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The Supreme Court

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AWR: The Supreme Court
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Associate Justice of the Supreme Court Stephen Gerald Breyer was born on August 15, 1938, in San Francisco, California.[1] The son of Irving G. and Anne Roberts Breyer, the justice is of Jewish faith, one of three current members of the court to share his religion. Irving Breyer was an attorney for the local educational board, while Anne Breyer was an active volunteer for the Democratic Party and League of Women Voters.[2] Breyer's younger brother, Charles, was a criminal defense attorney and later became a federal judge.

As a child and young adult, Breyer attended public schools in the San Francisco area, graduating from the well-renowned public, magnet Lowell High School. During his time at Lowell, Breyer was an active member of the debate team, becoming rivals with Jerry Brown, who would later become California governor. Breyer was voted "most likely to succeed". Breyer was a member of the Army Reserves, serving active duty from June to December 1957. Upon his high school graduation, Breyer attended Stanford University, where he graduated in 1959 with an A.B. degree in Philosophy, with high distinction.[3] After his graduation from Stanford, Breyer traveled to Oxford University, as a Marshall Scholar, receiving a Bachelors degree from Magdalen College in 1961.[4] There, Breyer graduated with First Class Honors and a degree in Philosophy, Politics and Economics.[5] Once Breyer finished his education in England, he returned to the United States and attended Harvard Law School, graduating with his L.L.B. in 1964, *magna cum laude* and as

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[1] History of the Court: The Current Court, Justice Stephen J. Breyer. The Supreme Court Historical Society, (Accessed October 16, 2014). Available at http://www.supremecourthistory.org/history-of-the-court/the-current-court/justice-stephen-breyer/.

[2] Supreme Court: Recent Decisions by Justice Stephen Breyer. Cornell Law, Legal Information Institute, (September 1994). Available at http://www.law.cornell.edu/supct/justices/breyer.bio.html.

[3] Id.

[4] Id.

[5] Id.

articles editor of the Harvard Law Review. Id. While at Harvard, Breyer was a summer associate at the law firm of Heller, Ehrman, White & McAuliffe in 1962, and a summer associate at Clearly, Gottleib, Steen & Hamilton in Paris, France, the next summer.[6]

After obtaining his Harvard Law Degree, Breyer served as a law clerk to Associate Justice Arthur J. Goldberg, of the Supreme Court of the United States, during the October 1964 term.[7] Justice Goldberg, who served for one of the shortest tenures of any justice to take the oath for the high court, shared Breyer's Jewish faith, although their tenures were vastly different.[8] After his clerkship, from 1965-1967, Breyer was a special assistant to Donald F. Turner, the Assistant U.S. Attorney for Antitrust.[9] Breyer returned to Washington D.C. as an assistant special prosecutor for the Watergate Special Prosecution force, against then President Richard Nixon.[10] From 1974-1975, Breyer stayed in the Nation's Capital, as special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee.[11] He stayed on as "an occasional consultant" to the Senate Judiciary Committee, until ultimately spending 1979-1980, as the committee's chief counsel.[12]

In 1967, Breyer began his career as a professor at his alma mater, Harvard Law School. His tenure as a professor at Harvard Law also included a four-year stint teaching in Harvard's undergraduate Kennedy School of Government. In 1975, Breyer was a visiting professor of law in Sydney, Australia, in Salzburg, Austria in 1978, and at the University of Rome in 1993. At

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[6] See GPO.gov, Senate Judiciary Committee, Initial Questionnaire. Available at http://www.gpo.gov/fdsys/pkg/GPO-CHRG-BREYER/pdf/GPO-CHRG-BREYER-4-3-4-1.pdf
[7] Supreme Court Historical Society, see Note 1, supra.
[8] Laura Krugman Ray, The Legacy of A Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg, 115 Penn St. L. Rev. 83, 84 (2010).
[9] See Note 1, supra.
[10] Id.
[11] Id.
[12] Id.

times sporadic because of his duties in Washington, Breyer taught from 1967 through his Supreme Court appointment in 1994. Breyer was and is still known as an administrative law scholar, whose academic writings focused primarily on economic regulation.[13] Breyer, along with Richard B. Stewart, coauthored an Administrative Law and Regulatory Policy textbook.

In 1980, President Jimmy Carter nominated Breyer to the U.S. Court of Appeals for the First Circuit. Breyer would later become the circuit's Chief Judge in 1990. During his tenure in the First Circuit, Breyer served as a member of the United States Sentencing Commission from 1985-1989. In 1990, in addition to his new title, Breyer became a member of the Judicial Conference of the United States.[14] Breyer would serve as Chief Judge until 1994, when he left for the Supreme Court. In 1993, when Justice Byron White retired, Breyer was interviewed for the vacancy but President Clinton chose to nominate current Justice Ruth Bader Ginsburg. In a recent revelation, due to the release of records from President Clinton's presidency to the National Library, a memo surfaced that may indicate a few reasons why the perception of Breyer may have gotten him passed over the first time around.[15] In the memo, now Deputy Solicitor general Ian Gershengorn and attorney Tom Perrelli, suggested that Breyer's opinions did nothing to suggest he would be "a great Supreme Court justice." The memo continues to say his opinions lack "very little heart and soul," eventually concluding Breyer is a "rather cold fish."[16] This contributed to a belief that Breyer never authored an opinion on a substantive issue, instead finding ways to decide cases on administrative or procedural grounds. The memo articulated a fear that logic above style,

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[13] Paul Gewirtz, The Pragmatic Passion of Stephen Breyer, 115 Yale L.J. 1675, 1676 (2006).
[14] See Note 1, supra.
[15] Jess Bravin, '*Cold Fish' Memo on Justice Breyer Surfaces in Clinton Papers*, The Wall Street Journal (June 6, 2014), available at http://blogs.wsj.com/washwire/2014/06/06/cold-fish-memo-on-justice-breyer-surfaces-in-clinton-papers/
[16] Id.

although legally correct, was not the impassioned justice that many liberals would want (although the memo's authors are quick to say how successful Breyer has been on the Supreme Court bench, and how wrong it was to have second year associates vet a nominee.)

In 1994, when President Bill Clinton again had the occasion to nominate a new justice, it ended much better for Breyer, with his appointment to the nation's highest court. The Senate confirmed his nomination in an 87-9 affirmative vote. Succeeding Justice Harry Andrew Blackmun, who himself served for 24 years; Breyer took the Oath of Office on August 3, 1994.[17] Since his appointment to the Supreme Court, Breyer has had to the occasion to rule on almost every substantive and politically divisive issue that one could imagine. He remains a consistent liberal vote and a well-respected member of the nine-member Court.

A 28-year-old Breyer met his future wife, Joanna Freda Hare, in Georgetown. Both Justice Breyer and his wife can be referred to as "the Honorable", as Ms. Hare Breyer is a member of the British aristocracy and the daughter of a viscount. They were married in 1967 and remain so today. They have three children: Chloe, Nell, and Michael.[18] Ms. Hare Breyer was a trustee for the University of Massachusetts from 1974-1981.[19] Justice Breyer is also and has been for many years, a trustee to the Dana Farber Cancer Institute, where Ms. Hare Breyer is a clinical psychologist.[20] Breyer always tops the list of wealthiest justices because of his marriage to Ms. Hare Breyer. For a legal career filled with government and academic jobs, he has done more than alright for himself financially.

[17] See Note 1, supra.
[18] Id.
[19] See Note 2, supra.
[20] Id.

When not deciding important Constitutional issues of the day, Breyer enjoys recreational activities, including most famously (or maybe infamously) bike riding. Unfortunately for Justice Breyer, he has a knack for injuring himself while on his bicycle. In 1993, while riding his bike across Harvard Square, Breyer was hit by a car and suffered a punctured lung and broken ribs. In May of 2011, Breyer broke his collarbone while biking in Cambridge, Massachusetts.[21] In April of 2013, Breyer fell of his bicycle near the Korean War Memorial in Washington, D.C., prompting him to undergo shoulder replacement surgery soon thereafter. [22]

Like many of the Supreme Court justices, Breyer has authored various books. In 2005, Breyer authored "Active Liberty: Interpreting our Democratic Constitution". In 2010, Breyer released his second book, "Making Our Democracy Work: A Judge's View". He is one of the most accessible justices on the Court, often appearing on television shows and networks to promote his books or speak on his personal views about a variety of legal issues.

Introduction to Justice Breyer's Judicial Opinions

Breyer is a well-known member of the liberal wing of the Court. In his book based on some of his academic lectures, "Active Liberty" focused its discussion on political philosopher Benjamin Constant's idea of ancient liberty, or the people's right to an active and constant participation in collective power.[23] Breyer's argument is that the Court should consider the

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[21] Associated Press, *Justice Breyer breaks collarbone in bike* accident, Boston.com (May 31, 2011), available at http://www.boston.com/news/local/massachusetts/articles/2011/05/31/justice_breyer_breaks_collarbone_in_bike_accident/.

[22] Anne E. Marimow, *Supreme Court Justice Fractures Shoulder in Biking Accident in D.C.*, The Washington Post, (April 27, 2013), available at http://www.washingtonpost.com/local/supreme-court-justice-stephen-breyer-hurts-shoulder-in-biking-accident-in-dc/2013/04/27/f9fafde8-af6d-11e2-a986-eec837b1888b_story.html.

[23] Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution, Alfred Knopf, New York (2005), p. 5.

democratic nature of the Constitution when interpreting both it and statutory texts.[24] Coupled with his democratic ideals, he argues for judicial modesty, including deference to the experience of the legislator and not being too sure of oneself.[25] He argues his constitutional theme of "active liberty", which he describes as not a general interpretive theory, but more a theme that he himself has worked into his interpretation of Constitutional text.

Breyer makes every effort to make his opinions compact, transparent, practical, and balanced.[26]" He handles complexity particularly well, attempting to give even a lay reader an easier way to digest complex legal information. But Breyer had been criticized for being a "technocrat" in many of his First Circuit opinions, using his academic background as an administrative law and regulatory specialist to produce such opinions.[27] He is well-known for asking long hypotheticals in oral argument but overall seeks to demonstrate logic over style in order to reach the core of the issues presented.

In comparison to other justices he served with on the Court, Breyer's temperament and moderation closely resembled that of Sandra Day O'Connor, although they never formed a close alliance because of their differences in political alignment and substantive issues. Today, if you put Justice Breyer next to Justice Scalia, one of the only things they would have in common is that they were standing in the same room. Although both show respect for the one another, they don't substantively agree on much of anything (this is outside of the high percentage of cases in which all of the justices unanimously agree.) The two justices appeared together to discuss the differences in their judicial philosophies, Scalia stating that he hopes the living constitution will

[24] See Note 23, Supra.
[25] Id. at 5-6.
[26] See Note 13, supra, at 1677.
[27] Id. at 1678, note 11.

soon die, while Breyer relies heavily on the importance of changing circumstances and the broad power he believes the Founders left to the nation, to expound its constitution.

Although some initially deem Breyer and liberals "activists, " Breyer has been known to defer to and protect the democratic process by exercising judicial restraint, rarely voting to overturn Congressional statutes, and when he does so it is to invalidate legislation that fundamentally limits democratic participation.[28] In a study conducted by Chad Golder and Paul Gewirtz from 1994-2005, Breyer has voted to overturn provisions of congressional statutes the *least amount* of times of any other justice.[29] Overall, Justice Breyer's opinions do not reveal an activist, bench-legislating judge, but a pragmatic and practical jurist who urges the use of knowledge and experience to come to fair dispositions of cases that come before him.

When deciding a case Justice Breyer looks to language, history, tradition, precedent, purpose and consequences, with an important emphasis on purpose and consequences and the premise that the Founders created the Constitution to achieve some flexibility, establishing an interpretive style very squarely within "living constitution" bounds.

MAJORITY OPINIONS

In Stenberg v. Carhart,[30] Justice Breyer was given the opportunity to speak for the Court in a Landmark Case concerning abortion rights and the application of the Court's Roe and Casey precedents. Joined by Justice O'Connor, the liberal wing of the Rehnquist Court was able to secure

[28] Id. at 1680-1681.
[29] Paul Gewirtz & Chad Golder, Op-Ed., *So Who Are the Activists?*, N.Y. Times, July 6, 2005, at A23.
[30] Stenberg v. Carhart, 530 U.S. 914 (2000).

the five votes necessary to strike down the Nebraska ban on "partial birth abortions" as violating the Due Process Clause.

Breyer begins his opinion by stating that the Court was again considering "the right to abortion."[31] Breyer and the majority reaffirmed that precedent has firmly established a fundamental liberty interest in a woman's right to choose, and that is to be left undisturbed. Stenberg was not about overturning those precedents, but instead applying their rules to the instant case.[32] In Stenberg, the Nebraska statute's penalty made it a Class III felony for doctors to perform certain types of abortion procedures, the violation of which carried a prison term of up to 20 years and a fine of $25,000, as well as the automatic revocation of the doctor's Nebraskan medical license.[33] Even though discussion of various abortion procedures may be disturbing and somewhat horrifying, the Court must take this step in order to make sure they arrive at the appropriate outcome. With technique at his side, Breyer is the justice to do it.

After pages of descriptions of the various methods by which doctors can perform abortions, Breyer gets to the two independent reasons why the ban is unconstitutional under Roe[34] and Casey. First, the law lacks any exception for the preservation of the health of the mother, and second, it imposes an "undue burden" on a woman's ability to choose a D&E abortion, thereby abridging her right to choose abortion itself.[35] Breyer argues that the law itself is not promoting human life, but just regulating the method by which an abortion can be had, and a State must not "endanger a

[31] 530 U.S. at 914.
[32] Id.
[33] Id. at 922.
[34] Roe v. Wade, 410 U.S. 113, (1973).
[35] 530 U.S. at 930.

woman's health when it regulates the methods of abortion".[36] The majority looks to the medical evidence that contradicts Nebraska's position that safe alternatives remain available, when other federal and the lower court found otherwise. Breyer rejects most of Nebraska's eight arguments against having a health exception, instead deferring to the medical health professionals and *amici*. This is a common theme of Breyer's: defer to those who know what they are talking about, not the State or a party who may have less experience and different reasons for arguing such a position. Breyer also accepts the fact that medical uncertainty about which or what procedures are safer or safest, means that the Court must take this factor as signaling for "a presence of a risk, not its absence".[37] Because of this factor, and the totality of unconvincing evidence that a health exception is "never necessary", the Court must use judicial restraint in upholding a law that might burden a substantial number of women.[38]

Breyer feels that requiring a health exception for the mother is a straightforward application of Casey,[39] not the Court removing itself from precedent to fashion a new remedy. He then turns to the second reason for the majority's rejection of the Nebraska ban, namely the "undue burden" it would place on women who are trying to obtain an abortion. Because the Court finds that two types of abortion, both the "D & E" and "D & X" procedures would be covered by the statute, Nebraska cannot deny that the statutes produces an undue burden on women seeking an abortion.[40] The Attorney General tries to narrow the interpretation of the law, but Breyer and the majority instead look to precedent, not giving the Attorney General's interpretation giving controlling

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[36] 530 U.S. 914 at 931, *citing* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 768-769 (1986).
[37] Id. at 937.
[38] Id. at 937-938.
[39] Ibid.
[40] Ibid.

weight. That interpretation does not bind the State courts, and the Court commonly gives deference to lower federal court interpretations.[41] Either way, the contention is rejected because a reading of the statutory text shows that the statute is much broader, enough so to create an undue burden on women seeking these procedures.

Breyer is a strong proponent of the broader interpretation of the right to women's privacy and autonomy in the abortion context. He not only authored Stenberg, but later joined Justice Ginsberg's dissent in Gonzalez v. Carhart.[42] In the Stenberg opinion, Breyer takes on a very controversial abortion case, and simply breaks down the issues into very manageable pieces. He swiftly ploughs through technical evaluations of medical procedures, explaining the need to understand the expert opinion on the matter since the Court is not the best interpreter of medical facts about abortion. He then moves it quickly into a simple application of precedent, taking the case from controversial and difficult to a much easier to understand Roe and Casey application. There is no appeal to unwarranted morality, there is no appeasing the good portion of the population that does not accept abortion as something that should be legally recognized. Breyer and the majority adhere to precedent and defer to the fact-finding of experts, then exercise their best judgment in striking down the ban. Breyer was the perfect justice to author this opinion.

Gray v. Maryland[43]

[41] Id.
[42] Gonzales v. Carhart, 550 U.S. 124, 127 S. Ct. 1610, 167 L. Ed. 2d 480 (2007).
[43] 523 U.S. 185 (1998).

Breyer was assigned the opinion in Gray v. Maryland, a 5-4 decision in which the more liberal bloc of the Rehnquist court held the Bruton [44] standard for admissibility of confessions of one codefendant against another during a joint trial, also forbade the use of a redacted or edited confession. The facts in Gray differed slightly from those in Bruton, most notably in the confession that was offered, and the Court took review to rule on whether or not the redacting or substitutions in the confession made a legally significant difference.[45] Breyer and the majority also had to consider later precedent Richardson v. Marsh, [46] in which a similar joint, codefendant trial produced a confession by one defendant, but the prosecution removed all reference to the codefendant, only implicating the confessing defendant and a third person. Because of the testimony of the non-confessing codefendant at trial, the jury was later able to infer that even though all reference to her name was omitted, her testimony allowed the jury to fill in the blanks.[47] The Supreme Court upheld the admissibility of the confession, and did not offer an opinion on the admissibility of a confession that replaces the defendant's name with a symbol or neutral pronoun.

This case ultimately concerns the Sixth Amendment rights of a defendant to confront the witnesses against him, and protection from "powerfully incriminating extrajudicial statements of a codefendant." The Bruton decision sprung from the concern about the inadequacy of a limiting

[44] Bruton v. United States, 391 U.S. 123, (1968). The Court in Bruton held that in a joint trial, the confession of one defendant that implicated the other could not be used against the non-confessing defendant, as a limiting instruction was not enough.

[45] The confession in Gray differed in what it offered to the jury. The police officer read the confession, simply saying "deleted" where the names of the codefendants appeared in the confession. The written confession contained "deleted" or white spaces where the names had been. 523 U.S. at 188.

[46] Richardson v. Marsh, 481 U.S. 200 (1987).

[47] Id. at 210. The Court held that even though in context of the trial, when the jury heard the testimony of the codefendant and inferred she was in the car at the time of a crime, Bruton did not apply because the confession was not "incriminating on its face" and required "linkage" to become incriminating.

instruction when the risk of the jury not following the instruction is "so great" and the consequences of that failure "so vital to the defendant" that the limitation of the instruction's weight is not to be ignored.[48] This was the practical concern of the Bruton court, and Breyer's majority opinion in Gray pays homage to that concern. Breyer is stringent about adhering to precedent unless there is a compelling reason not to do so. Although presenting slightly different facts, the practical consequences are the same, and this compelled Justice Breyer and the majority to come to the same conclusion as the Bruton Court, while leaving Richardson intact.

Breyer begins their analysis by taking the question left unanswered by Richardson; whether or not a confession, redacted but still implicating the existence of a non-confessing defendant, was constitutionally admissible. To Breyer, the confession left after the redactions here leave statements that "so closely resemble Bruton's unredacted statements" that, "the law must require the same result.[49]" To illustrate the myriad of problems that come from this type of redaction in a codefendant's confession, in typical Breyer style, we are given a "simplified but typical" example:

> [a] confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank… refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.[50]

[48] 523 U.S. at 190.
[49] Id. at 192.
[50] Id. at 193.

Breyer's example actually brilliantly exposes larger problems with the admissibility of the "deleted" or blank spaced redacted confession. Reliability, overreliance on the redacted evidence

Using totality of the circumstances, Breyer also finds the dissent's belief that Richardson controls is misplaced. Even though the fact that an "inference" is needed to jump from the confession here to the defendant, as was in Richardson and not Bruton, inference itself is not the difference, but the "*kind of*" inference is especially important.[51] The inferences need in Gray to get from "deleted" or a blank space to the codefendant, would be easy and happen immediately, unlike Richardson's inference that required the introduction of other evidence at trial.

Although Justice Scalia and the minority would lead us to believe that jurors always follow the instructions given, and a limiting instruction would stop the juror from using the confession against a codefendant, who is obviously implicated by the confession. Justice Breyer's majority knew better. The majority's approach makes sense according to precedent, and for what we know about human nature, which was the basis for the Bruton rule to begin with. There is also less of a cost to the prosecution here than there was in Richardson if the confession was not allowed. In Richardson, if the confession was not allowed it might force the prosecutor to abandon use of the confession at all or risk. Here, the majority's opinion is important because in a contested criminal procedure case, Breyer leads the Court in considering realistic expectations and consequences of the ruling in criminal cases that occur everyday throughout the United States.

NLRB v. Noel Canning[52]

Justice Breyer authored the Court's unanimous decision in NLRB v. Noel Canning, the hotly debated case surrounding the President's authority to make "recess appointments" during

[51] Id. at 196.
[52] 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014).

breaks in Senate sessions. Joined fully by justices Kennedy, Ginsburg, Sotomayor and Kagan, the Court held President Obama's recess appointment of three members of the National Labor Relations Board ("NLRB") during a "pro forma" Senate session were invalid. Breyer's opinion answers three questions as to when and how a president can validly use his power under the Recess Appointments Clause.[53] Although the count read 9-0, Justices Scalia, Roberts, Thomas and Alito did not join one word of the majority opinion, instead coming to their conclusion in a markedly different way.

This case arose out of a labor dispute with the Board finding Noel Canning, a bottler and distributor of Pepsi-Cola products, unlawfully refused to reduce to writing and execute a collective bargaining agreement and ordering the execution of the agreement and remedies to the employees.[54] The Constitutional question arose on appeal, when petitioner Noel Canning targeted the make-up of the Board, three of whom had been appointed by the President during a short Senate recess. The government argues that the President has authority to do so under the Recess Appointment Clause exception to the rule that the President obtain "the Advice and Consent of the Senate" [55] before he appoints any officer to a federal government position.

Two major background considerations guided the Court's majority, namely that the Recess Appointments Clause is the subsidiary, not the primary method for appointing federal officers, and the Court placed significant weight on the historical practice that has been used for over 200 years. This is essentially a separation of powers case and when such cases reach the Court's steps, constitutional interpretation can make all the difference in the Court's outcome. Scalia's

[53] U.S. Const. Art. II. §2, cl. 3.
[54] 135 S.Ct at 2557.
[55] U.S. Const. Art. II. §2, cl. 2.

concurrence scoffs at the use of historical practice and instead relies on Both the majority and concurrence agree these recess appointments were invalid and that is where their agreement ends.

The nod to the appropriate separation of powers consideration comports with Breyer's view on federalism and checks and balances. Citing The Federalist No. 76, Breyer makes it clear that the President gets to nominate the officers, and the Senate gets to exercise their power to check the president's "spirit of favoritism" by confirming the nomination. The whole point is that the President and Senate are supposed to work together jointly, but only when certain narrow circumstances arises, the second clause of Art. II, §2 allows the president to act singularly.[56] Breyer's second emphasis on historical practice, but when you actually parse through the opinion Breyer is able to use our nation's entire historical *experiences* as a factor to consider, while promoting the interpretive approach of the Living Constitution. Specifically in a case like the instant one, when the Court has not had occasion to interpret this Constitutional clause for over 200 years, delicacy with the history is necessary.[57]

The Court discussed three major questions presented about the necessities of the Recess Appointment Clause. First: what is the scope of the words "recess of the Senate?" The majority finds the clause applies to both inter-session recesses (a break between formal Senate sessions) as well as intra-session recesses.[58] In order for the intra-session recesses to count, they must be "of substantial length.[59]" After discussing dictionary definitions, and the important of "the" meaning only the formal break in session, Breyer finds that the "constitutional text is thus ambiguous" and the clause's *purpose* demands the broader interpretation.[60] History has also shown that Congress

[56] Id. at 2559, *citing* The Federalist No. 76, p. 510 (J. Cooke ed. 1961).
[57] Id. at 2560.
[58] Id. at 2556.
[59] Id. at 2561.
[60] Ibid.

has shifted from taking long inter-session breaks to taking more short and informal intra-session breaks, thereby Presidents were making more appointments in these intra-session breaks, and for the Court to ignore this substantial historical practice would be to ignore thousands of presidential appointments.[61] To restrict the clause to inter-session appointments would frustrate its purpose, and the longstanding historical practices of both the Senate and the President are enough to accord great weight in interpreting the clause.[62] The practical reality is whatever you want to call it, when the Senate isn't there, the Senate isn't there, and in order for the government to continue functioning the President must be able to make recess appointments whenever there is a "recess."

Next, what is the scope of the phrase "vacancies that may happen?" The Court finds this phrase refers both to vacancies that arise before a recess and continue, as well as vacancies that only initially arise during a recess.[63] This is an important finding because it gives greater latitude to the President to effectively and swiftly fill vacant seats, no matter when they arise. Lastly, the Court considered the length of the recess, here only three days, was too short of a time for the President to invoke his power. Looking to other instances of historical reference, Justice Breyer concludes that anything less than ten days is also probably too short of a time.[64] This is slightly problematic in Breyer's opinion; the length of time that he chose is arbitrary, a fact that Scalia quickly points out in his concurrence. But since the Constitution is silent, instead of invalidating years of recess appointments, Breyer finds a way to fashion a reasonable remedy. Breyer takes the ambiguities in the Constitution as a signal to interpret the broader interpretation, as he finds it more consistent with the purpose underlying the clause: allowing the President to obtain the assistance

[61] Id. at 2562.
[62] Id. at 2564.
[63] Id. at 2556.
[64] Id. at 2571.

of subordinate officers when the recessed Senate cannot confirm them.[65] The seats are meant to be occupied, not kept unfilled just because the openings arrive at an inopportune time.

In one of the few recent cases in which Breyer has been able to speak for the majority, the 5-4 internal split on the reasoning of the unanimous decision shows how large the divide is on constitutional interpretive issues. Although difficult to be a liberal on the Roberts' Court, many saw Breyer's majority as a victory for the living constitutional interpretation. Breyer's emphasis on purpose, tradition and consequences was able to garner five votes to Scalia's four, maybe a small but important victory to the justice.

CONCURRENCES

J. McIntyre Machinery v. Nicastro[66]

Although Justice Breyer loves to consider consequences in rendering his decisions, the speculative allusion to change on the horizon is not enough to overcome precedent and the facts. In J. McIntyre Machinery v. Nicastro, Robert Nicastro was a factory worker in New Jersey when he injured his hand while using a machine manufacturer by the petitioner. [67] Because J. McIntyre was incorporated and operated in England, and the product was manufactured in England, the company sought dismissal of the claims against them for lack of personal jurisdiction.[68] The New Jersey courts found the facts included petitioner's machine was sold by an independent company and petition never directly marketed goods in the State or shipped them there, the petitioner attended conventions in the United States but never in New Jersey, and no more than four machines

[65] Id. at 2568.
[66] J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011)
[67] J. McIntyre was the defendant at trial, and is the petitioner here, seeking to overturn the ruling of the New Jersey Supreme Court that New Jersey had jurisdiction over it.
[68] 131 S. Ct. 2780, 2786.

wound up in New Jersey.[69] The majority of the Court held that the New Jersey Supreme Court, although careful and thorough in its analysis, was in error when it found jurisdiction was proper under the "stream of commerce doctrine" when the appropriate standard is "purposeful availment."[70]

Breyer joined a plurality of the Court in holding that New Jersey did not have jurisdiction, but he arrives there in a significantly different way than the majority. Using precedent and the facts actually presented in this case, Breyer cannot join the majority's "rule of broad applicability" nor can he join the dissent's opinions that finds commerce has changed so significantly that it falls outside of the Court's personal jurisdiction precedent.[71] Even though the facts confirm the foreign manufacturer here wanted its machines in the United States and New Jersey, and its independent distributor did in fact sell to the state, that is not enough to constitute enough minimum contacts with the State as to exercise jurisdiction over the manufacturer.[72] Breyer would require more, since the precedents require more. The Court's previous holdings suggest that a single-sale is not enough nor is a single sale of a product in a State enough even if the defendant places the goods in the stream of commerce.[73]

Breyer concedes there may have been other facts to show a "regular course of sales," but he must defer to the fact-finding of the lower court and not reconsider them on appeal, as the dissent did.[74] In a sense, consequences are still important to Breyer's disposition, just not in the way that the plurality or dissent finds a move to act. To Breyer, there is a greater consequence in

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[69] Id.
[70] Id. at 2785.
[71] Id. at 2791.
[72] Id.
[73] See World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286; Asahi Metal Industry Co. v. Superior Court of Cal., Solano City., 480 U.S. 102, 111-112.
[74] 131 S. Ct. at 2792.

fashioning new jurisdictional rules when the facts of the case do not call for it, and the incident at issue does not implicate modern concerns.[75] The practical effect of the plurality's strict no-jurisdiction rule would foreclose an inquiry when it might be necessitated, especially when products are being sold over the Internet, which in turn have serious commercial consequences that are absent in the present case.[76] Nor is Breyer convinced that international commerce has changed so significantly for New Jersey to be able to fashion new jurisdictional rules that might require "a small Egyptian shirt-maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer" who sell their products through international distributors to appear in a State in which it has made all but one sale. [77] Since Breyer finds the facts in this case open to many questions, it is an "unsuitable vehicle for making broad pronouncements that refashion basic jurisdictional rules."[78] Instead, the same result can be easily achieved by adhering to precedent and the facts.

League of Latin American Voters v. Perry[79]

In a more politically controversial case, arising out of the mid-decade Congressional redistricting plan that Texas implemented in an attempt to override a judicially created redistricting plan, Breyer joined the majority (in various parts) striking down the Texas legislature's attempt to circumvent the judicial plan for their own political advantage. In his concurrence, Breyer mostly joined the concurrence of Justice Stevens, making clear that the "desire to maximize partisan advantage was the sole purpose behind the decision to promulgate" the redistricting plan.[80]

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[75] Id. at 2793.
[76] Id.
[77] Id. at 2794.
[78] Id.
[79] League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006).

[80] Perry, 548 U.S. 399, 492 (2006).

Breyer, the constant defender of democracy, takes considerable offense to the congressional plan that not only exaggerated the favored party's electoral majority, but would produce a majority of representatives from the favored party "even if the favored party receives only a minority of the popular votes."[81] Looking to the facts found in the lower courts, Breyer finds no nonpartisan reason for the gerrymander, and because this is just "an unjustified use of purely partisan line-drawing", the consequences of upholding the plan would have "seriously harmful electoral consequences."[82] His concurrence ends with the conclusion that the plan violates the Equal Protection Clause.

Breyer's short dissent in Perry shows his ability to narrow hotly contested legal battles into easily manageable pieces. It seems that looking to the consequences of the Court's decision is a place Breyer begins when making his practical decisions. Upholding the law at issue here would allow a political party to exert illegal influence. Democracy cannot function if one party's will is able to drown out the will of the majority of the people.

McCutcheon v. FEC[83]

In one of his more recent dissents, Breyer vehemently displayed his dismay with the Roberts' majority in McCutcheon v. FEC, by reading his thirty-page dissent from the bench. Joined by his three liberal colleagues, Breyer scolded the majority for overturning nearly forty years of campaign finance laws that had been tested and upheld by the Court, resting their conclusions on "its own, not a record-based view of the facts."[84] Petitioner Shaun McCutcheon

[81] Id. at 492.
[82] Id. at 493.
[83] McCutcheon v. FEC, 134 U.S. 1434 (2014).
[84] Id. at 1436.

challenged the aggregate limits on individual donations to federal candidates, parties and political action committees ("PACs") during a two-year period. In a 5-4 decision, the Court held these limits unconstitutional, and Justice Breyer was understandably dismayed with the decision overturning of precedent.

Breyer began was emotional from the beginning of the case, during the oral arguments, mostly because he thought this battle had been won in the Court's previous holdings of McConnell v. FEC and Buckley v. Valeo.[85] Breyer reiterates that in Buckley, the Court upheld limits on how much an individual could contribute to federal candidates, PACs and committees.[86] The attorney for the petitioner was three sentences into her argument when Breyer jumped in. She was able to get in a few more sentences before Breyer posited his first hypothetical and engaged in an exchange about why the regulations are necessary to avoid circumvention of the existing campaign limits.[87] Although the hypotheticals get complicated and mathematical, Breyer's point is well taken: campaign finance laws, aggregate limits included, are necessary to increase political participation and stop political corruption.

Breyer gives many examples in his opinion as to how removing the aggregate campaign limits, and one looks exactly like this:

> Before today's decision, the total size of Rich Donor's check to the Joint Party Committee was capped at $74,600—the aggregate limit for donations to political parties over a 2-year election cycle. After today's decision, Rich Donor can write a single check to the Joint Party Committee in an amount of about $1.2 million.
>
> ….
>
> Will party officials and candidates solicit these large contributions from wealthy donors? Absolutely… Will elected officials be particularly grateful to the large donor, feeling

[85] 424 U.S. 1 (1976).
[86] 134 U.S. at 1438.
[87] See McCutcheon v. FEC transcript.

> obliged to provide him special access and influence, and perhaps even a quid pro quo legislative favor? That is what we have previously believed.[88]

Breyer feels that this decision that "understates the importance of protecting the political integrity of our governmental institutions."[89] Taken together with Citizens United,[90] Breyer is hopeless that any national finance law still exists to combat rampant corruption, "democratic legitimacy" that the preexisting laws were aimed at resolving.[91] To Breyer, the aggregate spending limits were essential in actually promoting freedom of speech and political participation, not the hindrance of it. Breyer disagrees with the majority's narrow definition of corruption, arguing that it does little to combat the actual and real corruption that happens each and every day. Breyer argues that the history of campaign finance reform shows the anticorruption interest that drives Congressional regulation is far broader and more important than the plurality holds.[92]

Breyer is incredibly concerned that the Court is overruling important jurisprudence that protects the ideals of democracy he holds so important, without further development of fact-finding. Corruption breaks the constitutionally necessary "chain of communication" between the people and their representatives. It derails the essential speech-to-government-action tie. Where enough money calls the tune, the general public will not be heard.[93]

As he concludes, Breyer reiterates

> [T]he result, as I said at the outset, is a decision that substitutes judges' understandings of how the political process works for the understanding of Congress; that fails to recognize the difference between influence resting upon public opinion and influence bought by

[88] 134 U.S. at 1474.
[89] 134 U.S. at 1465.
[90] Citizens United v. FEC, 558 U.S. 310, (2010)
[91] Id.
[92] Id. at 1466-1467.
[93] Id. at 1467.

> money alone; that overturns key precedent; that creates huge loopholes in the law; and that undermines, perhaps devastates, what remains of campaign finance reform.[94]

All in all, McCutcheon is a stake in the heart in the Justice Breyer. It puts money above speech, and puts those with more resources miles ahead of the majority of the people who make up this nation. It overrules years of substantial precedent, ignores history, ignores reality and its holding presents dire consequences to individual participation in our democracy.

Bush v. Gore[95]

After the polls closed on Election Day in November of 2000, the United States was without a newly elected president. By November 16, we were still without a president and the state of Florida was embroiled in a political and legal battle surrounding the recount of some very poorly designed ballots. Bush v. Gore's tumultuous rise to the Supreme Court set the stage for the Court's even more controversial involvement. Although the opinion was officially written *per curiam*, there was no shortage of opinions to sift through.[96]

"The Court was wrong to take this case. It was wrong to grant a stay. It should now vacate that stay and permit the Florida Supreme Court to decide whether the recount should resume."[97] This is how Justice Breyer began his Bush dissent. Adhering to his belief in federalist principles, Breyer was able to separate what was a major political moment, from the insubstantial federal legal questions that the recount proposed. In this case, Breyer saw no reason not to give deference to the

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[94] Id. at 1481.
[95] 531 U.S. 98, 104 (2000).
[96] Chief Justice Rehnquist filed a concurrence in which Scalia and Thomas joined. Justice Stevens filed a dissent in which Justices Ginsburg and Breyer joined in part, Justice Souter filed a dissent in which Breyer fully joined, and Stevens and Ginsburg joined in part. Justice Ginsburg filed a dissent in which Stevens joined, and Souter and Breyer joined in part. And lastly, Breyer penned a dissent to which Stevens and Ginsburg joined in part, and Souter joined in part.
[97] 531 U.S. 98, 145.

Florida Supreme Court in interpretation of its state's voting laws. In turn, Breyer rebuts the majority's three-pronged reasoning as to why the Florida State Supreme Court's recount order was problematic under the Equal Protection Clause. Breyer reasoned that failure to include over votes in a manual recount, as well reviewing all ballots and not just the under votes, were unsupported by any evidence that the inclusion of over votes and all other ballots would actually produce more legal votes.[98] Breyer agrees that "basic principles of fairness" would have aligned with the majority's third point, that a uniform standard was necessary to ensure the ballots be reviewed appropriately, but because of the insane time constraints of the situation, that was not achievable. In order to allow the recount to continue to take place, Breyer advocates remanding to the Florida Supreme Court with instructions to continue recounting all under votes from the specified counties, according to a "single uniform standard."[99] According to Breyer, because of the Court's insistence on getting involved in this matter, it has taken away the time necessary for the Florida courts to decide how to complete the recount according to their own state laws.

By halting the recount, the majority has "crafted a remedy out of proportion to the asserted harm," and actually makes worse the inequality the Court says it is trying to prevent. Before a voter walked into the booth to cast his or her ballot there was already inequity, as each county was able to choose their own voting equipment, causing some of the misreading problems. Breyer feels that Florida's recount order addressed this issue and the Court has no business trying to overrule it.[100] Justice Rehnquist's concurrence tries to attach the Court's involvement to this case to the Constitution's Article II, §1 or 3 U.S.C. §5, but Breyer feels the plain-text reading of the

[98] Id. at 145.
[99] Id. at 146.
[100] Id. at 147.

Constitutional provision is incredibly too broad, inapposite to prior interpretations by the Court.[101] Similarly, the Court has no authority to §5 of the U.S.C., since that section regulates Congressional recognition of electors. In sum, the Court majority has gone from a presumption that state legislatures would want to take advantage of the §5 "safe harbor provision" into "a mandate that trumps other statutory provisions and overrides the intent that the legislature did express."[102] Breyer also faults the concurrence for "reaching the wrong conclusion" by second-guessing the State's interpretation of conflict in language of different statutes, faulting the Florida court's inability to conclude the recount on time when the Court itself hindered this by entering a stay, and requiring the Florida Courts to adhere to the Secretary's definition of "legal vote" "when nothing in Florida law requires the Florida Supreme Court to accept as determinative the Secretary's view".[103] To the contrary, the Florida Supreme Court used the power given to them by Florida statute to fashion orders in order to make sure allegations of missing votes be investigated, examined or checked, "and to provide any relief appropriate."[104] Overall, the Court can disagree with the Florida Supreme Court's interpretation of statute, but here, the interpretation was not "so misguided as no longer to qualify as judicial interpretation or as a usurpation of the authority of the state legislature."[105]

Again, Breyer reiterates the Court had no place in entering a stay or deciding this case. Breyer thinks the one equal protection claim, if found, could have been decided by the state courts as the petitioners continued to look to state law as the basis for determining voter intent and

[101] Id. at 148.
[102] Id. at 148-149.
[103] Id. at 150-151.
[104] Fla. State. Ann. § 102.168(8) (Supp. 2001).
[105] 531 U.S. at 152.

fairness.[106] Political importance does not equal legal importance, and Breyer insists his colleagues take a position of judicial restraint. The federal statute implores them to do so, instead creating a "road-map" of resolving electoral disputes, one that specifically calls for the state court to make the final determination about a controversy.[107] If the state fails to come up with a solution, the next body to become involved is Congress, authority found in the Twelfth Amendment and the Electoral Count Act of 1887, which also announced a detailed, comprehensive scheme for counting electoral votes. After recounting the history that led the founders and subsequent electorates to this conclusion, Breyer returns to James Madison's statement that allowing the judiciary to choose Presidential electors "was out of the question"[108], and the Court in Bush v. Gore made the unwise decision of basically doing just that. The previous instance in which judges have gotten involved in political electoral disputes, their involvement "did not lend that process legitimacy" or "assure the public that the process had worked fairly".[109]

Leave political questions to the legislature and leave state elections to the state courts.

> "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*." (emphasis added) [110]

Although it's been fourteen years since the Court has decided Bush v. Gore, the scars that remain from are deep, and the Court has not done a good job of trying to hide the tremendous impact it had on the Institution as a whole (Justice Souter nearly resigned).

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[106] Id. at 153.
[107] Id. at 153.
[108] See Breyer, J., dissenting and *citing* Madison, July 25, 1787 (reprinted in 5 Elliot's Debates on the Federal Constitution 363 (2d ed. 1876).
[109] Id. at 157.
[110] Id. at 155.

Justice Breyer penned a dissent that bore his belief that the Bush decision would not only be disastrous for the Court that day, but for years to come. Mostly, Breyer was concerned about the Court deciding an undoubtedly political question. It was within the province of Congress to have ultimate authority and responsibility for counting electoral votes. As Congress was a political body, it had a much more direct connection to the people, and would ultimately express their will more than an appointed judiciary. Historically, the Presidential Election of 1876 was mentioned; as another example of a time when the Court should have declined to exercise its legal power over a question of great political importance. The importance of the moment cannot override sound judicial decision-making.[111]

United States v. Booker[112]

Breyer often joins the conservative side of the Court when deciding Fourth Amendment principles. Notably, in United States v. Booker, Breyer wrote for the majority in part and dissented in part. In his majority piece, Breyer was joined by Justices Rehnquist, O'Connor, and Kennedy. In his dissent, he was joined by the liberal bloc of the Court. In a 5-4 decision, the Court held that any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt, applying their precedent of Blakely v. Washington to the Sixth Amendment.

In Booker, the petitioner was the defendant in a jury trial, and was later convicted of drug offenses that according to the Federal Sentencing Guidelines, called for a sentence of 210 to 262

[111] 531 U.S. at 103.
[112] 543 U.S. 220 (2005).

months in prison. At at his sentencing hearing, instead of following the Guidelines, the judge found additional facts and then sentenced the defendant to a prison term of 360 months to life.[113] The two questions presented to the Court were: whether or not the Apprendi line of cases applied to the Sentencing Guidelines and if so, what portions of the Guidelines could remain in effect. The Court found that the Guidelines did in fact violate the Sixth Amendment,

The Court held that the part of the Guidelines statute that makes their application mandatory was incompatible with their finding of the Sixth Amendment "jury trial" holding. Breyer's majority opinion focuses on the remedy that the Court must fashion in light of the holding that the Guidelines could not be applied in the way Congress originally drafted the law. First, looking to legislative intent, Breyer's majority focuses on uniformity and reality. In practical effect, the Sentencing Guideline became effectively advisory,[114] permitting a sentencing court to consider the applicable Guideline ranges, but also allowing the Court to tailor the sentence in light of other statutory concerns.[115] In typical Breyer fashion, he chose the lesser of the two evils, deciding that the new system would more closely resemble what Congress had attempted to create. Breyer attempts to hold on to the *purpose* that Congress had when it enacted the Guidelines; greater uniformity in sentencing throughout the nation by linking actual conduct to appropriate sentences.[116]

In Breyer' short dissent, Breyer argues that there is nothing unconstitutional about a sentencing judge findings facts about "the way" in which an offender committed a crime, if those

[113] 543 U.S. 220 at 244.
[114] Id. at 245.
[115] Ibid.
[116] Id. at 325.

facts then move the offender from one part of the guidelines to the next.[117] Looking to tradition, Breyer argues that sentencing judges have commonly considered manner in which a crime was carried out, and nothing in the Sixth Amendment forbids them to do so. Because Breyer disagrees with both the Apprendi and Blakely precedent, as well as their application here, he cannot join the substantive part of the majority's opinion.[118] Although Breyer is a proponent of the adherence to precedent, this is overcome when he feels the Court is misapplying the precedent to the detriment of Congressional legislation.

In both of Breyer's pieces of the opinion and dissent, his focus is on maintaining federalist principles and the separation of powers. Some consider his majority position as "snatching a partial victory from defeat, " because his remedy stopped the Guidelines from being thrown out altogether. Although the majority's holding made is necessary for the justices to step outside their normal bounds and fashion a remedy that included the rewriting of a Congressional mandate, Breyer tried to maintain a deference to the Congressional intension and interpret how the Congress would have now fashioned the rule, knowing of the Constitutional limitation. His opinions both showcased his judicial moderation, by attempting to strike a balance that was appropriate constitutionally and practically

Interestingly, Justice Breyer was on the Sentencing Committee that drafted these Guidelines and as an architect of the Guidelines, treaded cautiously in criticizing their practical effect and some of their practical failings. Breyer is still insistent that the Guidelines' purpose is noble and workable, hoping that no matter what changes it may undergo that the premise of

[117] Id. at 326.
[118] Ibid.

categorizing offenders, and greater honesty and fairness in sentencing be maintained. He remains cautiously optimistic about their future, continuing to open up the conversation on punishment and the policy that stems therefrom.

Florence v. Board of Chosen Freeholders of Burlington County[119]

In Florence, Justice Breyer rejoined his liberal colleagues in dissent. In a Fourth Amendment case arising out of the reasonableness of suspicionless strip searches for inmates who have committed minor criminal offenses,[120] Breyer looks to precedent, the need and success of the police, alternative law, and consequences that lead him to reject the invasive strip-search policy. Petitioner Albert Florence was arrested in 1998 and entered a guilty plea that required he pay a fine in monthly installments.[121] In 2003, after petitioner fell behind on his monthly payments and failed to appear at an enforcement hearing, the court issued a warrant for his arrest.[122] Despite paying the outstanding balance within a week of the issuance of the bench warrant, the warrant remained in New Jersey's statewide computer database, and two years later he was pulled over and arrested. Although the computer error was remedied and the petitioner released, the constitutional challenge comes from the searches that he endured while at two separate prisons. In Burlington County jail, petitioner showered in front of a prison guard and then was also asked to open his mouth, lift his tongue, hold out his arms, turn around and lift his genitals.[123] After six days petitioner was taken to Essex County Correctional Facility, where he was again subject to a strip search while officers looked at his body and body openings, which included coughing in a

[119] 132 S. Ct. 1510, 182 L. Ed. 2d 566 (2012).
[120] Id. at 1525.
[121] Id. at 1514.
[122] Ibid.
[123] Id. at 1514.

squatted position.[124] These searches occurred regardless of the offense admitted for, or the detainee's behavior, demeanor or criminal history, and the Court must decide if these searches are constitutional, absent a reasonable suspicion.

The majority holds that this searches are constitutional, mostly because it would be too difficult to operate otherwise, and the policy of keeping correctional facilities free from contraband is am important governmental interest. Breyer in dissent, first asserts that prison strip searches can be valid, especially when a prison has provided "considerable empirical information about the need for such a search" for minor offenders.[125] The strip searches that took place in Florence also constituted a serious invasion of a person's privacy than undressing and taking a shower, as they include "close observation of the private areas of a person's body."[126]

Should this invasive strip search be permitted when an arrestee is being held for only minor or misdemeanor offenses? Justice Breyer and his liberal colleagues answer with an affirmative "no," stating it is a Fourth Amendment violation to conduct these searches absent reasonable suspicion the inmate is in possession of drugs or other contraband.[127] Strip searches are humiliating; the highest form of invasion into personal privacy. The examples of persons subject to these strip searches include a nun arrested for trespassing,

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[124] Ibid.
[125] See Dodge v. County of Orange, 282 F. Supp. 2d 41 (S.D.N.Y. 2003). As described a "strip search" included "'a visual inspection of the inmate's naked body'" that included opening his mouth, running a hand through his hair, lifting arms and feet, spreading and or lifting his testicles, bending over to expose his anus, and for females there were similar procedures but they had to squat to expose the vagina. Id. at 46.
[126] 132 S. Ct. at 1525.
[127] Id. at 1526.

Although the Court normally defers to jail and prison administrators for what is sound policy, here, there is too much evidence to the contrary. The three interests that the prison says justifies these searches, including detecting injury or disease that might spread in confinement, identifying gang tattoos, and detecting contraband, are not enough for Breyer. [128] Although he accepts these interests as logical, they still "must be reasonably related to the justifying penological interest" and the need not be exaggerated.[129] Breyer disagrees that the practices already in place at the jail are not enough to protect these interests. Lastly, Breyer looks to actual consequences of the jail's policy which includes data that only "1 in 23,000" inmates strip-searched during a period of time at particular jail, and "3 of 75,000" inmates in another jail were successfully caught with contraband because of strip-searches. This supports Breyer's conclusion that strip-search policies are patently unreasonable.[130]

Many prison regulatory bodies, including the American Correctional Association, have promoted a standard that forbids suspicionless strip searches. At least ten other states prohibit suspicionless strip searches.[131] The reality that a woman arrested for not wearing her seatbelt or a nun arrested for trespassing, or a man erroneously arrested for not paying a civil fine will be subjected to an invasive and unnecessary strip search, are too great a consequence to liberty. Because the prison authorities did not have "reasonable suspicion" to believe that the individual in Florence, arrested for a nonviolent crime, possessed drugs or other contraband, the dissent finds the search unreasonable. This comports with Breyer's judicial philosophy of considering the practical and significantly harmful consequences of his decision, allowing him to strongly

[128] Id. at 1527.
[129] Id. at 1528, *citing* Turner v. Safely, at 87.
[130] Id. at 1528-1529, also citing Shain v. Ellison, 273 F.3d 56, 60 (C.A.2 2001).
[131] Id. at 1529.

advocate the minority's position against such a harmful policy and violation of the Fourth Amendment.

United States v. Morrison[132]

In United States v. Morrison, a former university student brought claims under Congress' Violence Against Women Act ("VAWA") against other students that she alleged had raped her. The question that came before the Court was whether or not the federal civil remedy imposed by VAWA,[133] was constitutional under the Commerce Clause or Section §5 of the Fourteenth Amendment.[134] The majority rejected Congress' power under the Commerce Clause, using the rule out of Lopez,[135] eventually concluding that gender-motivated crimes are not economic activity, and therefore Congress has no right to regulate the activity and impose a remedy under the Commerce Clause.[136] Citing the two cases the Court decided almost immediately after the Fourteenth Amendment's enactment, Harris[137] and the Civil Rights Cases[138], the Court also rejected the petitioner's argument that Congress had authority to enact a civil remedy under §5 of the Fourteenth Amendment because the action here was "purely private conduct."[139]

After joining in Justice Stevens' dissent, Breyer authored a dissent that begins with what looked a lot like one of his *Active Liberty* themes:

> "No one denies the importance of the Constitution's federalist principles. Its state/federal division of authority protects liberty- both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer

[132] 529 U.S. 598 (2000)
[133] Specifically 42 U.S.C. §13981(e)(2), (e)(2) which contains the civil remedy.
[134] Morrison at 601-602.
[135] United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995)
[136] 529 U.S. at 613.
[137] 106 U.S. 629 (1883).
[138] 109 U.S. 3 (1883).
[139] Morrison, at 621.

> to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue." [140]

Agreeing with Justice Steven's reasoning that history, precedent, and legal logic combat the majority's approach, Breyer acknowledges the difficulty in finding workable Commerce Clause rules that appropriately limit its scope, and points to the majority's opinion to illustrate that belief. [141] Breyer finds this difficulty in first looking to application of the majority's "economic/noneconomic" distinction, citing caselaw in which the Court has permitted Congress to regulate, through aggregation at economic establishments, forbidding discrimination at local motels, [142] local restaurants, [143] and non-economically motivated discrimination at public accommodations. [144] Moreover, Breyer sees little reason why such "critical constitutional importance" should be imputed to the local or economic nature of an interstate-commerce-affecting cause, when the language of the Commerce Clause says nothing about these considerations, and the Court has focused on the interstate commercial *effects*.[145]

Breyer also disagrees that the majority's rule is in anyway designed to stop a federal intrusion into areas of traditional state regulation. The prerequisite that the enacted laws be "commerce-related" is not difficult to satisfy, as most everyday products cross interstate boundaries, and this could lead Congress to be able to regulate traditionally state areas of law by simply tying it to movement of an object.[146] Looking to the consequences of these complex

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[140] 529 U.S. at 655-656.
[141] Id. at 656.
[142] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
[143] Katzenbach v. McClung
[144] See Note 135, supra.
[145] Morrison, at 657.
[146] Morrison, at 659.

Commerce Clause rules, Breyer finds that these fine distinctions that produce random results "do little to further the federalists interests that called them into being."[147]

The majority seemed concerned that allowing Congress to enact statutes after reasonably finding that "aggregated local instances significantly affect interstate commerce" would allow Congressional regulation of everything.[148] Breyer agrees that aggregation of local activity could have a substantial effect on employment, production, transit or consumption outside of the state, but that is a "practical reality" not a jurisprudential defect, and when the Court cannot change this reality they must defer to Congress for striking the appropriate state and federal balance.[149]

In his cooperative federalism belief, Breyer thinks Congress is "institutionally motivated" to consider what is adequate federal regulation and what is primarily in the purview of the State, as the members of Congress come from local districts and commonly consider the views of state and local officials when the legislate.[150] Breyer asserts that Congress is the better-suited branch to gather relevant facts and decide whether or not regulation is warranted. It also mattered a great deal to Breyer that Congress acted appropriately in attempting to adhere to the principles of federalism. Congress gave notice to the States of its intent to regulate violence against women, and the States responded with overwhelming support for federal attention to the problem of violence against women, which the States agreed was a national problem that could benefit from federal action.[151] Congress then narrowly tailored the law to target deficiencies in state legal systems and stay away from intruding upon divorce, alimony or child custody. Breyer finds this not a state/federal conflict, but a state and federal effort of cooperation that the Court should do

[147] Id. Breyer then cites the rejection of these complex rules in pre-Lopez cases.
[148] Id. at 659.
[149] Id. at 660.
[150] Id. at 661.
[151] Id. at 661.

little to disturb. Breyer concludes his Commerce Clause discussion by stating the traditional rational basis approach is appropriate, and hopefully time will show the majority's rule will be unworkable and that Congress' thorough review of federalist interests and their appropriate approach, will win out.[152]

Although the Commerce Clause portion of Breyer's dissent was the most indicative of his judicial philosophy, Breyer also attacked the Court's finding that the law does not fall within Congressional power under §5 of the Fourteenth Amendment. After rejecting the majority's reliance on Harris and the Civil Rights Cases because neither case considered the claim that the remedy was focused against the failure of state actors to protect from private illegal conduct, Breyer asks why Congress cannot provide a remedy against private actors, when the Court has held at least sometimes, that Congress can enact remedial legislation that prohibits conduct which is not itself constitutional.[153] That remedy does not try to determine what is a constitutional violation; it does not substantially intrude on the States or private parties; and it is only imposing liability for conduct that is already illegal at the State law level.

Arizona v. Gant[154]

In a divided 5-4 decision, Justice Breyer found himself in dissent along with Justices Alito, Kennedy and Roberts. The majority opinion was written by Justice Stevens and joined by Justices Scalia, Thomas, Souter and Ginsburg. An interesting ideological grouping to say the least, the Gant Court was tasked with deciding whether or not a warrantless search of a vehicle incident to arrest, which occurs while the arrestee is handcuffed and in the back of a patrol car, falls within one of the Fourth Amendment's exceptions to the warrant requirement. Here, the facts show that

[152] Id. at 663.
[153] Id. at 665.
[154] 556 U.S. 332, (2009).

petitioner Gant was arrested after police found out there was a warrant for his for driving with a suspended license.[155] Immediately upon his arrest, which occurred ten to twelve feet from his car, he was handcuffed and placed in a patrol car. [156] Two police officers than searched his vehicle finding a gun and cocaine in a jacket found on his backseat. The majority held that the search-incident-to-arrest exception as defined in Chimel[157] and extended to vehicle searches in New York v. Belton,[158] did not control here, and the search was of the arrestee's vehicle when he posed no threat to the police officer's was unjustified.[159]

Justice Breyer sympathizes with Justice Stevens' concern that the rule set forth in Belton can produce "results divorced from its underlying Fourth Amendment rationale" but that in it of itself is not enough to defeat precedent. Although Breyer agrees that the rule is not perfect, and he may well have looked for a better rule "were the question before use one of first impression," he cannot join in fostering a new rule because there is precedent squarely on point.[160] Breyer and minority think the search conducted in Gant was a constitutional search incident to arrest under Belton. Breyer does not waiver from his allegiance to *stare decisis*. He has always taken the overturning of precedent seriously, maybe more seriously than anyone of his current colleagues, and because this matter has already been decided and considerably relied upon, he will not overturn it. Those seeking to have him and Court do so have a heavy burden to bear.[161]

Although short, Breyer's dissent is important to his judicial philosophy, one that includes a strict adherence to precedent. Not only was a bright-line rule articulated by the Court in one

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[155] Id. at 336.
[156] Ibid.
[157] Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685 (1969).
[158] 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed.2d 768 (1981).
[159] Id. at 335.
[160] Id.
[161] Id. at 355.

instance, then reaffirmed years later in another case, numerous lower courts had relied upon the rule in deciding the constitutionality of automobile searches incident to arrest. Breyer's exhibition of judicial restraint when he easily could have joined the majority speaks to his authenticity in his beliefs. The Court needs stability and legitimacy, and in his dissent in Gant, Justice Breyer shows that a way to do that is not through judicial revision of past decision, but through adherence to important precedent.

ACTIVE LIBERTY[162]

For the purposes of this paper, I will include a short discussion of Breyer's book Active Liberty with one of the last topics he discusses: constitutional interpretation. In "A Serious Objection," Breyer takes on his own pragmatic, living constitutionalist view, and defends it against originalist detractors. His insistence upon purpose and consequences at times, do not sit well with textualists who believe that this approach strays incredibly too far from the original intent of the Constitution, and makes judges "activist". Breyer combats this view by stating his approach actually makes him less activist (a claim supported by his judicial record).

Justice Breyer wants the Court to think before it acts, but once it has acted by setting out a particular rule or precedent, the Court must think much harder before overturning that precedent. In many ways, this approach helps the Court maintain legitimacy and stability, and perhaps becomes easier for a general public to follow how and why the Court makes certain decisions. Unfortunately, as the liberal bloc continues to constitute a simple minority on the Roberts' Court,

[162] See Note 23, supra.

Breyer's well-reasoned approach is many times found in dissenting dicta and absent from the enforceable legal rules.

CONCLUSION

Justice Stephen G. Breyer has been an active member on our nation's highest court for twenty years and he shows no signs of slowing. He is an active justice both in the physical and mental sense. Although today he finds himself in the minority of more decisions than he'd like to be, he continues to carefully craft opinions, concurrences and dissents that stay true to his judicial philosophy, one that he hopes benefit our democracy as a whole.

To conclude, it is best to propose a simple hypothetical. Suppose you have two members of the Supreme Court: one takes into account the practical consequences of his actions and how they affect the broader functioning of our government and democratic values, so consumed by protecting liberty that sometimes he falls head-first off his bicycle; the other does none of that. Who would you rather have on the Court? I think the answer is clearly the former.