Respect for Deference and Consequences: The Jurisprudence of Justice Stephen Breyer

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Introduction

The judicial career of United States Supreme Court Justice Stephen Breyer is marked by a philosophy of judicial pragmatism, as well as a desire for the Court to extend more deference to the legislative branch. Justice Breyer consistently examines the real-life consequences of any decision offered by the Court, and he places those consequences at the forefront of his thought process toward arriving at an opinion in any given case. His majority opinions, concurrences, and dissents appear to consistently display a concern not only for the litigants involved in the case before the Court, but for similarly situated citizens whose lives will be directly impacted by the decisions of the Court. The roles that justice Breyer has played before joining the Supreme Court are somewhat informative of his judicial philosophy, particularly in the area of deference to Congress and his desire not to interfere with a strong administrative branch without a clear constitutional violation. Perhaps his experience in all three branches of government has given Justice Breyer a unique perspective on the relationship among the branches, a relationship he discusses in his books. Perhaps a desire to get things done without unnecessary interference from the other branches may be partly driving his more pragmatic approach to judging any case.

Justice Breyer was born in San Francisco in 1938.\(^1\) He attended Stanford University and Oxford University, prior to law school, graduating from both institutions with honors and distinction.\(^2\) He attended Harvard Law School, and went on to serve as a law clerk to Justice

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\(^2\) Id.
Arthur Goldberg of the United States Supreme Court. Justice Breyer is married to Joanna Hare, and they have three children, Chloe, Nell, and Michael.

Justice Breyer’s career prior to sitting on the bench may have played a role, I believe, on his judicial philosophy. He served as a Special Assistant to the Assistant U.S. Attorney General for Antitrust from 1965-1967. He was also an Assistant Special Prosecutor for the Watergate Special Prosecution Force in 1973, Special Counsel to the U.S. Senate Judiciary Committee from 1974-1975, and Chief Counsel to the Judiciary committee from 1979-1980. These positions in both the legislative and executive branches provided Breyer with a unique experience across all branches of government that many other Justices do not possess.

Throughout his career, until joining the bench, Justice Breyer served as a law professor at Harvard Law School, most notably teaching courses in Administrative Law, as well as teaching at Harvard’s undergraduate school and universities overseas. President Carter nominated Breyer to the 1st Circuit Court of Appeals in 1980, where he served as Chief Judge from 1990-1994, and President Clinton nominated him to the U.S. Supreme Court in 1994.

Justice Breyer describes his own judicial philosophy, derived from the judges and scholars that he most admires, as focused on judicial restraint and an awareness of the consequences of any particular decision. In quoting political philosopher Benjamin Constant’s argument for “judicial modesty,” Breyer states “The judge, compared to the legislator, lacks relevant expertise. The ‘people’ must develop the ‘political experience’ and they must obtain the

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4 Id.
5 Id.
6 Id.
8 Id.
moral education and stimulus that come from...correcting their own errors.”⁹ In citing to Justice Brandeis, “…a judge’s ‘agreement or disagreement’ about the wisdom of a law ‘has nothing to do with the right of a majority to embody their opinions in law.’”¹⁰ He is clearly more comfortable with the view of the judiciary as embodying a limited role compared to that of the legislature, as the legislature is more capable of developing that “political experience” based on the will of the people.

Breyer also cites, through his own writings, the importance of consequences in any judicial decision. Quoting Judge Learned Hand, Breyer writes, “[s]ince law in connected to life, judges, in applying a text in light of its purpose, should look to consequences, including ‘contemporary conditions, social, industrial, and political, of the community to be affected.’ And since ‘the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded.’”¹¹ Above all, Breyer believes the Court must serve a “pragmatic approach to interpreting the law.”¹² The Court must examine real-world consequences, respect the other branches of government, and build a better relationship with the other branches of government.¹³

The following cases embody, in my view, Justice Breyer’s judicial philosophy in one way or another. We see the Justice striving to convince the Court, and the public, that judges have a limited role to play with respect to the actions of Congress, i.e. the people. We also see Breyer pushing us to refrain from examining a case as a hypothetical story that only needs an

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¹⁰ Id at 17
¹¹ Id at 18
¹³ Id.
application of rigid rules, but to recognize that each case has real people in the background, whether litigants or not, with real impact on their day-to-day lives.


Justice Breyer calls for a pragmatic approach for implementing certain aspects of the Americans with Disabilities Act ("ADA")\textsuperscript{14} in his majority opinion for \textit{U.S. Airways Inc., v. Barnett.}\textsuperscript{15}

Barnett, the Plaintiff, injured his back as an employee at the airline unloading cargo.\textsuperscript{16} He requested a transfer to the mailroom as a "reasonable accommodation" under the ADA statute.\textsuperscript{17} But there was also a seniority system in place at the airline that would allow two other employees to secure the mailroom position before Barnett.\textsuperscript{18} The airline did not give Barnett an exception to the seniority system, and he ultimately lost his job.\textsuperscript{19} Barnett claimed, under the ADA, that the airline discriminated against him by failing to provide the reasonable accommodation of granting him the mailroom position.\textsuperscript{20} The District Court granted summary judgment to the airline because the ADA does not require the employer to submit to an accommodation if it will impose "undue hardship on the operations of the employer's business."\textsuperscript{21} However, the 9th circuit reversed, and held that merely having a long established seniority system in place does not automatically establish that the airline would suffer undue hardship, with permission to prevent the accommodation.\textsuperscript{22} Rather, the 9th circuit called for a more case-by-case analysis.\textsuperscript{23} Here, Justice Breyer and the Court are deciding whether the ADA

\textsuperscript{14} 42 U.S.C. §12101 et seq.
\textsuperscript{15} 535 U.S. 391 (2002).
\textsuperscript{16} Id at 394.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 395.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
requires to airline to ignore its seniority system in favor of an accommodation for a disabled employee.\textsuperscript{24}

By first highlighting the extreme positions of both parties, Justice Breyer signals his desire for a middle-ground approach. Barnett claims that the presence of a seniority system is never good enough to establish undue hardship to the employer,\textsuperscript{25} while the airline argues that the mere existence of a seniority system that might be disrupted is all that an employer needs to show the requisite hardship and avoid the accommodation.\textsuperscript{26} The airline says the ADA was never meant to provide “preferences”, only “equality.”\textsuperscript{27} But Justice Breyer says the statute naturally will involve some preferences in order to create equality.\textsuperscript{28} Any reasonable accommodation will be preferential treatment to a degree, otherwise “the reasonable accommodation could not accomplish its intended objective.”\textsuperscript{29}

Justice Breyer makes it a point not to dismiss or minimize the right of every employer to impose “neutral rules,” such as seniority systems, and have those rules respected.\textsuperscript{30} He does not feel that Congress intended seniority systems to be undermined by “complex case-specific accommodations”, and perhaps a violation of a seniority system is sufficient to defeat the accommodation.\textsuperscript{31} After all, there is an expectation on the part of other employees to be able to take advantage of the seniority system.\textsuperscript{32} With that argument, we see Justice Breyer concerned with how a broad ruling in favor of accommodations at the expense of seniority systems will

\textsuperscript{24} Id. at 396.
\textsuperscript{25} Id. at 400.
\textsuperscript{26} Id. at 397.
\textsuperscript{27} Id. at 397.
\textsuperscript{28} Id. at 397.
\textsuperscript{29} Id. at 397.
\textsuperscript{30} Id. at 404.
\textsuperscript{31} Id. at 404-405.
\textsuperscript{32} Id.
impact a great number of employees across the country, who are not involved in this case. At the same time, he allows an opening for Barnett to prove that “special circumstances” exist which show that this particular employer, U.S. Airways, had taken steps in the past to alter its seniority system, thereby lessening the overall employee expectation of strict adherence to the seniority system.33 Justice Breyer demonstrates his philosophy that the realities which exist at a particular place of employment should not be ignored in favor of black-letter rules for every place of employment.

II. Cherokee Nation v. Leavitt

Justice Breyer refuses to adjust the basic expectations of contracting parties, even if one of those parties is the United States Government, when he writes the opinion for a unanimous Court in Cherokee Nation v. Leavitt.34 Under the Indian Self Determination and Education Assistance Act,35 Indian Tribes and the U.S. Government may enter into contracts where the tribe will provide services that the government would otherwise provide.36 In this case, a Tribe agreed to provide health services to its people that a government agency would ordinarily provide, and the government agreed to pay administrative expenses and “contract support costs.”37 The Government then refused to pay the contract support costs because it said Congress did not appropriate sufficient funds.38

While Justice Breyer’s pre-judicial background, such as working in both the executive and legislative branches, has often provided him with a strong desire to defer to Congress and administrative agencies, the fundamental principles of contract performance prevail in this

32 Id. at 405-406.
33 543 U.S. at 634.
34 543 U.S. at 635.
35 Id. at 635.
36 Id.
37 Id. at 405-406.
decision. He does not allow the Government to establish “special circumstances” that would enable its legal departure from the terms of its contracts.

The Government argues that a Tribe “steps into the shoes” of government agency during the contractual process under this statute, and as such, government agencies know that funding for such contracts is always subject to congressional appropriations.39 There is some statutory language that lends some support to the Government’s argument, in that such contracts between government agencies are not considered “procurement contracts.”40 But Justice Breyer does not buy into the Government’s argument. He points out that the Act uses the word “contract” 426 times to define the relationship between the Government and Indian Tribes in these situations, and “contracts” generally mean “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” 41

Justice Breyer then proceeds to dismiss a number of the Government’s arguments one by one. The Government argues the Act does not require Health and Human Services (HHS) to reduce funding for one program to provide funding to another tribe. But an alternative need for funds, as Breyer points out, cannot rescue the government from its promises in a procurement contract, and the Court doesn’t find anything special about the promises here.42 The statutory language that funds are “subject to availability” doesn’t help the government either.43 Such language is often used in government contracts to indicate to a contracting party that Congress has not yet fully appropriated the necessary funds. 44 But here, Congress already appropriated

39 Id. at 638.
40 Id.
41 Id. at 639; citing Restatement (Second) of Contracts §1 (1979).
42 Id. at 642.
43 Id. at 643.
44 Id.
adequate unrestricted funds to HHS, and therefore availability is not a problem.\textsuperscript{45} The Government further claims that Congress appropriated a total amount to be spent on Indian Health Services “contract support costs” from 1994 through 1998, but those funds were spent long before 1998. Breyer responds that a statute cannot “retroactively repudiate the Government’s contractual obligations” without violating the constitution.\textsuperscript{46}

In each instance of Breyer’s rejection of the Government’s “special circumstances” for failing to uphold their responsibilities under the contracts, he points both to the reality that the necessary funds do exist under the control of HHS, and, more importantly, that a contracting party, in this case an Indian Tribe, should not be retroactively penalized just because the other contracting party (the Government) feels that it no longer has the money for that contract. This case involves some complicated analysis of the relevant statute, but I feel that at the heart of Justice Breyer’s decision is a more basic policy in favor of upholding the performance of contracts, and a concern about the consequences of failing to do so.

\textit{III. Gray v. Maryland}

In \textit{Gray v. Maryland},\textsuperscript{47} Justice Breyer writes a majority opinion that applies a sense of reality and practical consequences which accompany a criminal defendant’s Sixth Amendment confrontation rights. \textit{Bruton v. United States}\textsuperscript{48} established that, where two co-defendants are tried jointly, a confession made by one of those defendants cannot be used as admissible evidence against the non-confessing co-defendant. Justice Breyer and the majority extend this rule in \textit{Gray}\textsuperscript{49}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 645-646.
\item \textsuperscript{47} 523 U.S. 185 (1998)
\item \textsuperscript{48} 391 U.S. 123 (1968)
\end{itemize}
\end{footnotesize}
to account for the practical difficulty in sometimes eliminating one co-defendant from the
reading of a confession during trial.

Defendants Bell and Gray were tried jointly for a murder where Bell had confessed. 49
The police officer who read the confession into evidence used the word “deletion” whenever
Gray’s name was mentioned. 50 The judge instructed the jury that the confession was to be used
only against Bell, but Gray was ultimately convicted also. 51

Justice Breyer aims to be mindful of precedent. There was a case since Bruton,
Richardson v. Marsh, 52 where portions of a co-defendant’s confession were redacted to eliminate
any mention of the other co-defendant’s involvement in the crime. 53 The Court in Marsh
narrowed Bruton to allow admission of the evidence, because in Marsh the jury needed to link
several pieces of evidence for the confession to incriminate the defendant, and the redaction
eliminated ANY reference. 54 But the court in Marsh expressly said they had no opinion about
what to do if a word or symbol was placed to redact the codefendant’s name. 55

Justice Breyer maintains respect for the precedent in Marsh, but distinguishes that the
confession in Gray still refers the jury to the existence of another person in Bell’s confession. 56
Breyer takes a very common sense approach, with the anticipated thoughts of the jury in mind,
and says that to replace Gray’s name with an obvious blank, or symbol, or other word will not
fool anyone on the jury. 57 In Marsh, any reference in the confession to another person was

49 523 U.S. at 188
50 Id.
51 Id. at 189
52 481 U.S. 200 (1987)
53 523 U.S. at 190-191
54 Id. at 191
55 Id.
56 Id. at 192.
57 Id. at 193.
completely redacted, and the jury needed to link the confession to other evidence to realize that
the codefendant might have been named in the confession.\(^{58}\) Here, Breyer holds, the replacement
of Gray’s name in the confession is facially incriminating.\(^{59}\)

Justice Breyer tries to reconcile the constitutional principle embodied in *Bruton* with the
narrowing effect of *Marsh*. In doing so, he establishes that the Sixth Amendment right of
confrontation is clearly paramount here, and in order to truly protect the defendant in that regard,
we have to consider the real world consequence of having a jury listen to a police officer read the
confession of one of the defendants, who clearly identifies a fellow perpetrator (even if the
officer replaces that person’s name with “deletion”), at which point the jury will look to the
counsel table and see two defendants. Again, Justice Breyer is looking to uphold *Bruton* in a
practical way that makes sense when applying the *Bruton* doctrine to an actual jury deliberation.

Breyer also, consistent with his pragmatic approach, appears to provide prosecutors with
reasons that this broadening of *Bruton* will not negatively impact their cases. He points out that it
is not difficult for a prosecutor to redact *without* the use of symbols or replacement words.\(^{60}\)
There is no risk of mistrials, or abandoning confessions, if these redactions are conducted
properly, and many circuits have been acting in this manner under *Bruton* for years.\(^{61}\)

**IV. Gonzales v. Duenas-Alvarez**

Justice Breyer authors the majority opinion in *Gonzales v. Duenas-Alvarez*.\(^{62}\) I feel that
his pragmatism again shines through in this case in his efforts to prevent aiders and abetters of
criminal activity from arguing that they possess a lesser liability. While this case deals directly

\(^{58}\) *Id.* at 195-196.
\(^{59}\) *Id.* at 196.
\(^{60}\) *Id.* at 196.
\(^{61}\) *Id.* at 196.
\(^{62}\) 549 U.S. 183 (2007)
with the interaction between a state theft statute and a federal immigration statute, it also appears that Justice Breyer is thinking more broadly to prevent Supreme Court precedent from providing any erosion in accomplice liability.

The Immigration and Nationality Act lists several offenses, including “theft offenses,” which subjects certain aliens to removal from the United States. The Defendant in this case, a permanent resident alien, was convicted in California of a vehicle theft, under a California statute that holds accomplices guilty in the same manner as the person actually responsible for the theft. The federal government viewed this crime and conviction as a “generic theft offense,” and moved for removal proceedings consistent with the Immigration Act. A federal immigration judge agreed that this crime was a “generic theft offense” contemplated by the statute, and began removal proceedings. The Court is asked to decide “whether one who aids or abets a theft falls, like a principal, within the scope of this generic definition.” Breyer and the majority conclude that aiders and abetters do fall within the definition of generic theft.

Justice Breyer looks at the treatment of accomplice liability across jurisdictions, likely to highlight the universally accepted principle that an accomplice is also liable for a theft. This is so because of the “natural and probable consequences doctrine,” that exists in most jurisdictions, which holds an accomplice liable not only for the crimes that he and his cohorts intended, but also for the crimes that “naturally and probably result from his intended crime.” Breyer places

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63 8 U.S.C. 1101 et seq.
64 549 U.S. at 185-186.
65 id. at 187.
66 id. at 188.
67 id.
68 id.
69 id.
70 id. at 189-190.
71 id. at 190-191.
the onus on the Defendant to show that California’s treatment of aiders and abettors criminalizes conduct that most other states would not consider theft. 72 The Defendant here argues that California’s version of the natural and probable consequences doctrine makes him “criminally liable for conduct he did not intend, not even as a known or almost certain by product of the Defendant’s intentional acts.” 73 But Breyer makes the point that California law is not as strict as Defendant sees it, and it only convicts people of aiding and abetting who share the purpose/intent of the perpetrator. 74 Breyer cites other California decisions where the aider has at least foreseeable knowledge that the crime could be committed when he helped in some way. 75 The Defendant needs to point to specific cases where the State of California convicted people of aiding and abetting in a way that falls outside the generic way in which that is normally done, and the Defendant had not accomplished that goal here. 76

Justice Breyer would have been willing to accept Defendant’s argument upon a showing that California had been convicting accomplices in a radical way. He specifically asks the Defendant to show California’s departure from typical accomplice liability, and then rejects the Defendant’s attempt to pose hypothetical scenarios to the Court to show that California would convict accomplices no matter their intent. I think Breyer’s approach here indicates not only his respect for precedent across jurisdictions, unless some special circumstance applies, but also a preservation of an important staple of substantive criminal law, that accomplices should be subject to the same liability as the principal actor. A contradictory opinion in this case, even

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72 Id. at 191.
73 Id.
74 Id.
75 Id. at 192-193.
76 Id.
77 Id.
though dealing with a more narrow issue of immigration removal, could have had an eroding effect on accomplice liability, and I think Justice Breyer is aware and mindful of that concern.

V. U.S. v. Lopez

There is perhaps no clearer example of Justice Breyer’s pragmatic focus on the realities of the world, in his view, and the consequences of the Court’s decision, than his Dissenting opinion in United States v. Lopez. Breyer thoroughly displays his concern that the majority is not looking down the road at what a declaration of unconstitutionality of the Gun Free School Zone Act will have on children and the economy. In this case, more aggressively than any other Breyer decision I have read, we see the Justice passionately focusing our attention on the realities of life outside of the Court, the statute, and precedent, and driving home a basic idea that a gun in a school building has ripple effects on the lived of children that Congress had every right to consider and take action upon. Whether Breyer’s view is rightly or wrongly contemplated is not the issue for the purpose of this discussion. What is important in Lopez is the myriad of methods he uses to make his point, which all ultimately boil down to the application of practicality.

In 1990, Congress passed the Gun Free School Zone Act, establishing a federal offense “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” A 12th grader was arrested in Texas for carrying a loaded handgun to school. Federal agents charged the young man with a violation of the Gun Free School Zone Act. The Defendant argued that the Act itself was unconstitutional, and the

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79 514 U.S. at 551.
80 Id.
majority agreed, holding that Congress had overstepped its bounds when trying to regulate interstate commerce in this way.\textsuperscript{81} Justice Breyer dissents.

Breyer feels this regulation is well within the power of Congress, as Congress can regulate local activities IF they affect interstate commerce.\textsuperscript{82} To figure out if a local activity affects interstate commerce, Breyer argues, we can’t just look at this one instance of someone carrying a gun on school property, we have to look at what would happen if occurrences like this happened in greater numbers.\textsuperscript{83} The Justice is initially establishing his argument that we have to look at future consequences in order to determine constitutionality. Additionally, in judging the connection between regulation and interstate commerce, we’re supposed to give more deference to Congress to make that connection, as Congress is better suited to accurately investigate such things than the courts.\textsuperscript{84} The main question that Breyer wants to ask is: Could CONGRESS, not the Court, have rationally found a connection between violent schools, quality of education, and impact on interstate commerce?\textsuperscript{85}

Justice Breyer sets out a framework in this dissent that gets to the heart of his judicial philosophy of pragmatism and consequential thinking. He refers to the commerce connection as not a “technical legal connection” but a “practical connection.”\textsuperscript{86} He cites a long series of governmental reports showing gun violence at schools leads to drop outs and decreased academic achievement\textsuperscript{87}, and he goes through a lengthy discussion about global competition and

\textsuperscript{81} ld.
\textsuperscript{82} ld. at 615.
\textsuperscript{83} ld. at 616.
\textsuperscript{84} ld. at 616-617.
\textsuperscript{85} id. at 618.
\textsuperscript{86} id.
\textsuperscript{87} ld. at 619-620
the connection to quality primary and secondary education.\textsuperscript{88} This is the backdrop for Breyer’s conclusion that Congress could have found that since education is so intertwined with the economy, guns in schools become a “commercial problem” as well as a “human problem.”\textsuperscript{89} 

In looking carefully at Breyer’s word choice throughout his dissent, I can’t help but notice how he subtly reminds us of the social consequences of this decision. There is no doubt that he stays on task of arguing the commercial reasons for upholding the Act, because it is those commercial reasons which enforce the commerce clause argument. However, I think Breyer also signals through his dissent, that there are practical real-life reasons to uphold this statute which are non-economic, namely that gun violence is a threat and a danger to children. As cited above, he subtly reminds us that this is a “human problem” not just a “commercial problem.”\textsuperscript{90} When distinguishing gun violence from the other areas of local activity which the majority fears Congress could take over as a result of Breyer’s view, he reminds us that gun violence is “life-threatening” to children, and is therefore special as compared to divorce, child custody or other areas.\textsuperscript{91} These and other references may have been a reminder from Breyer that this issue is not just an exercise in mechanically calculating whether or not the commerce clause has been violated.

In wrapping up his commerce clause argument, Justice Breyer provides an additional slice of common sense. He makes the point that it is perfectly rational for Congress to decide that education falls on the “commercial side of the line.” After all, in 1990, the year the Gun Free School Zone Act was passed, education cost this country $230 billion, and we didn’t pay that

\textsuperscript{88} id. at 621.  
\textsuperscript{89} id. at 620.  
\textsuperscript{90} id.  
\textsuperscript{91} id. at 624
only for social reasons, we paid that to provide skills to future workers to contribute to our economy.\textsuperscript{92}

\textit{VI. Egelhoff v. Egelhoff}

The practical expectation of how families expect their property to be distributed upon death governs Justice Breyer's dissent in \textit{Egelhoff v. Egelhoff}.\textsuperscript{93} Mr. Egelhoff had in place a life insurance policy and pension plan through \textit{ERISA}\textsuperscript{94}, both naming Mrs. Egelhoff as beneficiary.\textsuperscript{95} After the Egelhoffs divorced, Mr. Egelhoff died shortly thereafter without changing the designation of his wife as beneficiary under the \textit{ERISA} plan.\textsuperscript{96} A Washington State statute automatically revokes an ex-spouse from taking non-probate assets, including life insurance policies and employee benefit plans.\textsuperscript{97} But \textit{ERISA}, a federal statute, does not have such a provision.\textsuperscript{98} Justice Thomas and the majority hold that the state statute is preempted by \textit{ERISA}, because it “relates to” a benefit plan covered by \textit{ERISA}, and the court does not want to require the federal government to master the beneficiary laws of 50 individual states.\textsuperscript{99}

Justice Breyer begins his analysis in dissent by concluding that there is no direct conflict between \textit{ERISA} and the state statute.\textsuperscript{100} But the more interesting analysis that he develops is that the majority too quickly concluded a direct conflict. Rather, it is a legitimate open question to Justice Breyer whether \textit{ERISA} forces a decedent to pay a former spouse as beneficiary after divorce.\textsuperscript{101} Justice Breyer focuses on the expectations that a person likely has in these situations.

\textit{\textsuperscript{92}Id. at 629-630.}
\textit{\textsuperscript{93}532 U.S. 141 (2001).}
\textit{\textsuperscript{94}Employee Retirement Income Security Act, 29 U.S.C. §1001 et seq.}
\textit{\textsuperscript{95}532 U.S. at 144.}
\textit{\textsuperscript{96}Id.}
\textit{\textsuperscript{97}Id.}
\textit{\textsuperscript{98}Id.}
\textit{\textsuperscript{99}Id. at 146-152.}
\textit{\textsuperscript{100}Id. at 154.}
\textit{\textsuperscript{101}Id. at 156.}
He claims that the state statute at issue here does not obstruct ERISA’s purpose, but rather the statute assists with carrying out ERISA’s objective of protecting employee benefits. Breyer looks at the reality that divorced workers likely prefer their children, not their ex-spouses, to receive their assets. Breyer further points out, that not everyone is going to have the sophistication to proactively change their beneficiary upon divorce, and we should have some respect for their expectations even if they failed to follow through with the correct procedure. He refers to this as “consistent with human experience.”

Finally, on the majority’s point that federal officials should not have to master state statutes to administer ERISA, Breyer again proposes that the Court look at the reality of the situation before making such an assertion. Federal administrators must learn state laws to answer routine questions for citizens across the country. Respecting state statutes like these does not put administrators in a difficult position of deciding choice of law questions, they will simply look to state law to administer the plan. And, if the federal government does not like that approach, Breyer continues, Congress can change the ERISA law to create uniformity in this area, and the ERISA documents can reflect that change to make it easier for everyone.

Breyer’s attempt to direct Congress and the federal administrators toward implementing policies to resolve this issue, instead of pre-empting state law through the Court, may reflect Breyer’s background as a Senate lawyer and Justice Department lawyer. He clearly favors resolving conflicts such as this through the democratic-legislative process.

102 id. at 158.
103 id. at 158-159.
104 id. at 159.
105 id.
106 id. at 157.
107 id. at 158.
108 id. at 158.
VII. Bush v. Gore

In *Bush v. Gore*\(^{109}\), the majority halted the recount of Florida’s presidential election ballots in 2000 because Equal Protection mandated, in the Court’s view, that all ballots receive a recount, not just a selection of ballots, and that such a recount should be conducted with uniform standards across the state.\(^{110}\) Justice Breyer agrees that uniform standards of conducting a recount would have been wise\(^{111}\), but his disagreement with the remedy of halting the recount altogether, as he describes in part of his dissenting opinion\(^{112}\), is instructive as to Breyer’s view of the Court’s role in the context of the circumstances.

Breyer would have preferred remanding the case back to the Florida Supreme Court, with instructions to recount ALL undercounted votes, even if they were already recounted, under one standard.\(^{113}\) He takes issue with the majority’s argument that there is insufficient time to conduct another recount.\(^{114}\) Specifically, Breyer argues that the Court does not have enough evidence to know whether or not time permits an additional recount, such a decision should be made by the state of Florida, as state courts are better equipped to make such a determination.\(^{115}\)

Again, we see Justice Breyer worried about consequences, and attempting to point out how un-pragmatic the majority remedy is. The Court is trying to protect fairness, and yet refuses, in Breyer’s view, to implement the only fair remedy left, a statewide manual recount.\(^{116}\) Breyer interestingly points out the already built in disparity between counties that have optical scan

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\(^{109}\) 531 U.S. 98 (2000)

\(^{110}\) *id.* at 145.

\(^{111}\) *id.* at 146.

\(^{112}\) Justice Breyer’s dissenting opinion contains several areas of analysis. I have focused my attention on his dissenting argument regarding the majority’s remedy to halt the recount altogether.

\(^{113}\) *id.*

\(^{114}\) *id.*

\(^{115}\) *id.* at 146-147.

\(^{116}\) *id.*
machines and counties that have punch card ballots.\textsuperscript{117} It does not make sense to him that the majority adds a layer to that inequality by prohibiting the state from conducting another recount, particularly when the Florida Supreme Court has already drafted an order to address this inequity.\textsuperscript{118}

\textit{VIII. Bd. of Educ. v. Earls}

In \textit{Bd. of Educ. v. Earls}\textsuperscript{119}, the Court took on the constitutional issue of required drug testing of high school students. Specifically the Court focused on whether such an intrusion would violate a student’s right to privacy.\textsuperscript{120} A school district in rural Oklahoma mandated that any high school student involved in “competitive extracurricular activities” would be subject to drug testing, even without suspicion of drug use.\textsuperscript{121} Several parents filed suit under 42 U.S.C. §1983.\textsuperscript{122} The Court, with Justice Thomas writing for the majority, ultimately held that this policy was not a violation of the Fourth Amendment, as incorporated by the Fourteenth Amendment, because: (1) schools have a custodial responsibility to maintain “discipline, health, and safety” which required a limitation of a student’s privacy rights,\textsuperscript{123} (2) students who participate in athletic or non-athletic activities have a lesser expectation of privacy because of “off campus travel and communal undress,”\textsuperscript{124} (3) the nature of obtaining the urine sample was not overly intrusive in this case,\textsuperscript{125} and (4) due to the epidemic nature of drug use the Court does

\textsuperscript{117} \textit{id.}
\textsuperscript{118} \textit{id.}
\textsuperscript{119} \textit{536 U.S. 822 (2002)}
\textsuperscript{120} \textit{id.}
\textsuperscript{121} \textit{id. at 826.}
\textsuperscript{122} \textit{id. at 827.}
\textsuperscript{123} \textit{id. at 830-831.}
\textsuperscript{124} \textit{id. at 832.}
\textsuperscript{125} \textit{id. at 832-833.}
not require a threshold need for the school district to prove a specific drug problem among these students in order to require drug testing without suspicion.\(^{126}\)

Justice Breyer actually joins with the conservative majority of the Rehnquist Court in this case, and writes a concurring opinion.\(^{127}\) He tries to further highlight why the majority opinion was decided correctly. He focuses first on the seriousness of drug use among children, highlighting several government reports showing sobering data regarding adolescent drug use.\(^{128}\) He also touches upon the reality that public schools are expected to do more than simply teach; school districts are expected to take on a greater role in everything from feeding students during the day to providing “medical and psychological services.”\(^{129}\) Breyer feels that these factual realities regarding the supervisory (somewhat parental) role that school systems play has an impact on a child’s expectation of privacy.\(^{130}\) He even goes as far as to suggest that if school districts don’t fulfill that role properly, parents will react by removing their kids from public schools, with assistance from the government, impacting the funding of public schools (essentially raising a school vouchers argument in this context).\(^{131}\)

Breyer also makes a very practical argument, consistent with his jurisprudence, regarding the effect of this policy on peer pressure.\(^{132}\) He argues that a school system which provides for this type of drug testing policy allows students an excuse to resist pressures of taking drugs from their friends.\(^{133}\) Breyer explains that a student could use the existence of a drug testing policy to decline taking drugs because he wants to try out for a sports team or some non-athletic school

\(^{126}\) *Id.* at 835-837.
\(^{127}\) *Id.* at 838.
\(^{128}\) *Id.* at 839.
\(^{129}\) *Id.* at 840.
\(^{130}\) *Id.*
\(^{131}\) *Id.*
\(^{132}\) *Id.* at 840-841.
\(^{133}\) *Id.*
activity.\textsuperscript{134} Whether Breyer is correct in his assumptions about teenage behavior is unclear. However, he once again displays his judicial philosophy of trying to examine the real life circumstances in which the Court’s decision will exist. He is imagining what effect this drug testing policy will have in the hallways and locker rooms in this high school, or any high school, and focusing his opinion on such realities.

Breyer also displays his desire, in this concurrence, residents of this Oklahoma community to engage in the democratic process around this issue of drug testing. Specifically, Justice Breyer recognizes the concern and embarrassment of many students with having to provide a urine sample while a teacher waits outside the restroom, listening to make sure the student provides the sample himself.\textsuperscript{135} Breyer encourages the community to engage in public meetings, to allow the residents to “participate in developing the drug policy.”\textsuperscript{136}

\textit{IX. Apprendi v. New Jersey}

Justice Breyer again calls for practicality in dealing with the constitutionality of a New Jersey hate crimes statute in his dissenting opinion in \textit{Apprendi v. New Jersey}.\textsuperscript{137} The Defendant was arrested for firing a weapon “into the home of an African-American family.”\textsuperscript{138} He confessed, but then later retracted, that he did so because the family was African-American.\textsuperscript{139} The Defendant pled guilty.\textsuperscript{140} Offenses such as this carry an enhanced sentence if they are found to have occurred with “biased purposes” under \textit{NJ.S.A. 2C:44-3(e)}.\textsuperscript{141} After entrance of the guilty plea, the judge concluded, by preponderance of the evidence that the crime was committed

\textsuperscript{134} \textit{id.}
\textsuperscript{135} \textit{id. at 841.}
\textsuperscript{136} \textit{id.}
\textsuperscript{137} 530 U.S. 466 (2000).
\textsuperscript{138} \textit{id. at 469.}
\textsuperscript{139} \textit{id.}
\textsuperscript{140} \textit{id. at 469-470.}
\textsuperscript{141} \textit{id. at 470.}
with biased purposes, and increased the sentence accordingly. Defendant’s appeal argues that the Due Process Clause of the U.S. Constitution was violated because the question of bias should have been presented to a jury, with the appropriate “beyond a reasonable doubt” standard. Justice Stevens writing for the majority, finds for the Defendant that the actions of the New Jersey courts in this case violated Due Process because a fact that increases a sentence above the statutory maximum must be presented to a jury for fact finding beyond a reasonable doubt.

Justice Breyer’s dissent describes the majority opinion as striving for an ideal that cannot be achieved in the modern criminal justice system. He feels the idea of requiring a jury to examine sentencing in the way the majority suggests is so impractical that the Constitution cannot be read to envision such a process.

Breyer highlights the merits of requiring judges instead of juries to impose sentencing, within the sentencing guidelines made available by legislatures. He says “it is important to realize that the reason is not a theoretical one, but a practical one.” He shows great respect for the U.S. Sentencing guidelines, pointing out that the guidelines make note that a sentencing system cannot be implemented to reflect every “conceivable wrinkle of each case,” as such would be unworkable. Equally unworkable, according to Breyer, would be to require a jury to go through that exercise.

\[142\text{Id. at } 471.\]
\[143\text{Id.}\]
\[144\text{Id. at } 497.\]
\[145\text{Id. at } 555.\]
\[146\text{Id.}\]
\[147\text{Id. at } 556.\]
\[148\text{Id.}\]
\[149\text{Id. at } 557\]
\[150\text{Id.}\]
Justice Breyer argues that there was a time when there existed too much judicial discretion regarding sentencing, but the Legislature has already taken action to remedy that problem.\textsuperscript{151} Specifically, legislatures have "directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline."\textsuperscript{152} He is unable to understand why the majority would find a violation of the constitution when the legislatures have provided the guidelines, but conversely the Court did not find a violation in the past when judges acted without limitations set by the legislatures.\textsuperscript{153} Further, the Court has no problem with Congress enacting guidelines for judges in terms of sentencing, and Breyer is confused as to why the Court has a problem with a statute that imposes an increased sentence upon the finding of certain circumstances, such as bias.\textsuperscript{154} While this case sets out, in the majority opinion, to deal with the theoretical question about the role of a judge versus the role of a jury, I think Breyer's dissent focuses our attention on a more practical question regarding how far a legislature can go to guide and/or direct judges in terms of sentencing. Breyer's opinion, again, embodies his desires for practicality as well as a deference to the legislative branch.

\textit{X. Morse v. Frederick}

Justice Breyer weighs into the complex issue of a high school student's right to free speech, concurring in part and dissenting in part, in \textit{Morse v. Frederick}.\textsuperscript{155} At a school sanctioned event, across the street from the local high school, a high school student displayed a

\textsuperscript{151} \textit{id.} at 560.
\textsuperscript{152} \textit{id.}
\textsuperscript{153} \textit{id.} at 561.
\textsuperscript{154} \textit{id.}
\textsuperscript{155} 551 U.S. 393 (2007)
banner reading “BONG HiTS 4 JESUS.” The school principal confiscated the banner and suspended the student for 10 days. The student filed an action under 42 U.S.C. §1983 claiming his First Amendment Rights had been violated. The Court, with the majority opinion written by Chief Justice Roberts, finds that the banner advocated illegal drug use. The Court cites earlier precedent that a student’s First Amendment rights may be suppressed if there is a reasonable conclusion that his expression will “materially and substantially disrupt the work and discipline of the school.” The constitutional rights of public school children are not automatically an extension of the rights of adults in other settings. The Court does not go so far as to restrict this student’s speech because it is offensive. But the Court is willing to restrict this student’s speech because it advocates illegal drug use, and the school has a responsibility to prevent the dangers of illegal drug use.

Justice Breyer interestingly urges the Court not to get involved in whether or not the First Amendment has been violated in this case, and instead would have reached the same ultimate result by concluding that “qualified immunity bars the student's claim for monetary damages” and leaving alone the precedent setting constitutional issue. He is concerned that the Court may have now permitted school officials to restrict student expression in a way that goes too far. Breyer worries that the reality of conversations or other forms of expressions among high school students might, at times, revolve around illegal substances, and perhaps the Court has

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156 Id. at 397.
157 Id. at 398.
158 Id. at 399.
159 Id. at 402.
160 Id. at 403.
161 Id. at 404-405.
162 Id. at 409.
163 Id. at 410.
164 Id. at 425.
165 Id. at 426.
now granted schools the ability to suppress any kind of speech of that nature, even if innocently made without the intent of encouraging drug use.\textsuperscript{166} Again we see Justice Breyer envisioning the real life impact on every day high school students.

Breyer also makes a kind of “slippery slope” argument in terms of the school’s permission, through the Court’s opinion, to regulate speech regarding drugs in particular. Breyer practically points out that drugs are not the only harm which students face, and from which schools are charged with protecting students.\textsuperscript{167} I think Breyer is concerned about the possibility that this opinion will open the door for speech about other dangers to be suppressed by school officials. He reminds us that the Court, during World War II, refused to regulate students’ free speech around the subject of war, and he wishes the Court would follow that advice in this opinion.\textsuperscript{168}

“Qualified Immunity” here provides the school principal, in Breyer’s view, with the protection against monetary damages because she did not intentionally violate someone’s constitutional rights; she merely reacted to a misbehaving teenager.\textsuperscript{169} To hold otherwise, in Breyer’s view, only invites more litigation from around the country on these issues.\textsuperscript{170} Breyer’s common sense of reality is to find a non-constitutional avenue for avoiding such complications.

**Conclusion**

An additional reference to the *Bush v. Gore* dissent seems fitting to conclude on Justice Breyer’s philosophy.

\textsuperscript{166} *Id.*

\textsuperscript{167} *Id.* at 426-427.

\textsuperscript{168} *Id.* Justice Breyer cites *West Virginia Board of Ed. v. Barnette*, 319 U.S. 624 (1943)(“holding students cannot be compelled to recite the Pledge of Allegiance during World War II”)

\textsuperscript{169} *Id.* at 428-429.

\textsuperscript{170} *Id.* at 428.
However awkward or difficult it may be for Congress to resolve difficult electoral disputes, Congress, being a political body, expresses the people’s will far more accurately than does an unelected Court. And the people’s will is what elections are about. . . . [Public confidence] is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . [W]e do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.”

While *Bush v. Gore*, as discussed earlier, was specifically focused on the resolution of a contested presidential election, I think Breyer’s words here cut across his more general concern about the immense power with which the Court possesses, and the manner in which the Court yields that power. He talks about the expression of the “people’s will,” the idea that it may not be the role of the Court to hold things in place as it sees fit, but rather to allow the people to decide, through the Congress granted to them, which direction they wish to go. Scholars have written about the divergent viewpoints of Scalia and Breyer, a strict construction of the Constitution versus a view of the Constitution as a living document.\(^{172}\) And throughout these cases, I think we can see what Breyer means by a “living document.” The Constitution is a framework, meant to apply to situations that the founding fathers could never have imagined.\(^{173}\) Breyer consistently urges the Court to respect the idea that Congressional action, which may not be directly envisioned by the Constitution, is still valid as long as it stays within the constitutional framework, because it is the result of the will of the people in a democracy. “In the framer’s eyes...the Court would help to maintain the *workable democracy* that the Constitution sought to create...the Court should interpret written words...using traditional legal tools...and, particularly, purposes and related consequences, to help the law effective. In this way, the Court can help maintain the public’s confidence in the legitimacy of its interpretive role.”\(^{174}\)

\(^{171}\) *Bush*, 531 U.S. at 155-158.