



A Workable Democracy

*The optimistic project of
Justice Stephen Breyer*

by LINCOLN CAPLAN

JUSTICE Stephen G. Breyer, LL.B. '64, sometimes says that his job and that of other members of the Supreme Court is to speak for the law. He does not mean that justices are Platonic Guardians, with ironclad power to impose their will on the nation despite being unelected. The job calls for deference to the elected branches of government, he emphasizes, and, even more, for caution and doubt. The United States is built on the principles of liberty, he quotes from a famous speech by Judge Learned Hand, and liberty's spirit is "the spirit which is not too sure that it is right."

At 78 and on the Court since 1994, Breyer is often described as a pragmatist whose vote in a case is influenced by the real-world consequences of deciding for one contending party versus the other. He is less predictable and sometimes more conservative—more of a moderate—than the three other justices with him in the Court's liberal wing, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. Some of their liberal opinions have sparked celebrity for each of them. Breyer has inspired no similar following.

He is best known as a sparring partner of the late Justice Antonin G. Scalia. Beginning in 1991—when Scalia had been on the Supreme Court for just five years and Breyer was the chief judge of the U.S. Court of Appeals for the First Circuit, in Boston—and continuing for more than two decades, they argued in many events around the country about how each thought a judge should speak for the law.

By almost any measure, Scalia won that long series of encounters. The ideas that he championed were highly influential on legal conservatism as it ascended to prominence in the legal culture. Scalia delivered them with bluster and sometimes bullying, leavened with color and charm: his largeness and loudness were memorable, reinforcing the seeming forthrightness of his thinking. Breyer praised him as a "titan of law" after he died.

It was a victory on accumulated points, however, with no knockouts. Breyer's geniality and moderation are the opposite of swagger—they reflect his counterview, which is measured and nuanced. He also began with a handicap: when they first debated, Scalia outranked him. But Breyer proposed a coherent jurisprudence as an alternative, which grew clearer over the years. He became the leading member of the Court to challenge Scalia about the role of the Court in American governance, the most important dispute in American law.

Their debates grew out of a technical-seeming yet deep-seated disagreement over laws passed by Congress. Scalia said he believed that Americans are governed by laws, not by the intentions of legislators, so drawing a law's meaning from its development in Congress, he said, is unconstitutional. He was a "textualist," in favor of finding the import of a statute only in its words and structure. Breyer agreed that a judge should do that when it is possible, but took what seemed to him the commonsensical position that, when the meaning of a statute is not clear from the words or their context, judges should read the law's history as a valuable tool in figuring that out.

The debates expanded to address how to interpret the Constitution. Scalia expounded about "originalism," the conservative view that the job of anyone applying America's fundamental law—espe-

cially a justice—is to examine and employ what the Founders meant when they wrote it. Breyer's reply was that, while it was admirable that Scalia sought to restrain himself by proceeding objectively, his method was less objective than he claimed. History often failed to provide clear guidance. Then what? Should the Court refuse to take a case because the record on how the eighteenth century thought about the issue was skimpy?

Scalia and Breyer also addressed the inescapable question about judicial review and the principle that the Supreme Court's reading of the Constitution's meaning is final, unless the Court reverses itself: Because justices are appointed, not elected, and they have life tenure, what keeps them from turning judicial review into judicial supremacy?

In the nineteenth century, the answer was, the Law. By the twentieth century, there was wide agreement that justices *make* law rather than finding it, so the law was no longer the restraint it was once said to be. That left the Court's role as an institution of government as the best alternative: to retain their authority, justices needed to be self-restrained, deferring as much as possible to the democratically elected representatives in Congress, the White House, and the states. In the past generation, though, no one has seriously viewed the Court as a model of restraint. A wide majority of Americans say the justices are often influenced by their political views.

Breyer insists that justices are not "junior-varsity politicians," second-guessing Congress and the president. But he says this because he knows many people are convinced they are. In an era when it has been smart politics to attack government itself, his project has been to explain "the Supreme Court's role in maintaining a *workable* constitutional system of government" (his italics).

In 2005, in his book *Active Liberty*, he defined the phrase as "participatory self-government," built on the belief "not just that government can help people, but that government is the people." He wrote, "My thesis is that courts should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts." One way is through judicial *modesty*, because "the judge, compared to the legislator, lacks relevant expertise." But another is through the exercise of judicial *authority*, to "yield better law—law that helps a community of individuals democratically find practical solutions to important contemporary problems."

The legal scholar Cass Sunstein, in the *Yale Law Journal*, in 2006, called *Active Liberty* "a brisk, lucid, and energetic book, written with conviction and offering a central argument that is at once provocative and appealing." He went on, "It is unusual for a member of the Supreme Court to attempt to set out a general approach to his job; Breyer's effort must be ranked among the most impressive such efforts in the nation's long history."

The book helped frame Breyer's importance on the Court, said Risa Goluboff, who is a legal historian, a former Breyer law clerk, and dean of the University of Virginia Law School: it underscored his willingness to take on textualism and originalism, and to insist there were other ways for justices to fulfill their responsibility to support and defend the Constitution.

Active Liberty set out six basic elements to consider in interpreting the Constitution or a statute: its *language* and structure; *history* showing what the words meant to the lawmakers who wrote it; *tradition* telling how the words have been applied in the law; judicial *precedents* interpreting the law; its *purposes*, or the values it embodies; and its *consequences*, or impact. "Some judges," he wrote, "emphasize

the use of language, history, and tradition,” like Antonin Scalia. “Others emphasize purpose and consequence,” like him. “These differences matter.”

In 2010, in *Making Our Democracy Work: A Judge’s View*, Breyer elaborated on why. He recounted the Supreme Court’s past “infirmity”: when decisions it made were “ignored or disobeyed, where the president’s or the public’s acceptance of Court decisions was seriously in doubt.” That acceptance, he underscored, “is not automatic and cannot be taken for granted.” Breyer’s concern was, and remains, the Court’s legitimacy. Public support for the Court has dropped dramatically in the past two decades, with 62 percent of Americans surveyed in 2000 saying they approved of how it was doing its job and only 42 percent saying that last July, after the end of the past Court term.



Tag team: Justices Stephen Breyer and Antonin Scalia testify at a Senate Judiciary Committee hearing on the role of judges under the Constitution, October 5, 2011.

Developments since that book came out have made American democracy ever more unworkable: extreme political polarization; extreme social and economic inequality; and a combination of anger, fear, and money fueling an anti-government upheaval in the 2016 presidential election. That has given urgency to Breyer’s advocacy for a workable democracy—for what once seemed a point of American pride and now seems a utopian alternative.

LAW AS “A SOCIAL INSTITUTION”

BREYER IS trim and alert, with a face as expressive as a mime’s, and a solicitous baritone whose tone and volume he turns up or down for emphasis, sometimes within a single sentence. As described by Garrett Epps, who covers the Court for *The Atlantic*, his “manner and writing exude a level of high culture unseen on the Court since Oliver Wendell Holmes retired in 1932.” Breyer told me, “I can’t jump out of my own skin. I am who I am.” But who he is is layered and, off the bench, he does not always exude high culture.

He grew up in a middle-class, Jewish family, in San Francisco. His father, Irving, was a lawyer and an administrator in the public-school system there for 40 years. On election days when Steve was a boy, Irving would take him into the voting booth, let Steve pull the lever, and say, “We’re exercising our prerogative.” Breyer remembers his father as kind, astute, and considerate, the man who helped his son develop “a trust in, almost a love for the possibilities of a democracy.”

His mother, Anne, volunteered for the city’s Democratic Party and the League of Women Voters. Breyer recalls her as intelligent, practical, and public-spirited. He told the Senate Judiciary Committee at his Supreme Court confirmation hearing, “She was the one who made absolutely clear to me, in no uncertain terms, that whatever intellectual ability I might have means nothing and will

not mean anything, unless I can work with other people and use whatever talents I have to help them.”

To learn how to do that, Steve and his brother, Chuck, who is three years younger, went to public schools and joined the Boy Scouts. They went to scout camp because their father’s idea of venturing into the great outdoors was walking in Golden Gate Park and their mother thought they should know the real thing. Scouting took drive. Both Steve and Chuck achieved the Eagle rank, among the 1 percent of scouts in those years who did. They went to Lowell High School, the city’s competitive magnet high school, where both were voted Most Likely to Succeed. (The dedication to *Active Liberty* reads, “To my brother and fellow judge, Chuck.” Charles R. Breyer has been a well-respected federal district judge in San Francisco since 1997.)

Steve turned down Harvard to go to Stanford because his parents were concerned that if he went to Harvard, he would spend too much time with his

books. But he spent enough time with them at Stanford to graduate Phi Beta Kappa, with highest honors in philosophy, and win a Marshall Scholarship to Oxford University. He got a second bachelor’s degree, with first-class honors in PPE (philosophy, politics, and economics), a discipline that people interested in public service often choose.

From there, he went to Harvard Law School, where he was one of the *Harvard Law Review*’s two articles editors, who work on the main pieces published. He was there when the most influential approach to the law at the school was becoming the most influential approach in American law. Called “The Legal Process” and developed by leading professors Henry M. Hart Jr. and Albert M. Sacks, the approach to “basic problems in the making and application of law” was presented in a 1,417-page mimeographed typescript rather than a book. The preface opened, “These materials are concerned with the study of law as an on-going, functioning, purposive process and, in particular, with the study of the various institutions,

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both official and private, through which the process is carried on.”

“The Legal Process” has the aura of the Glass Bead Game, an imaginary, ill-defined challenge testing all fields of knowledge for a select group of scholars, in Herman Hesse’s novel of that name. “A legal system is a system,” Hart and Sacks wrote: “Many of the troublesome and most frequently recurring difficulties in the law are not difficulties of the law of contracts, or torts, or property, or civil procedure, or constitutional law, or any other of the conventional fields of substantive or procedural law. They are difficulties which are intrinsic in the whole enterprise of organizing and maintaining a society which will effectively serve the purposes which societies exist to serve.”

But the approach focused on concrete questions about what it called “institutional competence”: Which government institution should make a legal decision because it is best suited to decide particular kinds of issues. The federal or a state government? An executive agency, the legislature, or a court? A trial court or a court of appeals? If a trial court, a judge or a jury? The approach insisted on “reasoned elaboration,” saying clearly how and why a court made a decision and identifying the principles and policies it relied on that, as the legal scholar Richard Fallon wrote, were “ultimately traceable to more democratically legitimate decision-makers.”

“Law is a social institution,” Justice Breyer told me, “It exists to help people. If we think of it in that way and of the benefits it can bring people living together, it makes sense to ask what its purpose is and what part of this large institution—the courts? the legislature? the city council?—is best situated to resolve the problem.” He went on, “When I went to Harvard Law School, I got exposed to Hart and Sacks through Al Sacks, who was then a professor and later dean. Some people think these ideas are out of date. I don’t. The main points I took from the Hart and Sacks materials are about ‘reasoned elaboration’ and the concept of the ‘reasonable legislator.’” The second phrase is Breyer’s distillation of a Legal Process idea, referring to a person in a legislature that “did not in fact consider a particular problem,” but who “*would have wanted* a court to interpret the statute in light of present circumstances in the particular case” (his italics).

A CONSENSUS-ORIENTED CENTRIST

IN THE DECADE from his high-school to his law-school graduations, Breyer’s record of employment shows the transforming power of top performance in elite education: in the summer of 1955, he mixed salads for the San Francisco recreation department at Camp Mather, its summer melting pot where police officers, fire fighters, and their families vacationed with lawyers, doctors, and business people and theirs; in the summer and fall of 1957, he served six months of active duty in the U.S. Army, as part of a reserve program; and, in the summer of 1958, before his last year at Stanford, he dug ditches for Pacific Gas & Electric Co. After his first year of law school, he was a summer associate at a venerable, now-defunct San Francisco firm; and, after his second year, he worked

in the Paris office of Cleary, Gottlieb, Steen & Hamilton, a leading international firm. (He taught himself French, among other ways, by reading Proust: all seven volumes of *À la recherche du temps perdu* [In Search of Lost Time] in the original, keeping track of new vocabulary words on index cards as he encountered them.)

He graduated from the law school *magna cum laude* in 1964 and went to clerk for Supreme Court Justice Arthur Goldberg. Then he became a special assistant to Donald Turner, on leave from his job as a Harvard Law School professor, who led the Justice Department’s antitrust division. In one of the cases Breyer worked on, the division argued as a friend of the court that real-estate agents in Akron, Ohio, had violated antitrust law when they agreed not to show houses in white neighborhoods to blacks. Breyer wrote the brief and argued the case before the U.S. Court of Appeals for the Sixth Circuit. The side he was supporting won, in the only case he ever argued in a court.

In Washington, he met Joanna Hare, an Oxford graduate who was working as an assistant to the Washington correspondent of the *London Sunday Times*. Her father was a British viscount who received his peerage for public service (as a member of Parliament, in cabinet posts, and as chairman of the Conservative Party). Her mother was from the family that started the Pearson Group, now an international media and education conglomerate, and very wealthy. They were married in 1967 in Suffolk, England, and moved to Cambridge, Massachusetts. Breyer began a career as a Harvard law professor, with, for a few years, a joint appointment at the Kennedy School of Government. Joanna Breyer earned a master’s in education in 1975 and a Ph.D. in psychology in 1983 at Harvard and became a psychologist at the Dana-Farber Cancer Institute, counseling children with terminal cancer and their families. They have three adult children and five grandchildren.

Breyer started as an antitrust specialist, but the year after he got tenure, in 1970, he began to teach administrative law as well. While he was an idiosyncratic teacher and known for being hard to follow, that is where he made a lasting mark as a scholar. His major academic work, *Breaking the Vicious Cycle*, argued that the government spent too many resources regulating small problems and too few on big ones. Cass Sunstein, an expert on administrative law, wrote in 2014 that Breyer’s “most important contribution was to challenge the view that the exclusive focus of the field should be on judicial review of agency action. On Justice Breyer’s account, it is not possible to understand what agencies do, or to evaluate judicial judgments, without having some sense of the substance of regulatory policy as well. It is not easy to overstate the importance of this claim, which has transformed a once-arid field.” He went on, “It is fair to say that as a law professor, Justice Breyer ushered administrative law into the modern era.” (Sunstein is profiled in “The Legal Olympian,” January-February 2015, page 43.)

In 1975, the year he turned 37, Breyer spent a sabbatical year as special counsel to a subcommittee of the Senate Judiciary Commit-

tee chaired by a Democrat, Edward M. Kennedy of Massachusetts. The subcommittee's work led to the formation of a working group in the Ford Administration, which decided that increased reliance on competition in the airline industry would bring cheaper and more efficient airline service. Breyer delivered that conclusion in a report that was a cornerstone of the Airline Deregulation Act of 1978.

In 1979, Kennedy became chairman of the Judiciary Committee and asked Breyer to serve as chief counsel. In the job while on leave from Harvard, he won a reputation as a straight-shooter and a consensus-builder—and, among people who worked closely with him,



ROBERT GIBOUX/AP/GETTY IMAGES

At the White House: President Bill Clinton and Supreme Court nominee Stephen Breyer speak with reporters in the Rose Garden, May 16, 1994.

as someone oblivious of day-to-day politics, with his head happily in the clouds, yet invaluable as a big thinker. In September 1980, Kennedy suggested that Breyer apply to fill an opening on the First Circuit and he did. In the landslide victory of Ronald Reagan over President Jimmy Carter that year, Republicans won control of the Senate. But the week after the election, Carter nominated Breyer and, a month later, he was confirmed by 80-10—the only judge confirmed in the lame-duck session.

He joined the federal appeals court in Boston as its fourth member. It was a small and collegial court, which nicely suited Breyer. His work on the court was widely considered intelligent, fair-minded, and moderately liberal. He disliked overturning federal district court judges. He made clear to his clerks that he hated dissenting. His opinions often focused on the facts. In unadorned declarative sentences (“The old law does not apply,” he wrote in an opinion, “and the new law’s procedures were not followed”), he sought to make the court’s decisions clear and sympathetic, in a simple writing style he consciously developed to make his opinions accessible to people with no knowledge of law.

To past law clerks, who described him to me as a speed thinker and a speed typist and said they suspect he is a speed reader, it looked as if he had three jobs. He continued to teach at Harvard,

sometimes a couple of courses a year, and to speak at academic and other public events, on average about half a dozen times a year.

Then, in 1984, the Sentencing Reform Act passed, with the aim of reducing disparity in federal criminal sentences and in time served in prison. (Sentences for the identical crime in one federal circuit ranged from three years in prison to 20; time served was uneven because of discretion in the parole system.) The law empowered a seven-member, bipartisan commission to create sentencing guidelines for judges. As Kennedy’s chief counsel, Breyer had worked on a bill that morphed into the law. He was appointed a commissioner.

The challenges were to figure out what was fair punishment for a crime and which crimes, set out in 688 different federal criminal statutes, warranted the same punishment. When the commissioners discovered they couldn’t come to various kinds of consensus—say, about whether pollution is a more serious crime than theft—they based the guidelines on typical past sentences. They extracted categories of crimes and proper lengths of sentences from close analysis of 10,500 sentences that federal judges had imposed, though they stiffened sentences for white-collar crimes, like insider trading, when they found that people convicted of them more frequently got probation.

The guidelines went into effect in 1987. They were said to reflect a practical, non-ideological approach, though they soon got caught in an ideological crossfire about mandatory minimum sentences, which Congress attached to many crimes, thus seriously thwarting the guidelines. They were also exceedingly complicated and Breyer became their main explainer. That reinforced his reputation as a technocrat (a term his friends reject): an independent expert who was a consensus-oriented centrist, keen to help find

feasible solutions to hard problems.

In May 1994, President Bill Clinton, elected in 1992 as a centrist, nominated Breyer for the Supreme Court. He was confirmed 11 weeks later by a vote of 87-9.

For 23 years on the Court, he has been a consensus-seeker and, by inclination, a problem-solver. Solving a legal problem through a ruling in a Court case requires being in the majority. He has been in the majority in many consequential cases, primarily because the Court has handed down major liberal decisions: that the Constitution prohibits a state from sentencing juveniles who are convicted of murder to life in prison without the possibility of parole, for example, and that it requires a state to allow marriages between people of the same sex.

Breyer has also written important majority opinions: last year, for example, for a 5-3 majority, he wrote the most significant opinion about abortion rights in a generation, striking down two provisions of a Texas statute that made it more difficult for many women to gain access to an abortion. He points out that the Court rules unanimously in about 45 percent of its cases, and that the 5-4 rulings make up only about 20 percent.

But, to the leading political scientists who study the institution, the Roberts Court is unquestionably conservative, more so than

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the Court was when it was led by Warren E. Burger and then by William H. Rehnquist, the two previous and conservative chief justices, going back almost half a century. The Court’s conservatism and Breyer’s moderation turned him into a dissenter.

IN DISSENT

AKHIL REED AMAR, a constitutional-law scholar and political scientist at Yale, who had clerked for Breyer on the First Circuit a decade before, told him after his confirmation, “Boss, you’re going to have to dissent. You can’t affirm all the time, because that will mean you’re choosing one circuit court over another.” Amar told me, “He didn’t like picking fights.” Yet from Breyer’s first term on the Court, his most powerful opinions have been dissents, usually for himself and other justices. In the five terms ending last summer, measured by the percentage of opinions they wrote that were dissents, Justices Anthony M. Kennedy and Elena Kagan wrote the fewest dissents, Justice Clarence Thomas by far the most, and Breyer was in the middle of the pack, writing dissents on average in about one-third of his opinions—far more than he expected.

The likely confirmation of a conservative justice to replace Scalia means that Breyer’s dissents are now likely speaking to a far-off-future Court that will not include him—and not to a Hillary Clinton-era Court with a liberal majority and with Breyer often a member of it, vying to replace Anthony Kennedy as the swing vote.

Since 2005, under the leadership of Chief Justice John G. Roberts Jr., the Court has been heavily defined by a series of conservative rulings that rejected or overturned well-established law. Among other momentous ones, the Court decided that voluntary efforts to desegregate public schools in two cities were unconstitutional and that any consideration of race in shaping that kind of remedy must overcome a heavy presumption that it is unconstitutional. It held that individuals have a constitutional right to own a gun for personal use and to keep one at home for self-defense. It decided that corporations can require customers to waive their right to class actions and to submit a claim through individual arbitration, even if the amount is so small that no realistic lawyer would take the case. In its signature ruling, *Citizens United*, it held that money equals speech and that banning the independent spending of corporations, unions, and other organizations in political campaigns infringes on their right to free speech.

Breyer has written important dissents from each of these weighty rulings of the Roberts Court, as well as others. They lack the eloquence and argumentative verve of dissents by Kagan, who is the Court’s outstanding writer. Conservatives have dismissed them as unprincipled pragmatism and described some as dangerous. But they are distinguished by all the traits that characterize Breyer’s legal career: their thoroughness in testing the value of legal doctrine

against its real-world consequences, their deliberateness in exploring the difficulties of both sides, and their effort to persuade readers with all the facts needed to agree with his conclusion. They almost never show the passion (as well as irritation) he reveals on the bench during oral argument when it is likely he will be in the minority.

An exception is his most important dissent, to him and to many others, in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007). It is his longest opinion as a justice and, in contrast to his other dissents, it is full of passion. The Court rejected a 36-year-old rule that the Constitution *permitted* local communities to use remedies taking account of race to desegregate public schools even when it did not *require* them to. Breyer said that decision distorted precedent, misapplied the Constitution, announced legal rules that would make it much harder to reverse the growing re-segregation of schools, and subverted *Brown v. Board of Education*, which found that school segregation violates the principle of equality at the heart of the Constitution.



In the Court: Justice Breyer works with his clerks in his outer office, June 17, 2002.

The Chief Justice, who wrote the plurality opinion, was just as harsh about Breyer’s dissent. He said it “selectively relies on inapplicable precedent,” “alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications,” and “greatly exaggerates the consequences of today’s decision.”

The crux of their disagreement was about the meaning of *Brown*. Roberts asserted that the ruling is about colorblindness: The Constitution’s Fourteenth Amendment prohibits the government from treating American children differently on the basis of their color or race. The closing line of the majority opinion expressed the Chief Justice’s conviction that *Brown* outlawed *discrimination*: “The way to

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stop discrimination on the basis of race is to stop discriminating on the basis of race.”

Breyer viewed *Brown* as outlawing *subordination*—ending the perpetuation of “a caste system rooted in the institutions of slavery and 80 years of legalized subordination,” by relegating black students to lower status in segregated schools. That was a matter of current events because many American public-school systems were re-segregating.

When Breyer delivered his dissent from the bench the day the decision was announced, he included, with a quiet but angry sorrow, a sentence that did not appear in his opinion: “It is not often in the law that so few have so quickly changed so much.” He was referring to Roberts’s replacement of Chief Justice Rehnquist and to Justice Samuel A. Alito Jr.’s of Justice Sandra Day O’Connor, and to their substitution of conservative activism for conservative restraint.

In *Citizens United* (2010), when the Court ruled that the government may not ban political spending by corporations, unions, and other organizations, Breyer joined the dissent of John Paul Stevens rather than writing his own. But in 2014, in *McCutcheon v. Federal Election Commission*, when the Court struck down a long-time limit on the total amount a person can contribute to federal candidates in a two-year election cycle, Breyer dissented, saying bluntly that it was “wrong to do so.” With *Citizens United*, he went on, the *McCutcheon* “decision eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to solve.”

For a plurality, Roberts wrote, “The right to participate in democracy through political contributions is protected by the First Amendment, but that right is not absolute. Our cases have held that Congress may regulate campaign contributions to protect against corruption or the appearance of corruption.” His definition of corruption is a *quid pro quo*: a direct exchange of an official act for money, a form of bribery. That narrow conception excludes efforts to gain influence over or access to elected officials—all the more so with enormous campaign contributions that far exceed the average citizen-voter’s means.

“In reality,” Breyer responded, “as the history of campaign finance reform shows and as our earlier cases on the subject have recognized, the anticorruption interest that drives Congress to regulate campaign contributions is a far broader, more important interest than the plurality acknowledges. It is an interest in maintaining the integrity of our public governmental institutions. And it is an interest rooted in the Constitution and in the First Amendment itself.”

The protection of free speech and free press includes the right of an individual to engage in political speech, but, as important, Breyer said, it protects the interest of the public in the *collective* speech that shapes and, really, defines American democracy. “What has this to do with corruption?” Breyer asked. “It has everything to do with corruption. Corruption breaks the constitutionally necessary ‘chain

of communication’ between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard.”

FOES AND FRIENDS

SOME OF HIS VOTES in cases appear motivated by the desire to boost consensus. After Scalia’s death last term, for example, he voted with the conservatives to uphold a police officer’s stop-and-search of a man who had walked out of a house where the officer thought there might be “drug activity,” which was not enough evidence to stop him. The decision all but invites police to make illegal stops and, as Justice Sotomayor wrote in dissent, “it is no secret that people of color are disproportionate victims of this type of scrutiny.” Breyer’s goal seems to be to avoid outcomes that leave all of the justices looking like junior-varsity politicians—in the stop-and-search case, by avoiding another 4-4 decision, with Republican-picked conservatives on one side and Democrat-picked liberals on the other.

His outlook is “Yesterday’s foe, today’s friend,” said Justin Driver, who teaches at the University of Chicago Law School and clerked for Breyer on the Supreme Court: “Even if you disagree vehemently with colleagues today, they are your allies tomorrow.” Neal Katyal, a leader in the Supreme Court bar who was acting solicitor general in the Obama administration and was an early Breyer Court clerk, said that when another justice wrote something nasty in an opinion about one of Breyer’s and the clerks wanted their boss to retaliate, he would decline and say, “This, too, will pass.” Seeing Breyer adhere to this ethic gave Katyal and other former Breyer clerks a north star to steer by as lawyers.

Bush v. Gore, the ruling of the Supreme Court that gave the 2000 election to George W. Bush, tested the extent of Breyer’s dedication to the ethic. It was as crushing for him as the decision striking down voluntary school-integration plans. For many Court-watchers, it was the ultimate proof that the justices reach whatever result they want to. The outcome was “not dictated by the law in any sense,” as the University of Chicago’s David A. Strauss wrote. Breyer issued a prophetic dissent, in which he said that the deeply divided ruling ran “the risk of undermining the public’s confidence in the Court itself.” That clearly happened.

Under the auspices of Yale Law School’s China Center, Breyer has since made trips to China, to meet with Chinese law professors and students. He invariably gets asked about *Bush v. Gore* and his dissent. According to Paul Gewirtz, a friend of Breyer’s and the professor who founded and leads the center, he always says something like: I thought the decision was wrong and very important. But in response to it, there were no riots, there were no police trucks in the streets, there were no people throwing stones. That is a tremendous virtue of our system.

His latest book, published in 2016, is called *Against the Death Penalty*. At its heart is a lengthy and great dissent (please turn to page 75)

COLOSSAL BLOSSOM

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host/parasite connections are potentially an important means by which horizontal gene transfers can occur. And it showed that the physiological invisibility of *Rafflesia* within the host is echoed in its genes: the host and parasite share so much biology that the boundaries between them have become blurred.

Intriguingly, some of the transferred genes swap in at precisely the same genetic location as in the parasite's own genome. "One of the ideas that we are exploring," says Davis, "is whether maintaining these transferred genes might provide a fitness advantage for the parasite. Might these transfers be providing a kind of genetic camouflage so that the host can't mount an immune response to the parasite that lives within it?" This kind of science has broader relevance, he points out, not only to plants, but to people. How do the pathogens that infect the human body "maintain themselves and survive?" These are the kinds of questions that, by chance, the study of *Rafflesia* may help elucidate. The plant's strategy might

Why are *Rafflesia* the biggest flowers in the world? That is a puzzle he'd hoped to solve since his postdoctoral days...

be an evolutionary dead end—or it could be a powerful, alternative means by which *Rafflesia* maintain their fitness: by co-opting the genes of their hosts.

THESE ARE LARGE QUESTIONS. FOR NOW, Davis shares the answer to a simpler one: Why are *Rafflesia* the biggest flowers in the world? That is a puzzle he'd hoped to solve since his postdoctoral days at the Michigan Society of Fellows. These plants place within the spurge family, whose members produce *tiny* flowers, just one to three millimeters in diameter. Wondering how they could have evolved to become so immense, he and Elena Kramer, Bussey professor of organismic and evolutionary biology, and other colleagues decided to tackle the question using floral developmental genetics.

Under their tutelage, Luke Nikolov '07, one of Davis's former doctoral students (now at



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the Max Planck Institute for Plant Breeding Research), began probing the relationships of the various parts of these strange flowers to the blossoms of other plants. He injected dyes into the plants as they grew, recording what genes were expressed during various stages of development to distinguish one floral organ

from another. In some species, he found, the central floral chamber is formed from a novel inner organ called the ring meristem. But in the largest flowers, the chamber is made

from organs that once were petals.

The inescapable conclusion, says Davis, is that extreme gigantism evolved in this tiny family of parasitic plants not once, but twice. Why? He suspects that in the first evolution, with the ring meristem-derived chamber, the plant had become as large as it could using that part of the flower. Only by "re-architecting" gigantism a second time, using petal structures, could the plant achieve the spans of three feet or more seen in species such as *R. arnoldii*.

But what advantage lies in enormous size? What extraordinary selection pressure could drive gigantism twice? Davis suspects that the answer may lie with the carrion fly. The literature on the biology of these insects is robust, he points out: "Carrion flies seek out the largest carcass they can find." ▽

Jonathan Shaw '89 is managing editor of this magazine.

Charles Davis with *Rafflesia tuan-mudae* in 2007, Gunung Gading National Park, Borneo.

A WORKABLE DEMOCRACY

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he wrote in *Glossip v. Gross*, in 2015, in which he called for a fundamental review of capital punishment and said he thinks it is "highly likely" that the punishment is unconstitutional: "In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes or we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment"—the Constitution's ban on cruel and unusual punishment.

The death penalty remains among the most divisive subjects on the Supreme Court's docket. Yet underlying his dissent is the optimistic idea underlying most of his dissents: What sets the majority and the dissenters apart is not a disagreement about basic principles—it is that the justices in the majority are not looking as carefully as they should at the most important facts. If they did, they would see the case as he does. They would join his opinion. ▽

Lincoln Caplan '72, J.D. '76, a contributing editor, is visiting lecturer in law at Yale Law School and the author of six books about the law, most recently American Justice 2016: The Political Supreme Court. He wrote about the Court as a New Yorker staff writer and as a member of the editorial board of The New York Times. His recent Harvard Magazine articles have covered Professor Cass Sunstein (January-February 2015), Judge Richard Posner (January-February 2016), and sibling scholars Carol Steiker and Jordan Steiker and their scholarship on the death penalty (November-December 2016).

In addition to Justice Breyer, LL.B. '64, and his wife, Joanna Breyer, M.Ed. '75, Ph.D. '83, alumni mentioned in this article include past and present Supreme Court chief justices William H. Rehnquist, A.M. '50, and John G. Roberts Jr. '76, J.D. '79, and past and present associate justices Oliver Wendell Holmes Jr., A.B. 1861, LL.B. '66, LL.D. '95, Ruth Bader Ginsburg, L. '59, LL.D. '11, Elena Kagan, J.D. '86, Anthony M. Kennedy, LL.B. '61, and Antonin G. Scalia, LL.B. '60. Also mentioned are: Charles R. Breyer '63; Justin Driver, J.D. '04; Garrett Epps '72; Richard Fallon, J.D. '80; Learned Hand, A.B. 1893, A.M. '94, LL.B. '96, LL.D. 1939; Henry M. Hart Jr. '26, LL.B. '30, S.J.D. '31; Edward M. Kennedy '54, LL.D. '08; Albert M. Sacks, LL.B. '48; David A. Strauss '73, J.D. '78; Cass Sunstein '75, J.D. '78; and Donald Turner, Ph.D. '47.