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Breyer Rabbit: The Apolitical Justice and the Refusal to Hop Toward Factionalism

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Breyer Rabbit: The Apolitical Justice and the Refusal to Hop Toward Factionalism

By: Jackson Sanders, Staff Editor, Vol. 110



Joel Chandler Harris popularized the fabled figure known in American folklore as Brer Rabbit.[1] The tale likely captured the hearts of the American public due to its pure yet profound message: The smaller side can overcome the stronger and larger opposition.[2]

In the modern day, it seems we have a judicial Brer—or Breyer—Rabbit. But Justice Breyer is not attempting to outsmart Brer Bear as the trickster animal did in the 19th century stories.[3] Instead, his battle is remaining stalwart in his refusal to step down from the Supreme Court despite fervent calls to do so from liberal advocates, law professors, and Democratic members of Congress.[4]

Justice Breyer, now age 83, was appointed to the Supreme Court in 1994 for then President Bill Clinton.[5] The jurist is “liberal” leaning on a now conservatively packed court,[6] which is one probable contributor as to why the left is so ready to get a younger, like-minded individual to replace him sooner rather than later.[7]

The former Eagle Scout[8] has proven his commitment to Democratic issues before, such as in his plurality opinion in *June Medical Services v. Russo* where he voted to strike down a highly restrictive

Louisiana abortion law.[9] And with the death of Justice Ruth Bader Ginsburg, Justice Breyer has taken the lead on a variety of major cases in the Supreme Court’s most recent session ranging from bolstering public school students’ speech rights to awarding Google the “W” in a copyright infringement case brought by Oracle.[10] With his lack of reticence, it seems the Justice is here to stay.

Calls for his retirement began with the flip in the Court from a 5-4 conservative majority to a 6-3 conservative super-majority after the appointment of Justice Barrett.[11] The latter’s rise to the most lauded judicial office followed President Trump’s other conservative additions of Justice Gorsuch and Justice Kavanaugh.[12] Many view this swift placement by Trump with a scoffing disdain, espousing accusations of judicial politicization.[13] Democrats are willing to return the favor in kind, and they might be able to do just that as they hold the presidency and the Senate.[14]

But is this “fight fire with fire” mentality the war cry the left wants to adopt? The Supreme Court has touted its avoidance of wading into the “political thicket” before and explained it would do so but only if the wrong to be righted proved truly dire.[15] It seems many are disregarding this wariness and giving a forceful shove right into the thick of it. What the pushers may not realize are the nuanced implications Justice Breyer’s retirement could incite.

Stephen Breyer is now the senior liberal justice on the Supreme Court.[16] While he has explained he fears a tarnishing of his legacy if a Republican president appoints a justice in his place,[17] his cautiousness is valid. When the nine justices deliberate on how to cast their vote for a particular case, they meet alone in a collective event called a “conference.”[18] Tradition dictates the Chief Justice speaks first, followed by the other justices based on seniority.[19] This means Roberts speaks and casts his vote, followed by Justice Thomas.[20]

Next to the podium is none other than our Breyer Rabbit.[21] He is the first liberal voice heard, and he can set the tone to possibly sway one of the more traditionally conservative justices to cross the aisle.[22] Logically, if Breyer retired, there would be a larger span of time before a leftist justice could engage in persuading those teetering between choices. This pivotal moment is likely lost on those rallying for Breyer’s resignation but could spell a solidification of the conservative bloc. Yes, liberals would gain a younger justice, but the decisions issued might be emblematic of even more entrenched right-wing ideologies.

Ultimately, Breyer has made it clear that his decision of “do I stay or do I go” rests on two factors: his health and the Court.[23] The Supreme Court’s make-up is obviously of a different vein than it once was.[24] But that is how the wheel of times turns, and it will continue to do so long after all nine justices’ names are relegated out of the news and into law school casebooks. There is no “right” decision for Breyer to make. There is only our anticipation as we await the end, timely or untimely as it may be, to this jurisprudential fable.

[1] The Editors of Encyclopedia Britannica, *Brer Rabbit*, Encyclopedia Britannica (Updated Oct. 23, 2014), <https://www.britannica.com/topic/Brer-Rabbit>.

[2] *Id.*

[3] *Id.*

[4] Joan Biskupic, *Stephen Breyer says he hasn’t decided his retirement plans and is happy as the Supreme Court’s top liberal*, CNN (July 15, 2021, 12:01 PM), <https://www.cnn.com/2021/07/15/politics/stephen-breyer-retirement-plans/index.html>.

[5] *Id.*

[6] See Krishnadev Calamur & Nina Totenberg, *Progressives Want Justice Stephen Breyer to Retire. His Response? Not Yet*, NPR (Sept. 9, 2021), <https://www.npr.org/2021/09/09/1035092720/progressives-want-justice-stephen-breyer-to-retire-his-response-not-yet>.

[7] *Id.*

[8] Jennifer L. Lack, *10 Things You Didn’t Know About Stephen Breyer*, U.S. News & World Rep. (Oct. 1, 2007), <https://www.usnews.com/news/national/articles/2007/10/01/10-things-you-didnt-know-about-stephen-breyer>.

[9] *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103 (2020).

[10] Biskupic, *supra* note 4.

[11] *See id.*

[12] Lawrence Hurley, *On guns, abortion and voting rights, Trump leaves lasting mark on U.S. judiciary*, Reuters (Jan. 15, 2021), <https://www.reuters.com/article/us-usa-trump-judges/on-guns-abortion-and-voting-rights-trump-leaves-lasting-mark-on-u-s-judiciary-idUSKBN29K162>.

[13] Steven Lubet, *A politicized Supreme Court? That was the point*, The Hill (Oct. 20, 2021, 8:00 AM), <https://thehill.com/opinion/judiciary/577428-a-politicized-supreme-court-that-was-the-point?rl=1>.

[14] Biskupic, *supra* note 4.

[15] *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

[16] Biskupic, *supra* note 4.

[17] Alison Durkee, *Supreme Court Justice Stephen Breyer Dismisses Retirement Calls, Says Politics Just One of ‘Many Factors*, Forbes (Sept. 12, 2021), <https://www.forbes.com/sites/alisondurkee/2021/09/12/supreme-court-justice-stephen-breyer-dismisses-retirement-calls-says-politics-just-one-of-many-factors/?sh=5ce288cb3e28>.

[18] Biskupic, *supra* note 4.

[19] *Id.*

[20] *Id.*


[21] *Id.*

[22] See *id.*

[23] *Id.*

[24] Lubet, *supra* note 13.

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