United States Supreme Court: Justice Stephen Breyer

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Introduction

Associate Justice of the Supreme Court Stephen Gerald Breyer was born on August 15, 1938, in San Francisco, California.\(^1\) His father, Irving, was legal counsel for the San Francisco Board of Education; his mother, Anne, spent most of her time volunteering for the League of Women Voters. He is one of three Supreme Court members of the Jewish faith.\(^2\) Although the family was not strict observers of the Jewish faith, his parents sent Justice Breyer and his brother Charles to a religious school as a child.\(^3\)

The Justice has been described as displaying a formidable intellect at an early age.\(^4\) He not only displayed this intellect in school but also as an Eagle Scout where he was known as the "troop brain" among his fellow Eagle Scouts when he was twelve.\(^5\) The Justice attended the prestigious Lowell high school where he was a part of the debate team and competed against a young Jerry Brown, who would one day grow up to be the Governor of California.\(^6\) His debate coach said that "Breyer would do copious research on debate topics while other kids were out doing things like stealing hubcaps."\(^7\) It is clear that at a young age Justice Breyer displayed great acumen graduating high school with one B and the rest straight A's and the distinction "most likely to succeed" in 1955.\(^8\)

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\(^2\) Id.

\(^3\) Id.

\(^4\) Id.

\(^5\) Id.


\(^7\) Id.

\(^8\) Id.
Breyer attended Stanford University where he graduated Phi Beta Kappa with an A.B. degree in Philosophy in 1959. After graduation Breyer attended Oxford University's Magdalen College as a Marshall Scholar. It was there he received a Bachelor's degree in Philosophy, Politics and Economics in 1961. Upon his return to the United States Justice Breyer concluded his education at Harvard Law School, joining the Harvard Law Review before graduating magna cum laude in 1964.

In 1967, Breyer met Joanna Hare, the daughter of “Lord John Blakenham of England who at that time of their meeting was the leader of the Conservative Party in England.” The pair married in England in an Anglican ceremony for which, because Breyer is Jewish, references to Jesus Christ were carefully edited out. He has three adult children Chloe, an Episcopal priest who is also the author of The Close, another daughter Nell and a son Michael. Stephen and Joanna raised their children in an interfaith home, his daughter Chloe notes in her book The Close “church based activity was more of the exception than the rule when I was growing up.” Michael is “a Stanford grad — college and business school — who is the co-founder and president of Courtroom Connect.” The company specializes in “addressing the growing need for communications infrastructure within courthouses.” He also ran in the 2012 election for California State Assembly District 19, but was ultimately defeated in the general

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10 See Note 1, supra.
11 Id.
12 Id.
13 See Note 6, supra.
14 Id.
15 Id.
16 Chloe Breyer, The Close: A Young Woman's First Year at Seminary (New York: Basic Books, 2000), 156
18 Id.
election. Justice Breyer’s daughter Nell is an MIT graduate that pursued a career as an artist working on interactive videos.”

Career

After graduation, Breyer’s first job out of law school was clerking for Supreme Court Justice Arthur Goldberg, who also shared Justice Breyer’s Jewish faith. During his clerkship, he assisted in drafting Justice Goldberg’s concurring opinion in the landmark privacy case Griswold v. Connecticut. The issue of this case was whether the Constitution “protected the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives.” The court ruled that “together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marital relations.” After his clerkship, Breyer was a special assistant to Donald F. Turner, the Assistant U.S. Attorney for Antitrust from 1965-1967. Following this position Breyer returned to Washington D.C. as an assistant special prosecutor for the Watergate Special Prosecution force, against former President Richard Nixon. In 1974 Breyer served as special counsel to the Administrative Practices Subcommittee of the Senate Judiciary Committee.

Breyer nevertheless remained connected to alma mater Harvard Law School. In 1967 he began his career as a Professor at Harvard Law School. Breyer taught from 1967 through his

19 Id.
20 Breyer, “U.S. Supreme Court Justice,” par. 52
22 381 U.S. 479, 85 S.Ct. 1678 (1965)
24 Id.
26 Id.
27 Id.
28 See Note 1, supra.
Supreme Court appointment in 1994. However Justice Breyer was and is still known as an administrative law scholar, whose academic writings focused primarily on economic regulation.  

Judicial Appointment

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. The Commission promulgates the Federal Sentencing Guidelines, which replaced the prior system of indeterminate sentencing that allowed trial judges to give sentences ranging from probation to the maximum statutory punishment for the offense. Justice Breyer also became a member of the Judicial Conference of the United States in 1990.

In 1993, when Justice Byron White retired, Breyer was interviewed for the vacancy but President Clinton decided 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. The memo suggests that Justice Breyer was

30 See Note 25, supra.
32 See Note 25, supra.
Breyer’s opinions did nothing to suggest he would be “a great Supreme Court justice.” The memo also states that his opinions lack “very little heart and soul.” It contributes to a belief that “Breyer has never authored an opinion on a substantive issue and is a “cold fish.”

Breyer’s chance finally came one year later when Justice Harry Blackmun, who served for twenty-four years, retired. After a week of hearings Breyer was approved by the Senate by a vote of 87 to 9 and assumed his position as an Associate Justice on August 3, 1994.

Jurisprudential Approach

Justice Breyer is a well-known author of several books, but one of the books that helps in understanding Justice Breyer’s philosophy and approach to opinions can be seen in his book “Active Liberty”. This book focuses 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. He believes the court should consider the “democratic nature of the Constitution when interpreting both it and statutory texts.”

In his most recent book, “Making Our Democracy Work”, Breyer writes that “the Court can carry out its constitutional responsibility by applying the Constitution’s enduring values to changing circumstances.” In an excerpt from his book he writes:

“In carrying out this basic interpretative task, the Court must thoughtfully employ a set of traditional legal tools in service of a pragmatic approach to interpreting the law. It must understand that its actions have real-world consequences. And it must recognize and

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34 Id.
35 Id.
36 Id.
37 See Note 1, Supra.
39 Id.
respect the roles of other governmental institutions. By taking account of its own experience and expertise as well as those of other institutions, the Court can help make the law work more effectively and thereby better achieve the Constitution's basic objective of creating a workable democratic government.\textsuperscript{41}

In a chapter titled “The Basic Approach” the Justice writes that “the court should reject approaches to interpreting the Constitution that consider the document's scope and application as fixed at the moment of framing.”\textsuperscript{42} The constitution should instead be regarded as a document that contains “unwavering values that must be applied flexibly to ever-changing circumstances.”\textsuperscript{43}

While each Justice on the Supreme Court has their own philosophies and ideologies, Justice Breyer and Justice Scalia’s judicial approach couldn’t be more different. Justice Breyer has developed a reputation for his pragmatic approach to the law. Often in opposition to the originalist views of Justice Antonin Scalia, “he championed an interpretation of the Constitution as a living document that required consideration of contemporary issues.”\textsuperscript{44} “The constitution is not stagnant and its interpretation changes as our country progresses.”\textsuperscript{45} This is often why he and Justice Scalia are on opposite sides of the spectrum. An example of this can be seen in their discussion of Brown v. Board of Education.\textsuperscript{46} An article titled “Recapping Breyer, Scalia Debate over Constitutional Interpretation” discusses the problem that Brown presents to originalists like

\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} See Note 40, Supra.
\textsuperscript{44} Id.
\textsuperscript{46} 344 U.S. 1, 73 S. Ct. 1 (1952)
Scalia. Originalists like Scalia interpret the Constitution as it was meant to be when it was drafted. This presents a problem, in the eyes of Justice Breyer, because interpreting it as it was written would mean that that several of the civil rights that have been afforded throughout our nation's history would be nonexistent under an originalists approach. He says "interpreting the constitution as it was meant to be when it was drafted would mean that segregated schools was not something to be done away with."47 Justice Scalia, failed to provide a direct answer and instead turned his attention to the earlier high court decision in Plessy v. Ferguson,48 which ruled that legalized segregation did not violate the Constitution stating that he would have sided with the dissent in that case."49

Breyer maintains, as he did during the Arizona debate, "that the words of the Constitution, if they are to have relevance today, cannot be interpreted in the framework of the 18th century."50 In a 2007 dissent in Parents Involved v. Seattle School District,51 Justice Breyer wrote:

"For much of this Nation's history, the races remained divided. It was not long ago that people of different races drank from separate fountains, rode separate buses, and studied in separate schools. In this Court's finest hour, this case challenged this history and helped to change it...It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live." Breyer once explained, "Much in the

47 See Note 45, Supra.
48 163 U.S. 537, 16 S.Ct. 1138 (1896)
49 See Note 45, Supra.
50 Id.
Constitution is written in a very general way.” Words and phrases such as “freedom of speech” do not define themselves. Nor does the word ‘liberty’ and that the “framers intent with these basic values in a document was that they would last for hundreds of years.”

Ultimately Justice Breyer believes the judges of today can uphold the values of the constitution and apply them to our ever changing circumstances through “traditional legal tools, such as text, history, tradition, precedent, and purposes and related consequences, to help find proper legal answers.” “Doing so will make the law work better for those whom it affects.”

**International Outlook**

Justice Breyer has been outspoken about law beyond U.S. borders. In the years following his judicial appointment he began noticing that the Supreme Court docket was very different from when he first became a justice in 1994. “Instead of just a handful of cases involving the interdependence of law in this and other countries, he estimates that the cases involving foreign law now have grown to as much as a fifth of the docket.” In his book “The Court and the World”, Justice Breyer wrote “it is more than a book; it is something of a mission — a mission to convince readers that American courts no longer have any choice about involving themselves in the law beyond U.S. borders.” He says "I began to understand the important divisions in the world are not on the basis of race or nationality or country or where you live." “They are really between people who believe in a rule of law as a way of deciding significant issues and those

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52 See Note 45, Supra.
53 See Note 40, Supra.
54 Id.
55 See Note 1, Supra.
56 Id.
57 Id.
58 Id.
who do not believe in a rule of law — who believe in force." The book argues that while American courts traditionally focus on domestic precedent, "they now increasingly face a duty to reckon with a globalized world." It cites, for example, a 2004 House bill that sought to prevent judges from even examining material from foreign institutions, in which a third of the of the house Republicans caucus backed that legislation at the time.

Justice Breyer explains how "globalization has changed the way the Supreme Court does business." With "new challenges imposed by an ever more interdependent world, judicial awareness can no longer stop at the border." The challenges come in several forms. The weightiest, is how to "protect basic liberties in the face of security threats." "The court was once highly deferential to presidents during wartime." "The justices looked the other way when, during WWI, the Wilson administration locked up socialists and prosecuted leafleteers opposed to the draft." Times are incredibly different now. We live in an age of terrorism that can come in various forms. Justice Breyer observes, threats to national security are "amorphous and heedless of borders which makes the role of the judiciary trickier." "Judges should not hamstring the executive's efforts to protect the nation." However they should not hand over a "blank check whereby any and all restrictions on individual rights are rubber-stamped as necessary to fight the enemy." According to Justice Breyer, "four cases involving the

59 Id.
60 Id.
61 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
Guantanamo Bay detention facility decided in the seven years following the September 11 attacks illustrate the justices' new commitment to strike a reasonable balance between security and liberty.70 Justice Breyer argues that "while many decisions regarding the detention of enemy combatants are seen as saying too little by many, they nevertheless represent the right approach."71 He states that the complex world of detaining them calls for a "case-by-case review as opposed to "bright-line rules for the Justices."72 This also keeps the court abreast as to what is happening abroad. "It imposes a heavy duty on them in order to adjudicate conflicts at home."73 "Constitutional principle alone cannot determine what kinds of surveillance are acceptable, or whether a particular plaintiff should be given a hearing in a non-military tribunal."74 "Technical information on the contours of international conflicts must factor into the justices' rulings."75

Justice Breyer divided his book into four sections, beginning with national security. As he noted in an interview with NPR, "the law governing national security is quite different today than it was for most of U.S. history."76 "From the time of George Washington through the two world wars, presidents could do as they wished during wartime."77 He points, for example, to World War II when the Supreme Court upheld the internment of Japanese-Americans. "We put 70,000 American citizens of Japanese origin into camps for no good reason at all."78 The court allowed that because, as Breyer puts it, the justices figured "someone has to be in charge."79 He

70 Id.
71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
states that it was better for it to be the president than the Supreme Court. Nevertheless the court had a different view by the Korean War. In Youngstown Sheet & Tube Co. v. Sawyer, the court ruled that President Truman could not seize the nation's steel mills to keep them operating during a wartime labor dispute.

After the Sept. 11 attacks, cases tested the indefinite imprisonment, without charge, of individuals brought to Guantanamo Bay. In four separate cases over several years, "the Supreme Court declared that the president does not have a blank check to violate civil liberties during wartime and that prisoners have the right to challenge the grounds for their imprisonment." Justice Breyer believes that this change in the court's rulings is due to a change in the larger world. "The nature of security problems has changed." "It's not straight-out war, we are no longer primarily fighting other nations, but terrorist movements that promise to last well into the future." "And if you say that the president has a blank check, then you're back to the Japanese camps."

Justice Breyer's opinion in an international copyright case is one example in which he emphasizes how interdependent the world is today. In Kirtsaeng v. Wiley An exchange-student from Thailand studying in the United States found that his English textbooks, published by a subsidiary in Thailand, were cheaper in his home country. Kirtsaeng and his friends bought books in Thailand, and sold them in the U.S. for a $75,000 profit. Wiley sued Kirtsaeng in district court for copyright infringement under Section 602(a) (1) of the Copyright Act, which

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80 Id.
81 343 U.S. 579, 72 S.Ct. 863 (1952)
82 See Note 6, Supra.
83 133 S.Ct. 469 (2012)
makes it impermissible to import a work “without the authority of the owner.”84 Kirtsaeng asserted a defense under Section 109(a) of the Copyright Act, which allows the owner of a copy lawfully made under this title to sell or otherwise dispose of the copy without the copyright owner's permission.85 The district court rejected Kirtsaeng's argument, and held that the doctrine was inapplicable to goods manufactured in a foreign country. The question before the Supreme Court asked “if a copy was made legally, acquired abroad and then imported into the United States, can that foreign-made copy ever be resold within the United States without the copyright owner's permission under Section 602(a)(1) and Section 109(a) of the copyright act?”86 In a 6-3 opinion written by Justice Breyer, the court found that there was “no geographic restriction on the first sale doctrine, which states that the copyright owner maintains control of the first sale only.”87 Justice Breyer looked to the “language and common-law history of the Copyright Act support a non-geographic reading of the Act that allows for unrestricted resale of copyrighted goods regardless of the location of their manufacture.”88 The Court also held that “a geography-based reading of the first sale doctrine would drastically harm the used-book business as it would force book sellers to be subject to the whim of foreign copyright holders.”89

This case represents one of several cases in which Justice Breyer not only displays his formidable intellect but applies his philosophies (mentioned earlier) in analyzing cases and applying the law. The cases that will follow in the next section of this paper will also highlight

85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
his philosophies from his majority opinion in *Stenberg v. Carhart* or *NLRB v. Noel Canning* to his impassioned dissents in *Bush v. Gore* or *Arizona v. Gant*. These cases will show that Justice Breyer relies heavily on applying the law to changing circumstances. Even though some may 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. He has also been known to vote with some of the more conservative members of the court although, this is not often.

**Majority Opinions**

Justice Breyer’s pragmatism, and inclusive approach to the law is best expressed through his judicial opinions. One of Justice Breyer’s most influential opinions was in *NLRB v. Noel Canning* which, in a 5-4, decision held recess appointments made by the president when the Senate was still in pro forma session were unconstitutional. While media accounts of the decision understandably emphasized how it was a loss for the president, “Justice Breyer’s opinion is about a far more important and enduring question than the lawfulness of these handful of recess appointments: “How should courts interpret the Constitution?” As has always been the case, the answer to this deeper question will shape judicial rulings across the spectrum of constitutional law issues, from gay rights and states’ rights to God and guns.

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90 530 U.S. 914 (2000).
91 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)
92 531 U.S. 98, 104 (2000)
93 556 U.S. 332, (2009)
95 Id. at 1680-1681.
96 134 S. Ct. 2550, 189 L. Ed. 2d 538 (2014)
97 Adam Winkler, *Justice Breyer’s Theory of Constitutional Interpretation Finally Gets Its Star Turn* (July, 2014)
98 Id.
99 Id.
Breyer’s opinion answers three questions as to when and how a president can validly use his power under the Recess Appointments Clause. Justice Breyer offers the most forceful defense of what’s often termed living constitutionalism to appear in a majority Supreme Court opinion in a generation. "He blatantly rejects Antonin Scalia’s 18th-century approach of originalism—in which all that matters is what the framers thought—Breyer in Noel Canning stakes a bold claim for interpreting the Constitution “in light of its text, purposes, and our whole experience.”

“His is a progressive vision of the Constitution, one articulated previously in his books, such as “Active Liberty”, and in various concurring and dissenting opinions he has authored over the years." Now in the wake of Canning it is also the opinion of the court. As a result, “it will influence how future courts—state and federal, trial and appellate—will apply the Constitution to answer tomorrow’s controversies.”

From Breyer’s perspective, “the recess appointments power dramatically illustrates the advantages of his approach.” Justice Scalia argues that “originalism requires reading the recess appointment power narrowly to apply only to formal breaks between sessions.” "Those were the types of recesses referred to in the dictionaries of the period, so that’s what the founders expected." Yet, due to institutional changes in the Senate, “such a narrow view of what counts as a recess would render the whole Recess Appointments Clause, an anachronism, from Scalia’s perspective,” as there would be no contemporary relevance. Justice Breyer calls out Scalia,

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100 U.S. Const. Art. II. §2, cl. 3.  
101 Id.  
102 Id.  
103 Id.  
104 Id.  
105 Id.  
106 Id.  
107 Id.  
108 Id.
who "would basically read it out of the Constitution." He performs this act of judicial excising in the name of liberty. He also adds: "We fail to see how excising the Recess Appointments Clause preserves freedom."

Contrary to some of the critics of active liberty, evolving constitutionalism, reading the Constitution broadly in service of its "reason and spirit isn't a license for justices to simply impose their own values on society." Justice Breyer "grounds his understanding of the core purposes of the Recess Appointment Clause in data and evidence." In order to determine whether midsession breaks qualify as recesses, the former law professor "surveys every single recess appointment since the founding." He examines the Senate reports and a century of presidential legal opinions and factors in the historic practices of the comptroller general. "He analyzes the recess power at key moments in history, "when its scope and meaning were publicly contested." "His judgment is shaped by empirical data on the average length of Senate confirmations and on the duration of recesses in which appointments have been made." "He adds two appendices, one on every congressional recess and another reporting the results of a random sample of recess appointments under recent presidents."

Breyer's approach to constitutional interpretation is not meant to disregard the intent of the framers as he considers the views of Madison, Jefferson, Washington, and Marshall. Nevertheless Justice Breyers "also seeks to discover how the recess appointment power has

109 Id. 110 Id. 111 Id. 112 Id. 113 Id. 114 Id. 115 Id. 116 Id. 117 Id. 118 134 S. Ct. 2550 (2014)
functioned and been understood since the founding—by the various attorneys general, by the Senate, and by presidents making appointments.” Justice Breyer also reminds us of the history that is here, but he suggests that “constitutional law should be informed by data as much as by dictionaries.”

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. 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.

The Court deliberated on three questions presented about the importance of the Recess Appointment Clause. The first question considered what exactly is the scope of the of the words “recess of the Senate?” The majority finds that the clause applies to both inter-session recesses which is a break between formal Senate sessions in addition to intra-session recesses. In order for the intra-session recesses to count, they must be “of substantial length.” After discussing dictionary definitions, and the important of “the” meaning only the formal break in session,

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119 Id. at 2551
120 Id.
121 Id. at 2559, citing The Federalist No. 76, p. 510 (J. Cooke ed. 1961).
122 Id.
123 Id. at 2560.
124 Id. at 2556.
125 Id. at 2561.
Breyer finds that the “constitutional text is thus ambiguous” and the clause’s purpose demands the broader interpretation.\textsuperscript{126}

The next question the court considered is the scope of the phrase “vacancies that may happen?”\textsuperscript{127} The Court concluded that this phrase refers both to vacancies that arise before a recess and continue, as well as vacancies that only initially arise during a recess.\textsuperscript{128} This may allow the President to fill seats more efficiently when they are vacant. The final question took into consideration the length of the recess, which in this case was only three days, but was too short of a time for the President to invoke his power. Justice Breyer looks to other occurrence of historical reference, and concludes that anything less than ten days is also probably too short of a time.\textsuperscript{129} This is slightly problematic in Breyer’s opinion; the length of time that he chose is arbitrary, which is a fact that Scalia notes in his concurrence. In this case Justice Breyer emphasized purpose, tradition, and consequences and was seen as a success for the living constitution interpretation.

Another decision in which Justice Breyer authored the majority opinion involved abortion rights and the application of the Court’s decision in Roe v. Wade\textsuperscript{130} and Planned Parenthood v. Casey.\textsuperscript{131} Stenberg v. Carhart,\textsuperscript{132} was a landmark case in which Justice Breyer strictly adhered to precedent. The liberal wing of the Rehnquist Court, with the vote of Justice O’Connor, was able to strike down the Nebraska ban on partial birth abortions as violating the Due Process Clause.

\textsuperscript{126} Ibid.
\textsuperscript{127} Id. at 2556.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 2571.
\textsuperscript{130} 505, U.S. 833 (1992).
\textsuperscript{131} 530, U.S. 914 (2000).
Justice 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."\textsuperscript{133} In \textit{Stenberg}, the Nebraska statute’s penalty made it a Class III felony for doctors to perform partial birth abortion procedures. Violation of the statute 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.\textsuperscript{134}

Justice Breyer 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 gets to the two independent reasons why the ban is unconstitutional under the precedent established. One of the reasons is that 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.\textsuperscript{135} 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 woman’s health when it regulates the methods of abortion."\textsuperscript{136} The majority looks to the medical evidence rejects most of Nebraska’s eight arguments against having a health exception, instead deferring to the medical health professionals.

\textsuperscript{133} Id.
\textsuperscript{134} Id. at 922.
\textsuperscript{135} 530 U.S. at 930.
In 2011, Justice Breyer authored the 5-4 majority opinion in *Turner v. Rogers*.\(^{137}\) The petitioner in this case, Michael D. Turner, was jailed six times from 2003 to 2010 for accumulated child support payment arrears.\(^{138}\) After a South Carolina family court ordered petitioner Turner to pay $51.73 per week to respondent Rogers to help support their child, Turner repeatedly failed to pay the amount due and was held in contempt five times. For the first four, he was sentenced to 90 days' imprisonment, but he ultimately paid what he owed (twice without being jailed, twice after spending a few days in custody).\(^{139}\) The fifth time he did not pay but completed a 6-month sentence. After his release, the family court clerk issued a new "show cause" order against Turner because he was $5728.76 in arrears.\(^{140}\) Both he and Rogers were unrepresented by counsel at his brief civil contempt hearing. The judge found Turner in willful contempt and sentenced him to 12 months in prison without making any finding as to his ability to pay or indicating on the contempt order form whether he was able to make support payments.\(^{141}\) After Turner completed his sentence, the South Carolina Supreme Court rejected his claim that the Federal Constitution entitled him to counsel at his contempt hearing, declaring that civil contempt does not require all the constitutional safeguards applicable in criminal contempt proceedings.\(^{142}\) The court therefore had to decide whether the Fourteenth Amendment's Due Process Clause requires the State to provide counsel (at a civil contempt hearing) to an indigent person potentially faced with such incarceration.\(^{143}\)

Justice Breyer authored this opinion in a 5-4 ruling. The Court held that the South Carolina courts "were under an obligation to provide an alternative procedure to ensure a fair

\(^{137}\) 131 S. Ct. 2507, 2510 (2011)
\(^{138}\) Id. at 2509
\(^{139}\) Id.
\(^{140}\) Id.
\(^{141}\) Id.
\(^{142}\) Id. at 2510
\(^{143}\) Id.
determination of the questions at hand.” Since Turner did not have clear notice that ability to pay would be the critical question in this proceeding, nor was he provided with information or forms that would have allowed Turner to disclose such information, the South Carolina courts erred in finding him able to pay and thus in civil contempt. Breyer stated: ‘there is available a set of substitute procedural safeguards, which, if employed together, can significantly reduce the risk of an erroneous deprivation of liberty.” They can do so, moreover, without incurring some of the drawbacks inherent in recognizing an automatic right to counsel. Those safeguards include (1) notice to the defendant that his “ability to pay” is a critical issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status, such as those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay.

Justice Breyer went on to reiterate those things that must be present so that Due Process does not require the appointment of counsel, stating:

“The Fourteenth Amendment's Due Process Clause does not automatically require the State to provide counsel at civil contempt proceedings to an indigent noncustodial parent who is subject to a child support order, even if that individual faces incarceration. In particular, that Clause does not require that counsel be provided where the opposing parent or other custodian is not represented by counsel and the State provides alternative procedural safeguards equivalent to adequate notice of the importance of the ability to pay, a fair opportunity to present, and to

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144 Id. at 2509
145 Id. at 2510
146 Id.
147 Id.
dispute, relevant information, and express court findings as to the supporting parent's ability to comply with the support order.”\textsuperscript{148}

“We consequently hold that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent individual who is subject to a child support order, even if that individual faces incarceration (for up to a year). In particular, that Clause does not require the provision of counsel where the opposing parent or other custodian (to whom support funds are owed) is not represented by counsel and the State provides alternative procedural safeguards equivalent to those we have mentioned adequate notice of the importance of ability to pay, fair opportunity to present, and to dispute relevant information and court findings. Thus there must be notice to the obligor-parent that his/her ability to pay is an issue. Then the must be forms designed to elicit this information and presumably a consideration by the court of the obligor-parent’s ability to pay. After this, courts are then required to make a specific finding in child support contempt cases whether or not the obligor-parent has or had the ability to pay in order to satisfy Due Process because this is the critical issue.”\textsuperscript{149} However, Justice Breyer specifically declined to address whether Due Process would require the appointment of counsel when the state is collecting overdue support payments due the state because then the state would be represented by counsel in complex cases stating with emphasis:

“The average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. And this kind of proceeding is not before us;

\textsuperscript{148} Id.
\textsuperscript{149} Id. at 2510.
neither do we address what due process requires in an unusually complex case where a defendant can fairly be represented only by a trained advocate."\textsuperscript{150}

The court ultimately concluded that whereas the custodial parent (entitled to receive the support) is unrepresented by counsel, the State need not provide counsel to the noncustodial parent (required to provide the support). But we attach an important caveat, namely, that the State must nonetheless have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order.\textsuperscript{151}

The ruling did not overturn the requirements of many states that counsel be appointed for indigent litigants facing incarceration at civil contempt hearings because states are free to provide more constitutional protections under state constitutions than the federal government provides under the United States Constitution.\textsuperscript{152} The federal agency responsible for enforcing child support is the Office of Child Support Enforcement (OCSE).\textsuperscript{153} In response to the Supreme Court's \textit{Turner} decision, OCSE responded that states should review their procedures to ensure that the proceedings are fair by giving the obligor-parents an opportunity to provide and respond to questions regarding their finances and ability to pay.\textsuperscript{154}

\textsuperscript{150} Id.
\textsuperscript{151} Id. at 2520.
\textsuperscript{154} Id.
Concurring Opinions

In Snyder v. Phelps\textsuperscript{155} the family of deceased Marine Lance Cpl. Matthew Snyder filed a lawsuit against members of the Westboro Baptist Church who picketed at his funeral. For the past 20 years, the congregation of the Westboro Baptist Church has picketed military funerals to communicate its belief that God hates the United States for its tolerance of homosexuality, particularly in America's military.\textsuperscript{156} The church's picketing has also condemned the Catholic Church for scandals involving its clergy. Fred Phelps, who founded the church, and six Westboro Baptist parishioners (all relatives of Phelps) traveled to Maryland to picket the funeral of Marine Lance Corporal Matthew Snyder, who was killed in Iraq in the line of duty.\textsuperscript{157} The picketing took place on public land approximately 1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers. The picketers peacefully displayed their signs--stating, e.g., “Thank God for Dead Soldiers,” “Fags Doom Nations,” “America is Doomed,” “Priests Rape Boys,” and “You're Going to Hell”--for about 30 minutes before the funeral began.\textsuperscript{158} Matthew Snyder's father (Snyder), petitioner here, saw the tops of the picketers' signs when driving to the funeral, but did not learn what was written on the signs until watching a news broadcast later that night.\textsuperscript{159} U.S. District Judge Richard Bennett awarded the family $5 million in damages, but the U.S. Court of Appeals for the Fourth Circuit held that the judgment violated the First Amendment's protections on religious expression. The church members' speech is protected, “notwithstanding the distasteful and repugnant nature of the words.”\textsuperscript{160} The Majority held that the First Amendment shields those who stage a protest at the

\textsuperscript{155} 562 U.S. 443, 131 S.Ct. 1207 (2011).
\textsuperscript{156} Id. at 1229.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id. at 1230.
funeral of a military service member from liability. They state that “while the messages may have fallen short of refined social or political commentary, the issues they highlighted—the political and moral conduct of the United States and its citizens, the fate of the nation, homosexuality in the military, and scandals involving the Catholic clergy—were matters of public import.” The context of the speech and its connection with the funeral did not make the speech a matter of private rather than public concern. Simply put, the protestors had the right to be where they were. They alerted local authorities to their funeral protest and fully complied with police guidance on where the picketing could be staged. The picketing was conducted under police supervision some 1,000 feet from the church, out of the sight of those at the church. The protest was not unruly; there was no shouting, profanity, or violence. Any distress occasioned by the picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.

Justice Breyer filed a concurring opinion in which he wrote that while he agreed with the majority's conclusion in the case, he did not believe that our First Amendment analysis can stop at that point. "A State can sometimes regulate picketing, even picketing on matters of public concern from Justice Breyer's standpoint. See Frisby v. Schultz. It does not hold or imply that the State is always powerless to provide private individuals with necessary protection. Rather, the Court has reviewed the underlying facts in detail, as will sometimes prove necessary where First Amendment values and state-protected (say, privacy-related) interests seriously conflict." See Florida Star v. B. J. F. To uphold the application of state law in these circumstances would

161 Id. at 1210.
162 Id. at 1221.
165 Id.
166 See 491 U.S. 524, 533, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989)
punish Westboro for seeking to communicate its views on matters of public concern without proportionately advancing the State's interest in protecting its citizens against severe emotional harm.\textsuperscript{167} The dissent in this case recognizes that the means used here consist of speech. However Justice Breyer points out “that the speech, like an assault, seriously harmed a private individual.”\textsuperscript{168} He asks the question does our decision leave the State powerless to protect the individual against invasions of, e.g., personal privacy, even in the most horrendous of such circumstances?\textsuperscript{169} This opinion is consistent with a common theme of Justice Breyer which is working in the interest of the public even if the public does not agree. It’s about the people and working to protect them and their rights.

**Dissenting Opinions**

One of the most controversial cases of the past fifteen years dealt with the presidential election in which the Court, in the eyes of many, effectively decided the 2000 presidential election. In *Bush v. Gore*\textsuperscript{170} the court held that the Florida Supreme Court's method for recounting ballots was a violation of the Equal Protection Clause and that no alternative method could be established in time—permitting Florida Secretary of State Katherine Harris's previous certification of George W. Bush as the winner to stand. Justice Breyer dissent can be viewed as the most impassioned opinion of his career. He uses unusually strong language writing that the Court was wrong to take this case.\textsuperscript{171}

\textsuperscript{167} 562 U.S. 443, 131 S.Ct. 1207, 1221 (2011).
\textsuperscript{168} Id. at 1222
\textsuperscript{169} Id.
\textsuperscript{170} 531 U.S. 98, 121 S.Ct. 525 (2000)
\textsuperscript{171} Id. at 556.
Justice Breyer compared the case with the historical experience of the disputed election of 1876 where a virtual tie between Rutherford B. Hayes and Samuel J. Tilden led Congress to appoint an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices.\textsuperscript{172} When the commission split evenly along party lines, the deciding vote was put in the hands of Supreme Court Justice Joseph P. Bradley, who awarded the electoral votes to Hayes. Justice Bradley immediately became the subject of vociferous attacks.\textsuperscript{173} Bradley was accused of accepting bribes, of being captured by railroad interests, and of an eleventh-hour change in position after a night in which his house was surrounded by the carriages of Republican partisans and railroad officials. . . . For present purposes, the relevance of this history lies in the fact that the participation in the work of the electoral commission by five Justices, including Justice Bradley, did not lend that process legitimacy.\textsuperscript{174} Nor did it assure the public that the process had worked fairly, guided by the law. Rather, it simply “embroiled Members of the Court in partisan conflict, thereby undermining respect for the judicial process.”\textsuperscript{175} Justice Breyer further explained that both the Twelfth Amendment and the Electoral Count Act, passed after and in response to the 1876 election, made clear that it is Congress that is chiefly responsible for resolving electoral disputes.\textsuperscript{176}

Breyer states:

“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.”\textsuperscript{177} The people’s will is what elections are about, since the

\textsuperscript{172} Id. at 556.
\textsuperscript{173} Id.
\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 557.
public’s confidence “is a vitally necessary ingredient of any successful effort to protect basic liberty and, indeed, the rule of law itself. . . . We do risk a self-inflicted wound—a wound that may harm not just the Court, but the Nation.”

In this case Breyer thought that deference should have been given Florida Supreme Court in interpretation of its state’s voting laws. He refutes the majority’s three-pronged reasoning as to why the Florida State Supreme Court’s recount order was problematic under the Equal Protection Clause. His position is based on the fact 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. 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.

Breyer believes that 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 fairness. Political importance does not equal legal importance, and Breyer insists his colleagues take a position of judicial restraint.

Breyer was concerned about the Court deciding an undoubtedly political question in the long run. He believes that Congress is the one with the power to decide these decisions as they have the authority and obligation for counting electoral votes. The judiciary does not have a direct connection with the people in the way that Congress does. Congress is elected by the people and has better way of executing their will.

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178 Id.
179 Id. at 558.
180 Id.
181 Id.
Another controversial issue involved prison strip searches. Justice Breyer also authored the four-justice dissenting opinion in *Florence v. Board of Chosen Freeholders of the County of Burlington*\(^\text{182}\) which upheld an invasive strip search of prison inmates when they are entering the general prison population even where there is no reason to suspect that the person being subject to the strip search might be carrying drugs or other contraband. In this case Albert Florence was searched twice in seven days after he was arrested on a warrant for a traffic violation he had already paid.\(^\text{183}\) He filed a lawsuit against officials at the two jails, arguing that the searches were unreasonable because he was being held for failure to pay a fine.\(^\text{184}\) The District Court ruled that the strip search of Florence violated the Constitution. However, officials representing both Burlington and Essex Counties appealed the decision. The U.S. Court of Appeals for the Third Circuit reversed, holding that it is reasonable to search everyone being jailed, even without suspicion that a person may be concealing a weapon or drugs. In a 5-4 decision the Supreme Court affirmed the lower court, holding that the strip searches for inmates entering the general population of a prison do not violate the Fourth Amendment.\(^\text{185}\) The Court concluded that a prisoner's likelihood of possessing contraband based on the severity of the current offense or an arrestee's criminal history is too difficult to determine effectively.\(^\text{186}\)

Breyer's dissenting opinion was joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan. The dissent relies on empirical evidence on strip-searches suggests

\(^\text{182}\) 621 F. 3d 296  
\(^\text{184}\) Id.  
\(^\text{185}\) Id.  
\(^\text{186}\) Id.
there is no convincing reason that, in the absence of reasonable suspicion, involuntary strip-searches of those arrested for minor offenses are necessary.\textsuperscript{187} They cited a study conducted in New York under the supervision of federal courts, where only one inmate had hidden contraband in his body that would have avoided detection by x-ray and a pat down.\textsuperscript{188} In a similar study in California on 3 inmates were found with contraband after a strip search was done out of 75,000 inmates that were strip-searched.\textsuperscript{189} "In Breyer’s view, “such a search of an individual arrested for a minor offense that does not involve drugs or violence—say a traffic offense, a regulatory offense, an essentially civil matter, or any other such misdemeanor—is an unreasonable search forbidden by the Fourth Amendment, unless prison authorities have reasonable suspicion to believe that the individual possesses drugs or other contraband.”\textsuperscript{190}

The empirical studies that were used in this case is similar to those used in another case regarding the treatment of prisoners, who were instead of being searched were facing the death penalty. Justice Breyer is strongly against the death penalty and is extremely vocal in expressing his dislike for the outdated execution of justice. This is vehemently expressed in Glossip v. Gross\textsuperscript{191} in which the court ruled that “executions carried out by a three-drug protocol of midazolam hydrochloride (midazolam), pancuronium bromide, and potassium chloride did not constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution.”\textsuperscript{192} The administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) Arbitrariness in application, (3)
Unconscionably long delays that undermine the death penalty’s penological purpose and, (4) Most places within the United States have abandoned its use.¹⁹³

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed.¹⁹⁴ Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue.¹⁹⁵ Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue.¹⁹⁶ Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012.¹⁹⁷ The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal.¹⁹⁸

Justice Breyer essentially argues that the death penalty often results in more harm than good as there can often be too many errors that create irreparable harm. It does not bring about justice as it violates the 8⁰th Amendment.¹⁹⁹
Justice Breyer has not always sided with the more liberal members of the Supreme Court. An example of Justice Breyer’s more conservative stance was seen in Arizona v. Gant.\(^{200}\)

The Gant Court was decided 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. Gant was arrested after police found out there was a warrant for his for driving with a suspended license.\(^{201}\) Immediately upon his arrest, which occurred ten to twelve feet from his car, he was handcuffed and placed in a patrol car.\(^{202}\) When the police conducted a search they found a gun and cocaine in the back seat.

The majority held that the search incident-to-arrest exception as defined in Chimel v. California\(^ {203}\) and extended to vehicle searches in New York v. Belton\(^ {204}\) 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.

Justice Breyer parted ways with his more liberal colleagues, joining the four-justice dissent. Breyer and the minority believed that the search conducted in Gant was a constitutional search incident to arrest under Belton. Breyer strictly adheres to stare decisis, which is something he holds to high regard. Breyer rarely takes the position of overturning precedent even if the precedent does not align with the left of the Court.

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\(^{200}\) 556 U.S. 332 (2006)
\(^{201}\) Id. at 336.
\(^{202}\) Ibid.
One case that highlights Justice Breyer’s “Active Liberty” themes is United States v. Morrison. This case involved a former university student brought claims under Congress’ Violence Against Women Act (“VAWA”) against other students that she alleged had raped her. The Court had to decide whether or not the federal civil remedy imposed by VAWA, was constitutional under the Commerce Clause or Section §5 of the Fourteenth Amendment. The majority rejected Congress’ power under the Commerce Clause, using the rule out of United States v. Lopez, which concluded 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.

Justice Breyer dissents stating:

“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 to home. The question is how the judiciary can best implement that original federalist understanding where the Commerce Clause is at issue.”

In addition to that he also argues that this was a job for Congress to decide as seen similarly in Roe. 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

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205 529 U.S. 598 (2000)
206 Specifically 42 U.S.C. §13981(e)(2), (e)(2) which contains the civil remedy.
207 Morrison at 601-602.
209 529 U.S. at 613.
210 529 U.S. at 655-656.
legislate. Breyer asserts that Congress is the better-suited branch to gather relevant facts and decide whether or not regulation is warranted. Morrison emphasizes a common theme which is that Justice Breyer diligently applies his philosophy of history, precedent and legal logic in his opinions regardless of the issue.

Conclusion

Justice Breyer believes that applying the law requires using both your head and heart. He says:

"The main thing I would like people to understand about the Constitution is that it does not decide how people in America should live their lives. That its basic object is to create a democratic form of government, a form of government that has limits, but within those limits there is enormous space for people to make up their own minds about how they want to live together in their communities."

This philosophy is evident in Breyer's opinions as he tactfully drafts them considering our society as a whole, and our principles of independence, democracy and justice.

211 Id. at 660.
212 Id. at 661.