A Conversation with Justice Stephen Breyer

Justice Stephen Breyer, known for his interest in cross-border intellectual exchange, recently visited various German academic and judicial institutions. Despite a full schedule, Mr. Breyer dedicated some of his valuable time to discuss legal developments with a small group of young lawyers. The following is a brief account of that discussion which took place at the American Academy in Berlin.

Mr. Breyer opened the colloquium by introducing himself and by outlining his role as a Supreme Court justice. He mentioned previous career stops such as being an aid to the state legislator before he revealed how his professional life had changed after he had been nominated by President Bill Clinton to become a life-tenured Supreme Court justice. As part of this introduction, he portrayed the Court’s history and, in particular, the Court’s jurisdiction within the U.S. dichotomy of state and federal adjudicatory systems.

Out of the millions of cases filed each year in U.S. courts, only approximately 4% deal with federal law and are thus potentially subject to U.S. Supreme Court review. Among those 4%, about 70% are resolved by settlement or plea bargaining according to statistics. Unlike the situation in most European countries, where a right to appeal exists, appeals in the United States are discretionary and rather exceptional. To provide a quantitative reference point, the Brazilian Supreme Court hears more than 100,000 cases each year; the U.S. Supreme Court currently limits its caseload to 70 cases per year.

This enormous filtering process presupposes rigid criteria. Permitting rare looks into the internal administration of the Court, Justice Breyer praised the role of his law clerks. Law clerks are graduate lawyers who are assigned to common law judges to prepare opinions and to facilitate administrative responsibilities. Typically, law clerks take a first look at incoming cases and evaluate the merits of the arguments. In this selection process, Mr. Breyer explicitly trusts his law clerks. While different judges have different criteria for choosing cases, Justice Breyer follows a two-step analysis: “All I care is: is there a split in the circuits and is this split relevant?”

Thematically, there were no restraints, Justice Breyer presented himself not just open to intellectual diversity but also as profoundly knowledgeable and informed. No field of law, no corner of specialization seemed to exist in which the judge did not have a deliberate opinion or reasoned comment. Whether the topic was intellectual property law or transatlantic tensions in antitrust enforcement, WTO developments, or international arbitration, Justice Breyer cited the applicable precedents and outlined or criticized the current status of the law.

Mr. Breyer found particular interest in three topics: federalism, the use of foreign precedents when interpreting the U.S. constitution, and the profile of future Supreme Court justices.

The first big topic was federalism. We initiated the discussion by inquiring how exactly the contours of federalism have changed in the aftermath of the Court’s interpretation of vertical powers in United States v. Lopez. In Lopez, for the first time in almost six decades, a majority of the Court held that Congress exceeded its authority under the Commerce Clause. Recently, however, the Court seemed to have reaffirmed its old vision of federalism by cutting the immunity of several individual states. Justice Breyer attributed these fluctuations to the famous “Rule of Five” whereby five justices form a majority. A majority supported Lopez, but each justice leaving the court and each new justice joining the court restacks the deck.

We sought further explanations on a comparative level. Mr. Breyer was asked to comment on what might be called the federalism paradox. On the one hand, the tremendous growth of federalism is quite the success story throughout the world. Many countries have either transformed from a unitary governmental system into a federal structure or have – as New Beginnings – decided to establish a federal as opposed to a unitary state. Even Great Britain and Belgium, classic examples of unitary governments, have successively decentralized power to other constitutional entities and thus joined the federal movement.
On the other hand, there is a sense of centralization and monopo-
ization. Whether because of economic emergencies, anti-terror-
isim or environmental legislation, many countries have successi-
vely shifted powers from the states to the federal government.
We wanted to know if Justice Breyer had an opinion about or an
explanation for this paradox that federalism, while increasingly
popular, appears at the same time to be outdated. Justice Breyer
was well aware of these conflicting developments and identified
the enormous changes that have taken place in many countries
since 1990 and after September 2001 as starting points of an
answer. Speaking for the United States, he viewed federalism as a
reflection and occasionally even as mirror of overall develop-
ments. Someone has to respond to attacks or to a financial crisis,
his, said, and federalism aims to find out which governmental
entity can do the job best.
A second major topic was the role constitutions play in times of
globalization. In particular, we focused on the idea to interpret a
constitution in light of foreign experience. Unlike Chief Justice
Roberts, Justice Scalia, Justice Alito, and Justice Thomas, who
vigorously reject foreign law even as a non-binding reference
point, Justice Breyer presented himself as an outspoken suppor-
tor of comparative analysis.
Our discussion tried to put aside political, historical, and cultural
arguments and instead directed our focus to genuinely legal
arguments. How would Justice Breyer respond to the alleged
risks of using foreign law when interpreting the U.S. constitu-
tion?
Apparently, U.S. law and foreign law are not always in har-
mony. One classic example is the decision of New York Times v.
Sullivan. While some Americans may consider the decision as
an “occasion for dancing in the streets,” as Professor Meiklejohn
famously put it, much of the rest of the world vehemently rejects
the Court’s actual malice standard to establish defamation.
Other examples suggest similar irreconcilable differences: Hate
speech; capital punishment; gun laws and fundamental rights asso-
ciated with it; the contours of obscenity; privacy rights versus
dignity; the implications of positive and negative rights; the
existence and scope of social rights as fundamental rights; the scope
of executive powers; the legitimacy of abstract and centralized
judicial review; the commensurability problem resulting from a
lack of hierarchy of fundamental rights in the United States as
opposed to, for example, Germany’s principle of “praktische
Konkordanz”; and, finally, the difficulties in comparing the idio-
syncrasies of U.S. federalism with those of other countries.
Given these and other differences among the world’s consti-
tutions, the question arose as to what methodological function the
Justice attributes to judicial comparison. Does Justice Breyer
recognize some areas of constitutional law as too idiosyncratic,
as too uniquely “national” to fit for comparison? If so, which
ones? Is there a systematic theory of judicial comparison or are
references to foreign law necessarily ad hoc considerations?
Justice Breyer responded to these questions in two interrelated
ways. In direct response to the questions, he rejects any firm
principles that would prescribe or prohibit the use of foreign pre-
cedents in any methodologically (or “mechanically” as he called it)
manner.
This said, he continued to elaborate on the point of methodology
more broadly. He, as a member of the Court, does not see himself
to be in a “camp,” but rather likes to think of the Court as a uni-
tity despite disagreements. The division of originalists, liberalists,
textualists, etc. is an invention of the media, Mr. Breyer claimed.
“They have to write about something.” To him, being an origi-
nalist or a liberalist is only a matter of emphasis, not something
of a fundamental choice. He likes history, but he is not a histori-
an. “History is not my area of expertise,” he said and left doubt
whether other members of the Court would be more qualified to
engage in profound 18th century historic exegetes.
He then further expatiated on his rejection of classifications when
he started to talk about what he calls the “legal mind approach.”
Mr. Breyer strongly depreciates categorizations, theories, bright
line rules, and any form of “boxes.” Instead, he prefers to look at
consequences, enforce pragmatism, and to present “good results”.
Formalistic self-restraints and abstraction do not, in his opinion,
adequately address the multiplicity of factual situations or the
requirements of individual equity and fairness. To a common
lawyer, each case is unique, he explained, each pattern of facts
is too distinct to allow factually immune, pre-drafted academic
approaches to solve the issue. Problems in the common world,
one might add, are primarily factual and not legal problems.
Mr. Breyer’s repeated reference to late Justice Holmes in this con-
text came as no surprise. When identifying the two approaches
to adjudication – flexible versus absolute – Justice Breyer allied
with Justice Holmes and Justice Cardozo as perhaps the two
most prominent supporters of case vis-à-vis doctrine orientated
resolution. “[General principles do not decide concrete cases,”
Justice Holmes famously declared and later Justice Cardozo
added that “[f]he common law does not work from pre-
established truths of universal and inflexible validity to conclu-
sions derived from them deductively. Its method is inductive, and
it draws its generalizations from particulars.”
To Justice Breyer, law is permanently evolving and in constant
flux, not static or absolute. Explicitly, Justice Breyer sharply
distinguished himself from Justice Hugo Black’s position according
to which there are ‘absolutes’ in our Bill of Rights, and that
they were put there on purpose by men who knew what the words
meant and meant their prohibitions to be ‘absolutes’.
We next talked about the issue that lower federal courts are not
always aware that decisions of international tribunals are not
(U.S.) “law;” a major setback for practicing U.S. attorneys,
lower courts regularly overlook the distinction between individu-
als and corporations when applying treaties and thus run the risk
of subjecting companies to strictly speaking non-applicable obli-
gations. Although Mr. Breyer did not criticize lower courts, he
agreed that “international law” still implies something mysteri-
ous if not cryptic to “too many U.S. judges and practitioners.”
With this, we bridged his answer to a third big issue, namely
whether the criteria for nominations to U.S. high courts are likely
to change in the future. Justice Breyer was quite enthusiastic
about this topic. He predicts that “soon” being an excellent lawyer
will no longer be enough to become a U.S. Supreme Court judge.
Future judges, we envisaged, will have to have more than just
legal expertise; diversity and foreign experience will become addi-
tional requirements that candidates are expected to bring to the
court. In particular, he hopes for more female Justices because of
their “inherent gift to conciliate.” Mr. Breyer made no secret that
he misses Justice O’Connor not just as a well respected colleague
but also as a friend.
I asked him if this lack of diversity and internationality in the
composition of the current Court helps to explain why decisions
of the U.S. Supreme Court seem to become less influential ab-
road. Numbers from India and Japan (note: both non-European
countries) suggest that the European Court of Human Rights is
progressively taking over the U.S. Supreme Court’s role as pre-
eminent inspiration. I asked him if he as a member of the Court
acknowledges this development and whether it concerns him.
He doesn’t care at all, he aridity replied. Mr. Breyers’ job “is to
decide cases, not to do politics, nor to care about what the world thinks” of his judgments. I expressed my surprise because in several recent decisions he claimed the impact that U.S. Supreme Court decisions have upon the world community.

For example, in *Roper*, Justice Breyer argued that applying the death penalty against minors would isolate the United States from other civilized nations and thus jeopardize the United States’ role within the international community. His response indicated that he did not like this follow up. He added that he does not see himself or the Court in any competition with foreign courts. Doubts about this indifference remained among the audience.

With this summary, I thank the American Academy in Berlin, the esteemed law professors who sponsored the event, my colleagues at the roundtable, and, of course, Justice Breyer in particular with my highest appreciation and sincere gratefulness to make this opportunity such a memorable experience.