I just gave?

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Justice Breyer: Well, an example of where I think it's more than usually necessary to refer back to basic constitutional values, which I've written about, is in a very difficult area of freedom of religion. And you might think it's just easy to say freedom of religion. But it's not so easy. I mean, the Quakers are required to pay their taxes. And their taxes might go to fight a war which they deeply don't believe in. And sometimes it doesn't count as freedom of religion. Is it an interference? You can do it. And sometimes it does. And how do you decide those tough cases, like what about putting up the Ten Commandments on a stone tablet and putting it in the governor's park in Texas? Is that an establishment of religion? You might think, that's sort of a tough question. I'm not sure about that.

But I say, to answer that kind of thing and to answer many of them, it will sometimes help to ask why. What is it that led Jefferson and Madison and the others to put the Establishment Clause, freedom of religion, first in the First Amendment? And my own view — and there's a good lecture Archie Cox told me to read on this subject and the history. Go back to the 17th century, and you'll see that people killed each other, really killed each other, burned each other at the stake in England — Latimer and Ridley and the others, Bishop Cranmer — because they had different religious beliefs, because they were thinking differently about something of great importance, namely religion. And they murdered each other because they thought it's better to save his soul than to save his body. And after a while, they became convinced that there's no other way to live.

And to say, let's forget about this. You practice your religion. Teach it to your children. I'll practice mine, teach mine to my children. That's helped us maintain a country of 331 million people with at least 50 or 60 different religions. And so you say, what are the two words that stand for that underlying thought in the Constitution? I've used the word social peace, or let's say, don't stir up trouble. And people who believe things on principle find it harder to compromise, often. Let's not try to stir religions up one against the other.

I've found that — you'd have to read it to see whether you agree — I've found that referring back to those principles helps decide some of those cases. Maybe there's a difference between a judge purposely putting the Ten Commandments on the wall in order to challenge the Supreme Court, and to say I can have religion, and a difference in Texas where the monument about the Ten Commandments is actually there because somebody wanted to advertise a Cecil B. DeMille movie by the same name, and that people have lived with that for years.

So, there are instances — not every case by any means — but there are instances where it helps to refer back. And perhaps sometimes for myself, I've written dissents or sometimes majorities where referring back to those basic principles helps illuminate the meaning of some language in a statute or a regulation or something.

That's our society. We pull together in light of those rather basic constitutional ideas.

Levi: Do you think of those as neutral principles that can take you out of the fray of the moment and give you a kind of a broader perspective?

Justice Breyer: Well, that is a very good point. And you've seen that as a judge. If I were to say, and it's maybe surprising, but the one bigger difference, a big difference, between sitting here as a judge, as you have, and deciding questions, important undecided questions about constitutional law or statutory interpretation and working in Congress as a staff member, it's the timeframe. It's the frame of time that you're moved by, because you know perfectly well here, particularly after three or four or five years, that things that you write, particularly for the majority, may be there for a while. And you think of the country not in terms of this minute, or who's telling who about what, or who's telling what or who's saying what about whom, or whatever. That's not the point.

The point is more often, not always, but more often a kind of principle, a kind of approach, a kind of way of deciding things that will last for a while. So your frame of reference, temporally, tends to change. And that was one of the reasons I wrote this, because I think we're not going to succeed in maintaining this kind of constitution unless the next generation — that isn't just my children, let's go on to my grandchildren — they've got to learn. See, I have this in my office, this document [the U.S. Constitution]. They've got to learn what's in it. And more than that, they have to learn how this country's governments, all their government, cities, state, local, national — I mean, they have to learn — and beyond, they have to learn how they work in detail, because ultimately what this document does is it sets boundaries. It doesn't tell people what to do. Very little.

I used to listen on the radio, and I've said this a lot, to Sergeant Preston of the Yukon. He patrolled the boundaries of Canada and Alaska on the radio in 1950 or whenever. And it was cold and miserable there. And that's what we do. I mean, is abortion inside the boundary or outside the boundary? Lots of questions are like that. But those boundaries of where the legislatures and where the presidents and where the agencies, where the states can't go beyond that

boundary too far — between the boundaries where states do legislate, where cities legislate, where Congress legislates, where others make decisions. Very big space. And that, I want to say to my grandchildren, and I do — they're bored, but nonetheless — that's where you're going to participate, particularly. And that's what you better learn how to do. And that's what you better practice. And that's what you better, etc. Trite, but true.

One I quote often, if you want me to, I can quote it by memory, but I like this quotation by Camus. I love it. He was a writer in France who really caught my generation and the generation before, their feeling, because the Nazis had occupied France. And he wrote a story called *The Plague*. And that's pretty good to read right now where we have this COVID. It's a very good book. And he wrote it about Oran and a Northern African city where he grew up, and an imaginary plague, but it was really the Nazis in France, in part. But it's very interesting now. It tells a story of when they were under quarantine and couldn't go out. And some behaved well and some badly, and so forth and so on.

And at the end, he says, Why did I write this book? I wrote it, he says, because I wanted people to understand how the citizens of Oran behaved during this difficult quarantine from the plague; some well, some badly, et cetera. I wrote it because I wanted people to understand what a doctor is. A doctor is a person who helps others. He doesn't philosophize. He just does it. And I wanted to write it because I wanted people to understand that that plague germ — and by that I think he means the bad part of every human being — there's no one who escapes that bad part. It's there in everybody. That part does not, it's not destroyed, ever. It just goes into remission. It goes into remission. One day, it can reemerge. In remission, he says, in the hallways and file cabinets and the attics all over the place. But one day it can reemerge, and once again send its rats for the education or to the misfortune of mankind. He sends them into a once happy city.

And that rule of law, I say, why is that important? I can't say it better than Camus. The rule of law is there as one of humankind's efforts, weapons, to prevent that plague germ from reemerging. Only one, but an important one. And in trying to maintain that rule of law, it's not enough for just the lawyers and judges to cooperate. It requires, as I said to the woman from Ghana, everybody, everybody. And part of that is, of course, my grandchildren's generation has to understand how this document works, and how they're a part of it, and what participation means.

You started out, "Why did I write this book?" That's why.

The following is transcribed from an audio recording and is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Levi: We're going to finish up here. We've taken a lot of your time. But could we talk a little bit about the leadership possibilities for the Court? You talk about compromise and you say that actually when the justices or judges have very different views, very different jurisprudential views, it's even more important for them to compromise. And we know that in the first courts of our republic, when the great Chief Justice Marshall was the chief, he worked very, very hard at generating consensus and the justices lived together. He wrote many or most of the opinions. And he was apparently very persuasive. And they spoke with one voice at a time when maybe that was very important, at the beginning of the nation, when so many questions were unsettled. If we're in a similar period now, could the Court start to speak more with one voice or perhaps with a more understanding voice of opposing views? Is that possible?

Justice Breyer: I don't know, is the truthful answer. It takes time. I don't know. You can't always speak with one voice. As far as living in a rooming house, I mean, we don't live in rooming houses. But nonetheless, we get on perfectly well. I've never heard people say things insulting or voices raised in that conference. And as people, we get on perfectly well. We do have, some of us, quite different views, underlying views of jurisprudence. And you have to work out. Compromise is not always good. Sometimes it is. And there is no magic answer to that question. It's a good question.

My father said the best thing you can do, and I'm sure that's true, and I apply it right here — the best thing we can do to build confidence in the Court is we do our job. And that means *do your job*. You try to write clearly, explain. You deliberate in the way that I talked about with Senator Kennedy, listening to the other person and seeing what we can make of that. You try to compromise in some cases, if there are ways of doing it. And you pay attention to the underlying values, the basic values that underlie that Constitution.

That's, I think, the most we can do with our part. And we all have different parts, different rules, and that's pretty much what we can do. And that's why I put in this thing, which is really trite, and as you can see from my description of our part, you see I say, of course it's not political. Whoa, whoa. Because you see, I can't say — P.G. Wodehouse has a thing like that I like. It says, Bertie woke up one morning and he wasn't disgruntled, but he wasn't exactly gruntled either. And what I try to do is explain, well, here are things that people could take as political, but it isn't.

Nuance is important. Understanding is important. And that's the last thing, which isn't up to me. It's really up to the teachers and the school districts and others to make sure that those who graduate —what happened to 12th grade civics, which

we took in the 12th grade? Put it in the 11th grade. I don't care — as long as they take that civics course and understand how their government works, and really understand, understand how to work together. Fifth grade, Mrs. [Kwatagatsu] broke us into groups of four and said, "You're getting one grade for this project." Well, you have to cooperate then. I mean, there are a lot of ways of doing that teaching, but that's a fairly high level abstraction. But those are the kinds of things I've written about.

Levi: So you've quoted from your father. I'll quote from mine. When a new dean, it happened to be Geoff Stone at the University of Chicago, asked him once — and my father was a former dean — what were the attributes of a great dean. My father said, the dean should radiate the values of the institution.

And Justice Breyer, I think in this book, you have succeeded in radiating the best values of your institution, the Supreme Court of the United States. And what an important institution. And what a pleasure to talk to you today about your new book, *The Authority of the Court and the Perils of Politics*. It touches on such important questions in a hundred pages. Of course, it could be a thousand pages and we could have talked here for hours. There are lots of nuances, as you say today. Thank you for being with us today.

Justice Breyer: Your father was a great attorney general, too, a great attorney general. And he came in at a period when the country was pretty divided because of the Nixon scandal, etc. And he helped in that administration bring us together.

Levi: It's possible. It's always possible.

Thank you for your service to our courts, to our country.

Outro: Thank you for tuning in to Reasonably Speaking. Visit ALI.org to learn about this important topic and our speakers. Don't forget to subscribe so you never miss an episode. Reasonably Speaking is produced by the American Law Institute with audio engineering by Kathleen Morton and digital editing by Sarah Ferraro. Podcast episodes are moderated by Jennifer Morinigo and I'm Graham Lucas.