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Legal Sidebar

Justice Breyer Retires: Initial Considerations

January 28, 2022

On January 27, 2022, Justice Stephen G. Breyer announced that he would retire from active service as an Associate Justice of the Supreme Court at the end of the Court's current Term, "assuming that by then [his] successor has been nominated and confirmed." This Legal Sidebar provides an overview of key legal issues that Congress (and particularly the Senate, through its advice-and-consent role) may consider as it reflects on Justice Breyer's tenure on the Court and how his successor might shape the Court's future jurisprudence.

The discussion below summarizes Justice Breyer's approach to judging generally before highlighting several areas where Justice Breyer staked out significant legal positions, both through majority opinions and dissents that he authored and through his votes. As the decisions cited below illustrate, Justice Breyer's pragmatic approach has generally led him to prefer standards, which would allow judges to consider all the relevant circumstances, over strict rules. He has frequently taken fact-specific approaches to resolving cases and interpreting statutes by looking to their context and operation.

Nominated to replace Justice Harry Blackmun in 1994, Justice Breyer came to the Court with a broad range of experiences. In the preceding decades, Justice Breyer served in all three branches of the federal government—including as an attorney at the Department of Justice, as Chief Counsel of the Senate Committee on the Judiciary, and as a judge on the U.S. Court of Appeals for the First Circuit. Justice Breyer also had a lengthy academic career, teaching at Harvard Law School and Harvard's Kennedy School of Government. He has authored works on many issues, not always exclusively legal in scope. His various writings on the "administrative state," which explore the legal, political, economic, and behavioral consequences of governmental regulation, proved particularly influential. From that experience, Justice Breyer brought to the Court a keen interest in the practical elements of governance.

Justice Breyer's Approach to Judging

Justice Breyer has written that "[l]aw is tied to life," and that "an overly literal reading of a text can too often stand in the way" of achieving a law's intended benefits. This statement is borne out by his approaches both to constitutional and statutory interpretation.

In his 2005 book, *Active Liberty: Interpreting Our Democratic Constitution*, Justice Breyer outlined the foundation of his constitutional interpretation. He described U.S. constitutional history as "a quest for workable democratic government protective of individual personal liberty." Reflecting his pragmatic attitude toward legal questions, Justice Breyer emphasized that active liberty "operates in the real world,"

and that "institutions and methods of interpretation must be designed in a way such that this form of liberty is sustainable over time and capable of translating the people's will into sound policies." He differentiated this interpretive philosophy from constitutional originalism, which he believed did not serve this conception of active liberty.

In his approach to statutory interpretation, Justice Breyer has been described as "the quintessential Legal Process judge," referring to a relatively holistic, purposive mode of interpretation that "long held sway on the Court." Justice Breyer's legal analysis flows from the premise that Congress consists of "reasonable persons pursuing reasonable purposes reasonably," and his opinions look to Congress's objectives. He has called on the Court to "take account of, and place weight on, why Congress enacted a particular" statutory provision, using whatever tools might reveal that purpose. For example, he favors the use of legislative history to understand a statute's context and purpose. By his own description, this approach contrasts with the textualist mode of interpretation championed by Justice Antonin Scalia, which was ascendant on the Court during Justice Breyer's tenure.

Justice Breyer has also often been described as an institutionalist, in that he has voiced his concern for the Supreme Court's reputation and legitimacy. In a 2021 speech, Justice Breyer rejected the notion that the Court decides cases on political grounds and asserted that the Court's authority rests on "a trust that the court is guided by legal principle, not politics." In *Active Liberty*, he describes the differences between judges as "differences of emphasis," rather than "a radical disagreement about the general nature of the Constitution or its basic objectives." He has also strongly defended stare decisis—the principle that the Court should adhere to its own prior decisions—and he wrote that the Court should have a "special justification" for overruling its precedents.

Justice Breyer's Jurisprudence

During his more than quarter-century on the Supreme Court, Justice Breyer has encountered nearly every major debate within modern American law. While Justice Breyer's influence on the Court's decision is apparent in a wide variety of areas, including on such topics as antitrust and intellectual property, this Sidebar focuses on those issues that have traditionally resulted in a closely divided Court or that may be of particular interest to Congress.

Abortion: During his tenure on the Supreme Court, Justice Breyer has been a consistent opponent of measures that he viewed as unduly restricting abortion access. Justice Breyer authored the lead opinions in *June Medical Services LLC v. Russo* (2020) and *Whole Woman's Health v. Hellerstedt* (2016), in which bare majorities of the Court struck down state laws regulating abortion providers. He also authored the opinion of a five-Justice majority striking down a state law banning late-term abortion in *Stenberg v. Carhart* (2000). In *Whole Woman's Health v. Jackson* (2021), Justice Breyer dissented from the Court's decision not to block a Texas abortion law temporarily from taking effect. He later joined the separate opinions of Chief Justice John Roberts and Justice Sonia Sotomayor arguing that the Texas law effectively nullified the constitutional right to abortion and that challenges to the law should be able to proceed against additional state officials. During the October 2021 Term, Justice Breyer heard oral argument in *Dobbs v. Jackson Women's Health Organization*, a case concerning the constitutionality of pre-viability prohibitions on elective abortions. A decision in *Dobbs* is expected before Justice Breyer's retirement.

Administrative Law: Justice Breyer has generally been deferential to the efforts of administrative agencies to solve the problems that Congress has committed to them. This tendency is most evident in decisions involving the statutory authority of federal agencies. Some Justices have called for the Court to narrow the degree of judicial deference given to agencies' interpretations of the statutes and regulations they administer. In contrast, Justice Breyer wrote for the Court in *Barnhart v. Walton* (2002) that such deference was appropriate even for agency actions less formal than notice-and-comment rulemaking.

Further, he was part of the five-Justice majority in *Kisor v. Wilkie* (2019), which affirmed that courts may defer in many cases to agencies' reasonable constructions of ambiguous regulatory language. Although the Court has sometimes questioned whether it should interpret statutory language to grant agencies broad authority on questions of "economic and political significance," Justice Breyer voted in favor of broad grants of authority to agencies when he believed the statutory text supported that result. For example, he recently voted to uphold the Biden Administration's Coronavirus Disease 2019 (COVID-19) vaccine-related mandates both for health-care facilities (as part of a Court majority) and for large employers (in dissent).

Justice Breyer has been less deferential to federal agencies on questions of administrative procedure, voting in several cases to require agencies to disclose and explain more carefully the basis for their decisions. These cases include *Department of Commerce v. New York* (2019), rejecting the Commerce Secretary's attempt to include a citizenship question on the 2020 census, and *Department of Homeland Security v. Regents of the University of California* (2020), ruling that the government acted improperly when it rescinded the Deferred Action for Childhood Arrivals initiative.

Affirmative Action: The Supreme Court considered several significant cases involving race-conscious policies during Justice Breyer's tenure. Justice Breyer authored or joined a number of opinions arguing that the government has wide latitude to address historical and systemic discrimination against racial minorities. For example, he dissented from the Court's ruling in *Adarand Constructors, Inc. v. Peña* (1995), which held that even "benign" race-based classifications by the federal government intended to help disadvantaged groups are subject to strict scrutiny from courts. Justice Breyer also joined bare majorities to uphold race-conscious school admission policies in *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas at Austin* (2016), although he also voted in *Gratz v. Bollinger* (2003) to hold invalid a policy that did not allow for sufficiently individualized review of applicants. He authored the dissenting opinion on behalf of four Justices in *Parents Involved in Community Schools v. Seattle School District No. 1*, in which a fractured Court invalidated two school districts' plans that sought to improve racial diversity by considering a student's race as a factor in determining which school the child could attend. He also wrote a separate opinion concurring in the Court's judgment in *Schuette v. Coalition to Defend Affirmative Action* (2014), where he concluded that a state constitutional amendment prohibiting preferential treatment on the basis of membership in specific protected classes did not violate the Equal Protection Clause.

Criminal Law & Procedure: Criminal law is an area in which the Supreme Court often does not divide along perceived political lines, and Justice Breyer's jurisprudence reflects that tendency. For instance, in *Mont v. United States* (2019), Justice Breyer joined Justices Sotomayor, Kagan, and Gorsuch in dissenting from the majority's holding that a period of supervised release may be tolled if the defendant is charged with another crime and placed in pretrial detention. And, in *Maryland v. King* (2013), Justice Breyer joined four of the Court's conservative members in holding that states may collect and analyze DNA from people arrested for serious crimes.

Before his elevation to the Supreme Court, Justice Breyer served on the U.S. Sentencing Commission. He dissented from the Court's ruling in *Apprendi v. New Jersey* (2000) that certain criminal-sentence enhancements could be imposed only if they were supported by jury findings. Reflecting his pragmatic approach to the law, Justice Breyer expressed concern that the majority's ruling would impede the fair operation of the criminal justice system as a whole. He also dissented in part in *United States v. Booker* (2005), arguing that judges should be allowed to make sentencing determinations about "the *manner* or *way* in which the offender carried out the crime of which he was convicted." However, he acknowledged (in a separate opinion for the Court in *Booker*) that the Court's sentencing jurisprudence rendered the Federal Sentencing Guidelines "effectively advisory."

Justice Breyer authored a dissenting opinion in *Glossip v. Gross* (2015) arguing that the death penalty was incompatible with the Eighth Amendment's prohibition on cruel and unusual punishment, a position that

he further discussed in a book he published the following year. He joined majority opinions prohibiting the imposition of capital punishment against juvenile offenders and the cognitively disabled. In *Miller v. Alabama* (2012), he joined a majority of the Court in holding that the Eighth Amendment forbids mandatory life without parole sentences for juvenile offenders. In a separate concurrence in *Miller*, Justice Breyer argued that a juvenile homicide offender should only face life without parole if he "kills or intends to kill the victim."

On Fourth Amendment matters, Justice Breyer joined controlling or concurring opinions that recognized technology-assisted surveillance as posing unique threats to privacy expectations. In other cases, however, he authored or joined dissents that would have allowed the government more expansive search and seizure powers.

Elections & Voting Rights: Justice Breyer joined a number of dissents in high-profile cases relating to elections and voting rights, including *Bush v. Gore* (2000), in which the Supreme Court rejected an equal protection challenge related to the 2000 presidential election; *Citizens United v. Federal Election Commission* (2010), in which the Court struck down federal campaign finance laws prohibiting independent expenditures and electioneering communications by corporations and unions; and *Shelby County v. Holder* (2013), in which the Court struck down the coverage formula for preclearance in the Voting Rights Act of 1965 (VRA). In *Alabama Legislative Black Caucus v. Alabama* (2015), Justice Breyer's opinion for the Court established a new standard for judicial review of redistricting decisions by state legislatures. He also joined a bare majority of the Court to hold that a North Carolina redistricting map violated equal protection principles.

Justice Breyer has written of the need for courts to balance carefully the governmental interest of increasing fairness in the electoral debate by limiting campaign contributions against the free speech rights of contributors. He authored the Court's opinion in *Federal Election Commission v. Akins* (1998), holding that Congress broadly defined "political committee" in federal election law and intended to allow groups of voters to sue for certain informational injuries directly related to voting. Similarly, Justice Breyer wrote a concurring opinion that created a majority allowing a VRA claim to proceed in *Morse v. Republican Party of Virginia* (1996). His concurrence looked to the VRA's history to conclude that Congress did not intend to enact a law excluding all suits challenging political party activity.

Environmental Law: Consistent with his general approach to administrative law, Justice Breyer has frequently voted to uphold federal agencies' authority to take action protecting the environment. Where possible, he has favored interpreting statutes to allow agencies the flexibility to consider factors such as regulatory costs and benefits or the relative contributions of multiple causes to a problem. Justice Breyer would have recognized the authority of federal agencies to apply the Clean Water Act to a broad array of waters, an issue that appears set to return to the Court soon after he retires. Most notably, he was one of five Justices in the majority in *Massachusetts v. Environmental Protection Agency* (2007) to hold that EPA has authority under the Clean Air Act to regulate greenhouse gases as an "air pollutant." Justice Breyer—the last Justice from that majority remaining on the Court—is expected to hear a new case about the regulation of greenhouse gases at one of his last Court sessions.

First Amendment: Justice Breyer has played a significant role as a median vote in a few cases involving the First Amendment's Religion Clauses. His opinions in this area reflected his general preference for standards over rules, as he advocated for totality-of-the-circumstances approaches to assess the constitutionality of specific government practices. For instance, in *Van Orden v. Perry* (2005), Justice Breyer provided the fifth vote to reject an Establishment Clause challenge to a Ten Commandments display on the grounds of the Texas State Capitol. A plurality of the Justices argued that the Court should address such monuments with a view to the "Nation's history." Justice Breyer's decisive concurring opinion expressed his belief that there could be "no test-related substitute for the exercise of legal judgment" that looked to all the relevant factual circumstances. Justice Breyer similarly joined a majority of the Court to uphold a World War I monument known as the "Peace Cross" in *American Legion v.*

American Humanist Association (2019), again writing separately to state that there "is no single formula for resolving Establishment Clause challenges." He believes a similar "fact-sensitive" approach should govern in cases evaluating Free Exercise Clause claims, using a narrow analysis that looked only to the circumstances before the Court rather than attempting to make broad pronouncements.

Justice Breyer's pragmatic approach disfavoring rigid tests also prevailed in his separate opinions interpreting the First Amendment's Free Speech Clause. For instance, his concurring opinion in *United States v. Alvarez* (2012), which created a Court majority to rule the federal Stolen Valor Act unconstitutional, eschewed any "strict categorical analysis." Justice Breyer also wrote opinions ruling for the government that emphasized the state's regulatory authority, even in areas with free speech implications. For instance, he wrote a number of separate opinions in which he stated he would have upheld various laws as economic regulations, and would not have applied any heightened level of scrutiny to review otherwise lawful efforts to regulate commercial enterprises. This approach has led him to depart from the majority when the Court appeared to define new, heightened standards for certain categories of speech.

National Security: In recent decades, the Supreme Court has considered numerous cases involving executive branch authority in the areas of immigration and national security. While these cases often closely divided the Court, Justice Breyer has advocated for less deference to executive branch judgments. In *Trump v. Hawaii* (2018), a five-Justice majority afforded broad deference to presidential security determinations in upholding the Trump Administration's "travel ban" barring foreign nationals from certain countries from entering the United States. Justice Breyer dissented, finding evidence that the policy was based on anti-Muslim bias. He also dissented from several Court opinions that effectively foreclosed lawsuits related to counterterrorism policies in the aftermath of the September 11, 2001, terrorist attacks.

With regard to the President's war powers, in *Hamdi v. Rumsfeld* (2004), Justice Breyer joined a majority holding that due process requires a U.S. citizen held in the United States as an enemy combatant to be given a meaningful opportunity to contest the factual basis for his detention. He later joined the Court in *Hamdan v. Rumsfeld* (2006) in ruling that military tribunals established by presidential order to try enemy combatants could not proceed because they provided inadequate procedural protections. Justice Breyer also joined the majority in *Boumediene v. Bush* (2008), which held that the constitutional writ of habeas corpus extended to foreign nationals held as enemy combatants at the Guantanamo Bay detention facility.

Powers of Congress: Justice Breyer has consistently employed a broad conception of congressional authority. That approach left him outside the majority in important cases in which the Rehnquist and Roberts Courts limited the reach of congressional power. Justice Breyer authored dissents in two key decisions of the Rehnquist Court that established parameters on the exercise of Congress's commerce power: *United States v. Lopez* (1995) and *United States v. Morrison* (2000). He dissented from the Roberts Court's holding that the Affordable Care Act was not supported by the Commerce Clause in *National Federation of Independent Business v. Sebelius* (2012). He likewise dissented in two major decisions that limited Congress's powers under the Reconstruction-era amendments, *City of Boerne v. Flores* (1997) and *Shelby County v. Holder* (2013). In *Printz v. United States* (1997), Justice Breyer also dissented from a Court ruling that barred congressional directives to state executive officials.

Justice Breyer has also applied this broad conception of legislative authority to cases at the intersection of Congress's powers and executive-branch appointments. Justice Breyer dissented in several narrowly divided cases where the Court recognized constitutional limits to Congress's ability to shield certain executive officials from at-will removal by the President or a superior officer, including in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* (2010). In his *Free Enterprise Fund* dissent, Justice Breyer explained at length how the Court's holding would "disrupt severely the fair and efficient administration of the laws." A similar pragmatic attitude is evident in his opinion for the Court in *National Labor Relations Board v. Noel Canning* (2014), holding that the President has the power to

make executive appointments during an intra-session recess of Congress, but only when that recess is "of substantial length."

Justice Breyer appears to be less deferential to Congress when he believes a law infringes upon the constitutional rights of individuals. For example, in the immigration field—where congressional power is substantial—Justice Breyer authored the majority opinion in *Zadvydas v. Davis* (2001), where a closely divided Court recognized that substantive due process considerations prevent immigration authorities from indefinitely detaining a deportable alien.

Second Amendment: In *District of Columbia v. Heller* (2008), the Supreme Court held that a law prohibiting the possession of handguns in the home violated the Second Amendment. Justice Breyer authored a dissent arguing that "the Second Amendment protects militia-related, not self-defense-related, interests," and that the law at issue fell "within the zone that the Second Amendment leaves open to regulation by legislatures." He also authored a dissent two years later in *McDonald v. City of Chicago* (2010), where the Court held that the Second Amendment applies to state and local governments through the Fourteenth Amendment.

Nomination and Confirmation Process

As Justice Byron White once noted, "every time a new justice comes to the Supreme Court, it's a different court." In recent years, the composition of the Supreme Court has changed significantly: Justice Breyer's retirement will cause the fourth vacancy in the past five years. The previous vacancy, caused by the death of Justice Ruth Bader Ginsburg in September 2020, resulted in the confirmation of Justice Amy Coney Barrett to fill the seat the following month.

It is difficult to predict how any nominee to replace Justice Breyer might change how the Court decides future cases. Following Justice Barrett's confirmation, some commentators predicted that many Supreme Court cases would be decided by 6-3 votes, with the three Justices nominated by Democratic presidents in dissent. In practice, however, the Court has not consistently split along perceived partisan lines. During the October 2020 Term, the most common outcome was for the Justices to reach a decision unanimously; less than a quarter of cases were divided 6-3 or 5-3. In cases where the Court divided, Justice Breyer was in the majority 58% of the time, which was slightly less often than in prior years.

As with past vacancies on the Court, forthcoming CRS products will examine the vacancy created by Justice Breyer's retirement and provide information about any nominee to fill his seat. CRS has also published products reviewing procedural issues caused by vacancies and products related to congressional hearings on judicial nominees, including the selection and the questioning of nominees.

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