

BREYER'S BIG IDEA

The Justice's vision for a progressive revival on the Supreme Court.

BY JEFFREY TOOBIN

In the weeks after the Supreme Court issued its decision in *Bush v. Gore*, on December 12, 2000, the mood was despondent in the chambers of the Justices on the losing side. The five-to-four ruling ended the recount of the Presidential vote in Florida and assured George W. Bush's victory in the election. "The clerks were tremendously alienated," one recalled recently. "A lot of them thought that the Court was a fraud, that the place had sacrificed its legitimacy, and that there really wasn't much point in taking the whole institution seriously anymore."

Stephen G. Breyer was among the dissenting Justices in the case. He was appointed to the Supreme Court by President Clinton in 1994, but his main residence is still a rambling clapboard house in Cambridge, Massachusetts, which he and his British-born wife, Joanna, bought three decades ago, early in his career as a professor at Harvard Law School. The house is on a cul-de-sac not far from Brattle Street, which has been home to the city's gentry since the American Revolution. Breyer works in the back of the house, in a sunny, glassed-in office, surrounded by paintings and leather-bound books.

One morning a few weeks ago, Breyer, who is sixty-seven, sat in his office in a worn wing chair, relating how he had tried to reassure the clerks. "I spent a long time going to lunch with quite a few of them, to calm them down," he said. "I told them, 'This, too, will pass.'" Breyer said that the pep talks were intended to help keep the young lawyers motivated, but they also reflected his fundamentally

optimistic nature. "You have to assume good faith, even on the part of people with whom you disagree," he told me. "If you don't assume good faith, it makes matters personal, and it makes it harder to reach a good result and, in my experience, it normally isn't even true. People do act in good faith. The best clue to what a person thinks is what he says."



Breyer believes that the Court should stay out of Congress's way.

Breyer's confidence in the Supreme Court isn't shared by many Democratic lawyers and judges. After his appointment, membership on the Court remained stable for eleven years—the longest period without turnover in more than a hundred and fifty years. But now John G. Roberts, Jr., has replaced William H. Rehnquist as Chief Justice, and

Bush has nominated Harriet Miers, his White House counsel, to fill the seat vacated by Sandra Day O'Connor. Furthermore, Breyer's most liberal colleagues, John Paul Stevens and Ruth Bader Ginsburg, are eighty-five and seventy-two years old, respectively. A period of conservative hegemony on the Court seems a real possibility. In April, the Harvard Law School professor and veteran Supreme Court litigator Laurence H. Tribe announced that he would not complete a new edition of his mammoth treatise on constitutional law, which was originally published in 1978, because so many precedents that had once seemed settled now appear at risk of being overruled. "I've suspended work on a revision because, in area after area, we find ourselves at a fork in the road . . . and because conflict over basic constitutional premises is today at a fever pitch," Tribe wrote in a letter to Breyer, an old friend and former colleague.

In September, Breyer published "Active Liberty: Interpreting Our Democratic Constitution," a manifesto for a progressive revival in American jurisprudence. The book, which is a hundred and sixty-one pages long, was inspired in part by Breyer's disdain for the method of constitutional interpretation championed by his principal ideological rivals on the Court, Antonin Scalia and Clarence Thomas. Their approach, known as originalism or textualism, holds that the words of the Constitution mean only what the framers understood by them; the document's sense does not evolve over time. Constitutional scholars on both the left and the right have criticized originalism for being overly literal and doctrinaire, but Breyer is the first Justice to attempt to elaborate simultaneously a rebuttal and an alternative.

In "Active Liberty," Breyer argues that the framers never intended for future generations of jurists to resolve contemporary controversies by guessing how the framers themselves would have resolved them. Instead, their goal was to promote what

Breyer, quoting the nineteenth-century French political writer Benjamin Constant, calls “active and constant participation in collective power”—in other words, “active liberty.” The Constitution not only sets limits on official power, Breyer asserts; it insures the right of ordinary citizens to shape the workings of government. “There is this coherent view of the Constitution that has taken hold, called originalism, textualism, a kind of literalism, which is a well worked-out theory,” Breyer told me. “And I think people are tempted to say that there is a coherent theory, on the one hand, and, on the other hand, there are simply judges who go around deciding each case as they think appropriate. And that isn’t so. I think there is a more traditional approach, and it’s coherent, consistent, and specific.”

Several days after his book was published, Breyer visited a classroom at the New York University School of Law, where he took questions from students and engaged in a characteristic rhetorical technique: interviewing himself. Supreme Court Justices are known for their public reticence, but Breyer appears frequently before academic groups, from grade schools to law schools, and he plainly enjoys the give-and-take. Tall, thin, and nearly bald, he radiates nervous energy, rubbing his head as he puzzles over questions, and, in sessions at the Supreme Court, rocking in his leather chair—sometimes pitching so far forward that his chin almost rests on the bench. Breyer stays limber by bicycling around Cambridge and Georgetown, where he also has a home. (In 1993, when Breyer was a federal appeals-court judge in Boston, he had what is certainly the most famous bicycle accident in Supreme Court history. A few days before an interview with President Clinton for the vacancy on the Court created by Byron White’s resignation, Breyer crashed while trying to avoid a pedestrian near his home in Cambridge, breaking a rib and puncturing a lung. He was in pain during the meeting with the President, and it didn’t go well. Breyer was appointed the following year, after Harry Blackmun retired.)

“We get very open questions in constitutional law,” Breyer said at N.Y.U. “So how do I react to them? Well, of course, you look at the text, the cases, the

history, and all those things, but you can’t escape your background, your own experiences. And I start with Lowell High School, Class of 1955. That doesn’t mean a lot to you, but it means a lot to me.”

Breyer mentions his public high school, in San Francisco, in nearly every speech. “In San Francisco in the nineteen-fifties, it was a wide-open time,” he told me. “It’s true that there were lots of people, mostly black people, who were still excluded from opportunities, but for the rest of us there was a sense of possibility that we’ve never seen before or since. You had a great mixing of classes. I was a hasher at Camp Mather, in the Sierras, which was run by the city and county of San Francisco. Anyone could go. You had a mix of the families of firemen, policemen, and doctors and lawyers. They all felt an obligation to be part of the community and to contribute to the community.”

For forty years, Breyer’s father worked as a lawyer for the San Francisco school system, eventually serving as a chief intermediary between the system’s administrators and local politicians. His mother was a homemaker who volunteered with the Democratic Party and the League of Women Voters. Breyer’s younger brother, Chuck, became a criminal-defense lawyer in San Francisco and, in 1997, was named a federal district judge by President Clinton. (Breyer recuses himself in appeals of his brother’s rulings.)

“The message I’m trying to provide is that there is more to the Constitution than a Fourth of July speech,” Breyer went on. “It was a serious objective of the framers that people participate in the political process. If people don’t participate, the country can’t work.” In his book, he cites several recent Supreme Court opinions to illustrate his thesis. In the 2003 case *McCConnell v. Federal Election Commission*, the Court had to assess the constitutionality of the 2002 McCain-Feingold campaign-finance law, and consider whether caps on campaign contributions, and restrictions on advertising, constituted infringements on the right to free speech, which is guaranteed by the First Amendment. Breyer (along with a majority of his colleagues) upheld most of the law’s provisions. “To understand the First Amendment as seeking in significant part to protect active liberty, ‘participatory self-

government,' is to understand it as protecting more than the individual's modern freedom," he writes. "It is to understand the Amendment as seeking to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process."

In drafting the campaign-finance legislation, Congress had weighed the need for fair elections against the right to free speech, and fashioned a compromise. Paying deference to legislative judgments is a touchstone of Breyer's philosophy. "The need to make room for democratic decision-making argues for judicial modesty in constitutional decision-making, a form of judicial restraint," he writes. Neal Katyal, a professor at Georgetown University Law Center, who clerked for Breyer in the mid-nineties, says, "Every single day you spend with him, you hear about how the courts should trust the political branches. He trusts Congress a lot more than the left did in the sixties and seventies, and a lot more than the right does today." Indeed, according to an analysis by Paul Gewirtz, a professor at Yale Law School, and his student Chad Golder, of Supreme Court decisions between 1994 and 2005 addressing the constitutionality of sixty-four congressional provisions, Breyer voted to strike down laws twenty-eight per cent of the time—less often than any other Justice. Clarence Thomas voted to overrule Congress sixty-six per cent of the time, more than any other Justice.

Breyer's accommodating attitude toward Congress represents a departure from liberal judicial tradition. "William Brennan and Thurgood Marshall had a vision of the Constitution as having these big ideals of equality and liberty which would require renovation of many social practices, so that they would require the criminal-justice system, or welfare, or education all be changed in significant ways to conform to their aspirations," Cass Sunstein, a professor at the University of Chicago Law School and an admirer of Breyer's work, says. "You can't see any of that in Breyer. There is nothing in Breyer to show that he thinks there are many areas where the Constitution is properly used to renovate American society, no indication that he wants to move society or constitutional law in novel directions. Today, it's the conser-

vatives who want to use the law to make big changes in American society."

For more than fifty years, starting with the New Deal, the Supreme Court gave Congress considerable leeway to pass laws, under the authority granted to it by the Constitution to regulate interstate commerce. In the nineteen-nineties, however, the Court—led by the conservative Justices Rehnquist, Scalia, and Thomas—began to challenge congressional statutes in an effort to limit the power of the federal government. In 1995, in *United States v. Lopez*, a five-Justice majority ruled that Congress lacked the authority to pass a federal law banning the possession of guns in a school zone. On similar grounds, in 2000, the Court struck down, in another five-to-four vote, a provision of the federal Violence Against Women Act which gave victims of sex-related violence the right to sue their attackers in federal court.

Breyer dissented in both cases, arguing, in his opinion in *Lopez*, that "the statute falls well within the scope of the commerce power as this Court has understood that power over the last half-century." The cases exemplify the conflict between originalism and the more pragmatic approach advocated by Breyer, and the outcome of this conflict has enormous implications for American government. Scalia and Thomas would like to see the federal government's role in regulating citizens' lives reduced to the modest one that they believe the framers envisaged. As Thomas put it in his concurring opinion in *Lopez*, "The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal Government." Breyer believes that, whenever possible, the Court should stay out of Congress's way.

When I visited Breyer in Cambridge, there was a tidy pile of children's toys on the living-room floor, the residue of a recent visit by his oldest grandchild. "My daughter told me she didn't want me to be buying toys all the time for my grandchildren, and I said fine," Breyer said. "So these are my toys," he added, with the triumphant smile of a lawyer deploying a winning argument. "I bought them for myself."

Breyer's optimism on the bench may be partly congenital, but he owes his faith in Congress to his experience as a young lawyer on the Senate Judiciary Committee staff. After graduating from Stanford, in 1959, he studied philosophy and economics at Oxford on a Marshall Scholarship, and earned a law degree at Harvard, where he made the law review. From 1964 to 1965, he clerked for Justice Arthur Goldberg. The liberal Warren Court was near its apogee, and Breyer worked on *Griswold v. Connecticut*, the case in which the Justices overturned the state's ban on contraception and began articulating the right to privacy which led, eight years later, to *Roe v. Wade*. However, Breyer gravitated to antitrust and administrative law, and after a brief stint as an attorney in the antitrust division of the Justice Department he was hired to teach at Harvard.

While Breyer was working in the capital, he met and married Joanna Hare, an assistant in the Washington office of the London *Sunday Times*. Hare comes from an aristocratic British family; her father, John Hare, was the First Viscount Blakenham, a peer and statesman who served as a leader of the Tory Party in the nineteen-fifties and sixties. She later became a psychologist, and now treats young cancer patients at the Dana-Farber Cancer Institute, in Boston. One of the few modern works of art in the Breyers' home in Cambridge is a striking painting of their three children, Chloe, Nell, and Michael, who are now adults.

"That's Chloe, my oldest daughter," Breyer said as we stood in front of the painting. "She's an Episcopal priest, of all things. And I'm Jewish! So you can see we are very ecumenical around here." (Nell is a video artist; Michael is an aspiring software entrepreneur.)

In the mid-seventies, Breyer began commuting from Harvard to Washington to work as a counsel for the Judiciary Committee, then chaired by Senator Edward M. Kennedy. "When Steve came to work for me, he was advised that this was a disaster in terms of a career," Kennedy told me. "Everyone told him that if he wanted experience in government he should go to the executive branch. You don't really get your hands dirty in the executive branch. I wish I could walk into the Harvard Faculty

Club with him today and see what they think of their advice now.” When Kennedy was preparing to challenge Jimmy Carter for the 1980 Democratic Presidential nomination, Breyer encouraged him to embrace a cause that moderated the Senator’s image as a doctrinaire liberal: deregulation—of the airlines, trucking, and the natural-gas industry. “Steve started talking in the most common-sense way about getting the federal government out of the way of economic competition, and we held a series of very successful hearings on the subject,” Kennedy said.

Breyer’s support for deregulation, and his genial demeanor, earned him the admiration of several Republicans on the committee. “He was a really decent and honorable person,” Senator Orrin G. Hatch, the Utah Republican, told me. “He worked with both sides and tried to bring everyone together.” Eventually, Breyer became Kennedy’s chief counsel on the committee, and under their direction it achieved considerable productivity and ideological harmony. Breyer left the committee in 1980, his childhood faith in civic participation intact. “It leads a person who works there to see that most politicians are trying to achieve results that will benefit the people who elected them,” Breyer said of his experience as a congressional staffer. “Contrary to what people who haven’t worked there might expect, they really are mostly trying to do the right thing.”

Deference to Congress, a technocrat’s belief in governmental solutions, and a taste for compromise have all figured in Breyer’s jurisprudence. His book, however, provides few guidelines for applying his theory of active liberty to actual cases. Even if one accepts his assertion that the Constitution was designed to guarantee broad participation in the democratic process, the notion doesn’t help lawyers and judges who are trying to adjudicate cases involving some of the most contested issues in constitutional law—race, privacy, and religion. No controversy better illustrates the strengths and weaknesses of Breyer’s approach than the two Ten Commandments cases, from earlier this year.

In separate cases, civil-liberties advocates challenged, as violations of the establishment clause of the First Amend-



“I don’t know. What do you want to do?”

ment, two public displays of the Commandments, one in a pair of Kentucky courthouses, the other on the grounds of the Texas state capitol, in Austin. Four Justices (Stevens, O’Connor, David Souter, and Ginsburg) rejected both states’ displays as violations of the Constitution’s separation of church and state; four others (Rehnquist, Scalia, Anthony M. Kennedy, and Thomas) approved both states’ displays. Only Breyer, the swing vote in both cases, saw a difference between the displays: he rejected the Commandments in the Kentucky courthouses and upheld the one in the Texas park.

In his opinion concurring in the judgment in the Texas case, *Van Orden v. Perry*, Breyer noted that “there was no single mechanical formula that can accurately draw the constitutional line in every case,” and he proceeded to compare the history of the displays. The Texas Commandments, which are carved into a granite monument, had been donated to the state by the Fraternal Order of Eagles, a private civic (and primarily secular) organization, in 1961. Most important, Breyer argued, no one had complained about the structure, which is situated among sixteen other monuments and twenty-one historical markers, for decades. “Those forty years suggest more strongly than can any set of formulaic

tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect,” Breyer wrote. By contrast, the displays in the Kentucky case, *McCree County v. A.C.L.U.*, had been placed on the walls of the courthouses by local officials, accompanied in one case by a Christian minister, in 1999, and had immediately become objects of controversy. In his opinion in the Texas case, Breyer wrote, “the short (and stormy) history of the [Kentucky] courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them.”

Together, Breyer’s decisions suggest an ad-hoc attempt at political compromise as much as the application of legal principles. His opinions in the cases amount to a demand that politicians stop erecting provocative religious monuments, with the understanding that old ones can stay. Removing uncontroversial displays like the one in Texas could, he wrote, “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.” Applying Breyer’s ruling to cases involving similar issues isn’t easy. In a decision last month excluding the words “under God” from the Pledge of Allegiance, Lawrence K.

Karlton, a federal judge in Sacramento, wrote that Breyer's method in the Commandments cases was "utterly standardless . . . leaving those of us who work in the vineyard without guidance."

Breyer smiled when I told him about Judge Karlton's complaint. "That's a problem for the person in question," he said. "What kind of guidance? There is a tremendous temptation to believe that a bright-line rule is guidance and the absence of a rule is not guidance, particularly in an area of the law that is subtle. But there is also common-law guidance, which is by example. The best example of how to behave is by example. It's true with children. It's one thing to tell them how to behave, but it's another to live your life in such a way that you show them. You teach by example. You don't go too far too fast. Sandra understood this."

In conversation, Breyer often invokes Sandra Day O'Connor, with whom he had a close relationship. A former Arizona state senator, she shared Breyer's inclination to defer to the legislative process. Mostly, though, Breyer and O'Connor shared a judicial disposition—pragmatic, improvisational—that distinguished them from their more rule-based colleagues, including Scalia and Ginsburg. Breyer likes to win cases, and O'Connor, the Court's swing vote, was a means to that end.

"I once complimented him on a dissent, and he held up four fingers with a wistful smile," Akhil Amar, a professor at Yale Law School, who clerked for Breyer on the federal Court of Appeals in the mid-eighties, says. "He only got four votes. Nino Scalia would rather be right than in the majority, but Breyer by temperament is someone who is going to find the center. He cultivated O'Connor in the way that Scalia drove her away."

In his book, Breyer pays extended tribute to O'Connor's opinion in the 2003 case *Grutter v. Bollinger*, upholding the affirmative-action policy at the University of Michigan Law School. He discounts Ginsburg's traditional liberal rationale for affirmative action—that it's a remedy for past discrimination—in favor of O'Connor's view that preferences for minorities in university admissions guarantee diverse workplaces and leadership. Without affirmative action, Breyer writes, "too many

individuals of all races would lack experience with a racially diverse educational environment helpful for their later effective participation in today's diverse civil society."

"Well, I was very sorry to see Justice O'Connor leave," Breyer told me in his study in Cambridge. "But life goes on."

The walls in Breyer's chambers at the Supreme Court are lined with hundreds of old books, remnants of a collection that belonged to his late uncle, Leo Roberts, an eccentric philosopher and freelance academic who haunted used-book sales. "He'd get me out there at five in the morning with him, to get first crack at them," Breyer told me. "He rarely spent more than a dollar for a book." On a wall beside the shelves are photographs of three previous occupants of his seat: Felix Frankfurter, Arthur Goldberg, and Harry Blackmun. For many years, it was known as the Court's "Jewish seat" (until it went to Blackmun, a Methodist). "If I could have told my grandfather that I was going to be on the Supreme Court, and I was going to be the second Jewish person on at the same time"—Ginsburg is also Jewish—"he definitely would have said I was lying," Breyer said.

Breyer has cordial relationships with all his colleagues on the Court, including his ideological adversaries. In "Active Liberty," he attacks originalism, asserting that there is no way of knowing precisely what the framers meant by such phrases as "freedom of speech" or "due process of law," much less how they would have applied those terms today. Scalia and Thomas's approach, he concludes, "has a tendency to undermine the Constitution's efforts to create a framework for democratic government—a government that, while protecting basic individual liberties, permits citizens to govern themselves, and to govern themselves effectively."

Yet Breyer sits next to Thomas on the bench, and they often whisper and

laugh together during oral arguments. "Lots of times his colleagues will throw barbs at him in opinions, but he'll never say a bad word about them, in public or private," Neal Katyal says.

Breyer said, "It's a congenial and professional Court. In our conference, there are very contentious issues, and I've never heard a voice raised in anger in eleven years. And I have not heard people make slighting remarks about others, not even as a joke. I remember once, we were having lunch at one point and I said, 'Isn't it interesting, we've just come out of a conference where there were two five-to-four decisions. And the personnel were on different sides. And yet here we are having lunch, a pretty pleasant lunch at a time we are just absolutely at loggerheads.'"

To some extent, Breyer owes his judicial career to his reputation for bipartisanship. Kennedy told me that after he withdrew from the race for the Democratic Presidential nomination, in 1980, he recommended Breyer to President Carter, telling him, "Steve is someone very, very special, and I would like to see him nominated to the First Circuit." After Carter lost to Ronald Reagan, Kennedy pleaded with Strom Thurmond, then the senior Republican on the Judiciary Committee, to allow the Senate to confirm Breyer.

"Kennedy went to Thurmond after Reagan had won the election and asked him to give Breyer a vote," Hatch recalled. "And Strom said, 'No, we won the election.' So Kennedy came to me and said, 'Orrin, can you help me? I'd like to get Steve on the First Circuit.' And I said, 'Sure.' So I went to Strom and I said, 'This man had been a wonderful chief counsel for this committee. He's a member of the family, and we ought to send him through.' And Strom said, 'You think?' He was the last judge confirmed before Carter left office."

Breyer's respect for the political process does not mean that he exempts legislation from judicial scrutiny. He has sided with other liberals in several high-profile civil-liberties controversies, and in these cases he has overruled the decisions of political majorities. In a 2002 dissent in *Zelman v. Simmons-Harris*, he argued that a voucher system established by the state of Ohio to subsidize the education of children, including some in



parochial schools, violated the establishment clause of the First Amendment, because, he wrote, the subsidy to religion invited “social conflict.”

In 2000, in what may be his best-known opinion since joining the Court, Breyer ruled for a five-Justice majority in *Stenberg v. Carhart* that Nebraska’s law banning late-term (or partial-birth) abortions violated the Constitution. “All those who perform abortion procedures using that method must fear prosecution, conviction, and imprisonment,” Breyer wrote. “The result is an undue burden upon a woman’s right to make an abortion decision. We must consequently find the statute unconstitutional.”

So Breyer is a majoritarian—sometimes. “What is mysterious and really unexplained is what is the relationship between his embrace of democracy in his book and the vigorous enforcement, in which Justice Breyer has sometimes enthusiastically participated, of individual rights against majority decisions,” says Charles Fried, a professor at Harvard Law School and a friend of Breyer’s, who was a former Solicitor General in the Reagan Administration and frequently disagrees with his decisions. “It’s not helpful to say that the dominant interpretive principle is to reinforce majority rule when a number of the most controversial constitutional doctrines, like abortion, are exactly designed to limit and counteract majority rule.”

Breyer concedes that a judicial approach based on “active liberty” will not yield solutions to every constitutional debate. “Respecting the democratic process does not mean you abdicate your role of enforcing the limits in the Constitution, whether in the Bill of Rights or in separation of powers,” he said. “We have to decide when these limits are exceeded. People tend to forget that when the limits are not exceeded. Almost everything the government does is within these limits. We have to give guidance. There is no absolute guidance, no absolute rules.”

Nevertheless, the widespread dismay among Republicans that Harriet Miers, President Bush’s choice to replace Sandra Day O’Connor, has not publicly embraced a conservative agenda suggests that there is a desire by some in Bush’s party for absolute rules. In this context, Breyer’s rosy outlook on the future of the

Court could seem naïve. Indeed, his opinion in the partial-birth-abortion case may be one of the first casualties of a new conservative majority on the Court. The five-Justice majority in *Stenberg* included O'Connor; her prospective replacement, Miers, has publicly endorsed anti-abortion positions. A case challenging a new federal ban on partial-birth abortion is almost certain to come before the Justices this term.

"Your opinions are not your children," Breyer told me. "What they are is your best effort in one case. The next one will come along, and you'll do your best. You'll learn from the past. [Justice] Goldberg taught me never to look backward. People ask all the time whether I was sorry that I was in the minority in *Bush v. Gore*. I say, 'Of course I was sorry!' I'm always sorry when I don't have a majority. But, if I started moping about it, I can hear Goldberg saying, 'What are you talking about, feeling sorry for yourself? There's no basis for feeling sorry for yourself. Get down and do it. Keep going. Maybe they didn't agree yesterday. Maybe they'll agree tomorrow.'

"One of the great things about our Court is that there are two rules which I love—not written-down rules, but ways of behaving," he went on. One involves the Justices' conference, at which they discuss their decisions and announce their votes in order of seniority. "The first rule, which I love because it works in my interest, is that nobody at conference speaks twice until everybody has spoken once. Great rule. Helps preserve the peace, and helps keep the junior Justice happy." Breyer's enthusiasm for the Justices' conference is understandable. Here, if nowhere else, his ideal of active liberty—a forum in which individual rights are protected and everyone participates—is realized.

The second rule, he said, is that "tomorrow is another day. No dependency of a decision of one case on another: You join me, I join you. None of that. None of that, zero. The coalitions float. Each one, each case, is a new day. Each day is a new day."

A couple of weeks later, as Breyer escorted me from his chambers, I asked him whether he knew the new Chief Justice, John Roberts. "I don't know him," he said, before adding quickly, "But I know it'll be fine." ♦