
ESSAYS IN HONOR OF JUSTICE STEPHEN G. BREYER

INTRODUCTION

*Martha Minow**

To honor Justice Stephen G. Breyer's first twenty years of service on the United States Supreme Court, Harvard Law School planned a celebration and many individual faculty members wrote reflections on some of his opinions. Those reflections are assembled here along with our community's deepest admiration and appreciation. As one of the small number of individuals in American history who have offered their service at the highest levels of all three branches of the United States government, Justice Breyer has devoted his professional life to advancing the public good. He does so with intellectual rigor, imagination, and wisdom, all in evidence in the cases discussed in the comments that follow.

One distinctive feature of his judicial opinions is the perspective afforded from his deep knowledge of how government works. As Special Assistant to the Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice and Assistant Special Prosecutor on the Watergate Special Prosecution Force, 1973, he worked to enforce the law. As Special Counsel and then Chief Counsel for the U.S. Senate Judiciary Committee and Special Counsel for the Subcommittee on Administrative Practices, he pursued legislative factfinding, lawmaking, oversight, and advice and consent work. His service within the judiciary started when he worked as a law clerk to Justice Arthur J. Goldberg at the Supreme Court of the United States, and continued with his service on the U.S. Court of Appeals for the First Circuit, where he also served as Chief Judge, as a member of the Judicial Conference, and as a member of the U.S. Sentencing Commission at the time of its development of the Federal Sentencing Guidelines.

Harvard University has been lucky he decided to come East following college at Stanford University and West following his time as a Marshall Scholar at Oxford University. A distinguished student and editor of the *Harvard Law Review*, he returned as a law professor and professor at the Kennedy School of Government. A prolific and influential scholar, his powerful work on risk regulation, regulatory reform, energy regulation, making democracy work, and judicial interpretation reflects both his first-hand experiences in governing and deep

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commitments to rational decisionmaking, governmental deliberation, and citizen participation. His civic service on the boards of educational and health care institutions and his bicycling, his cooking, and his wide and constant reading help to explain the breadth of his knowledge, but his sense of humor is all his own.

It is with joy that we offer these reflections on some of his judicial work.

MAKE IT WORK!: JUSTICE BREYER ON PATENTS IN THE LIFE SCIENCES

I. Glenn Cohen*

Like Tim Gunn, the avuncular advisor to aspiring designers on reality TV's *Project Runway*, if Justice Breyer had a slogan, it would be "Make it work!" The idea of the law as useful — as a way to solve problems — runs through his many writings, whether opinions, articles, or books. As he put it in his confirmation testimony before the Senate:

I believe that the law must work for people. The vast array of Constitution, statutes, rules, regulations, practices and procedures, that huge vast web, has a single basic purpose. That purpose is to help the many different individuals who make up America — from so many different backgrounds and circumstances, with so many different needs and hopes.¹

This focus on making things work — making sure the trains run on time — is exemplified often in Justice Breyer's questions at oral argument. For example, in *Norfolk & Western Railway Co. v. Hiles*,² a case about the occupational injuries of railroad workers who connect one railcar to another, Justice Breyer let the railroad's advocate know that "my law clerk found" a device in "the Car and Locomotive Cyclopedia for 1974" that could make the task safer, noting that "[t]hey have four pictures."³

Sometimes Justice Breyer's tendency to try to make the law work, to be practical rather than adversarial, produces some surreal moments. One of my favorite such colloquies occurred during the severability portion of the oral argument in *NFIB v. Sebelius*.⁴ In this part of the oral argument, the Justices confronted what to do about the huge number of programs contained in the more than one thousand pages of the Affordable Care Act should they strike down the individual mandate portion. In a colloquy with Deputy Solicitor General Edwin Kneedler, who argued for the government in favor of severability, and similar to one he

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¹ *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 20–21 (1994) (statement of Stephen G. Breyer, Supreme Court Nominee).

² 516 U.S. 400 (1996).

³ Linda Greenhouse, *The Breyer Project: "Why Couldn't You Work This Thing Out?,"* 4 CHARLESTON L. REV. 37, 38 (2009) (quoting Transcript of Oral Argument at 12, *Norfolk*, 516 U.S. 400 (No. 95-96)).

⁴ 132 S. Ct. 2566 (2012).

had earlier with Paul Clement, who argued for the challengers to the law, Justice Breyer asked:

I think it's not uncommon that Congress passes an act, and then there are many titles, and some of the titles have nothing to do with the other titles. That's a common thing. And you're saying you've never found an instance where they are all struck out when they have nothing to do with each other. My question is, because I hear Mr. Clement saying something not too different from what you say. He talks about things at the periphery. We can't reject or accept an argument on severability because it's a lot of work for us. That's beside the point. But do you think that it's possible for you and Mr. Clement, on exploring this, to — to get together and agree on — (Laughter) . . . — I mean on — on a list of things that are in both your opinions peripheral, then you would focus on those areas where one of you thinks it's peripheral and one of you thinks it's not peripheral. And at that point it might turn out to be far fewer than we are currently imagining. At which point we could hold an argument or figure out some way or somebody hold an argument and try to — try to get those done. Is — is that a pipe dream or is that a —⁵

Mr. Kneedler responded: “I — I — I just don't think that is realistic. The Court would be doing it without the parties, the millions of parties.”⁶

In a world where every litigant was as committed to “make it work” as Justice Breyer, this approach would represent the ideal way forward on the complex severability question the Court ultimately was able to duck. And while Justice Breyer recognized it might have been a “pipe dream,” what a lovely dream it was. It was the kind of dream that animates his worldview, and this worldview is quite evident in Justice Breyer's patent opinions — the subject of this tribute.

A second defining characteristic of Justice Breyer's approach to the world that is evident in his opinions is his commitment to getting things right based on evidence and expertise. As Linda Greenhouse poetically put it, Justice Breyer's “fundamental challenge — I am tempted to call it his tragedy, but I hesitate to ascribe dark emotions to this optimistic man — [is] to navigate as an Enlightenment Justice in an unenlightened period of Supreme Court history, a counter-factual age when ideology routinely trumps evidence-based decision-making.”⁷

This element is also evident in Justice Breyer's work in patent law. In *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc. (LabCorp)*,⁸ Justice Breyer (joined by Justices Stevens and Souter) took the unusual step of dissenting from the Court's dismissal

⁵ Transcript of Oral Argument at 46–47, *NFIB*, 132 S. Ct. 2566 (No. 11-393), http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-393.pdf [<http://perma.cc/JY84-Y2J5>].

⁶ *Id.* at 47.

⁷ Greenhouse, *supra* note 3, at 38–39.

⁸ 548 U.S. 124 (2006).

of certiorari as improvidently granted.⁹ In so doing, he set out the legal theory that would ultimately become the Court's in its subsequent forays into patentable subject matter in the biosciences, culminating in last year's decision on gene patenting.¹⁰

The case involved the amino acid known as homocysteine. Doctors have known for at least half a century that high homocysteine levels were associated with serious health problems, but it was the patent holders who determined the pathway: high levels of total homocysteine were signs of folic acid and vitamin B₁₂ deficiencies. While it was well established that these deficiencies led to health problems — pregnant women are routinely warned of the risk of spina bifida in their babies if the mothers have too little folic acid — actually measuring folic acid and B₁₂ levels in a patient was difficult. Measuring total homocysteine levels, by contrast, was quite easy, and so the association between high homocysteine levels and these deficiencies produced a useful tool for clinical practice.¹¹

The patent holder, Metabolite, licensed its invention to LabCorp, permitting it to use the tests described in the patent in return for a 27.5% share of related revenues, with the agreement permitting LabCorp to terminate the arrangement if “a more cost effective commercial alternative is available that does not infringe a valid and enforceable claim of” the patent.¹² Eventually LabCorp decided to switch to using, in some instances, one of Metabolite's competitor's tests, and refused to pay royalties on its use of these other tests.¹³ Metabolite sued for patent infringement and breach of licensing agreement. As Justice Breyer put it, their theory was not that using the competitor tests

infringed the patent's claims describing methods for testing for homocysteine. Instead, respondents relied on a broader claim not limited to those tests, namely, claim 13, the sole claim at issue here. That claim — set forth below in its entirety — seeks patent protection for:

“A method for detecting a deficiency of cobalamin or folate in warm-blooded animals comprising the steps of:

“assaying a body fluid for an elevated level of total homocysteine; and

“correlating an elevated level of total homocysteine in said body fluid with a deficiency of cobalamin or folate.”

⁹ *Id.* at 125 (Breyer, J., dissenting from dismissal of certiorari).

¹⁰ *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107 (2013).

¹¹ See Robin Feldman, *A Conversation on Judicial Decision-Making*, 5 HASTINGS SCI. & TECH. L.J. 1, 10 (2013).

¹² *LabCorp*, 548 U.S. at 128 (Breyer, J., dissenting from dismissal of certiorari) (emphasis omitted) (quoting Joint Appendix, Vol. II at 305, *LabCorp*, 548 U.S. 124 (No. 04-607)) (internal quotation marks omitted).

¹³ *Id.* at 128–29.

Claim 13, respondents argued, created a protected monopoly over the process of “correlating” test results and potential vitamin deficiencies. The parties agreed that the words “assaying a body fluid” refer to the use of any test at all, whether patented or not patented, that determines whether a body fluid has an “elevated level of total homocysteine.” And at trial, the inventors testified that claim 13’s “correlating” step consists simply of a physician’s recognizing that a test that shows an elevated homocysteine level — by that very fact — shows the patient likely has a cobalamin or folate deficiency. They added that, because the natural relationship between homocysteine and vitamin deficiency was now well known, such “correlating” would occur automatically in the mind of any competent physician.

On this understanding of the claim, respondents argued, LabCorp was liable for inducing doctors to infringe.¹⁴

At trial, a jury found that LabCorp had infringed. The case made its way up to the Federal Circuit, which upheld the decision on infringement. The Supreme Court granted certiorari on the question “[w]hether a method patent . . . directing a party simply to ‘correlat[e]’ test results can validly claim a monopoly over a basic scientific relationship . . . such that any doctor necessarily infringes the patent merely by thinking about the relationship after looking at a test result.”¹⁵ The Court granted certiorari against the recommendation of the Solicitor General, who recommended denying certiorari because “the issues necessary to address the question had not been fully argued below.”¹⁶ The Solicitor General somewhat tartly added that “if this Court were to consider reevaluating almost a quarter-century of administrative practice and lower court jurisprudence, it should do so based on a full record.”¹⁷

Ultimately the Court decided to dismiss the case as improvidently granted — perhaps it was the pouring in of amicus briefs, or perhaps it was the replacement of Justice O’Connor by Justice Alito on the Court, leading to a disappearing fourth vote for certiorari. But Justice Breyer wrote his dissent from this decision, and in so doing laid the groundwork for a line of jurisprudence on patentable subject matter. The opinion’s explanation of why the Court was wrong to dismiss the petition as improvidently granted was vintage Breyer — practical, not interested in adversarialism or wasting of time, taking note of when expertise can be useful, and extremely respectful of his colleagues on the other side. Notice how impersonal he makes it:

¹⁴ *Id.* at 129–30 (citations omitted).

¹⁵ *Id.* at 132 (alterations in original) (quoting Petition for a Writ of Certiorari at i, *LabCorp*, 548 U.S. 124 (No. 04-607)) (internal quotation marks omitted).

¹⁶ Feldman, *supra* note 11, at 10.

¹⁷ *Id.* at 10–11 (quoting Brief for the United States as Amicus Curiae at 19, *LabCorp*, 548 U.S. 124 (No. 04-607)) (internal quotation marks omitted).

I can find no good practical reason for refusing to decide the case. The relevant issue has been fully briefed and argued by the parties, the Government, and 20 amici. The record is comprehensive, allowing us to learn the precise nature of the patent claim, to consider the commercial and medical context (which the parties and amici have described in detail), and to become familiar with the arguments made in all courts. Neither the factual record nor the briefing suffers from any significant gap. No party has identified any prejudice due to our answering the question. And there is no indication that LabCorp's failure to cite § 101 [pertaining to patentable subject matter, the main issue he would address] reflected unfair gamesmanship.

Of course, further consideration by the Federal Circuit might help us reach a better decision. Lower court consideration almost always helps. But the thoroughness of the briefing leads me to conclude that the extra time, cost, and uncertainty that further proceedings would engender are not worth the potential benefit.

Finally, I believe that important considerations of the public interest — including that of clarifying the law in this area sooner rather than later — argue strongly for our deciding the question presented now.¹⁸

That is,

[t]o fail to do so threatens to leave the medical profession subject to the restrictions imposed by this individual patent and others of its kind. Those restrictions may inhibit doctors from using their best medical judgment; they may force doctors to spend unnecessary time and energy to enter into license agreements; they may divert resources from the medical task of health care to the legal task of searching patent files for similar simple correlations; they may raise the cost of health care while inhibiting its effective delivery.¹⁹

Further, at the opinion's end, we get an amazingly modest statement about the progression of the Court's jurisprudence and its interaction with Congress that could come from only Justice Breyer, with his deep respect for and experience serving the other branches:

Even [if the analysis on the merits we have offered is] wrong, however, it still would be valuable to decide this case. Our doing so would help diminish legal uncertainty in the area, affecting a "substantial number of patent claims." It would permit those in the medical profession better to understand the nature of their legal obligations. It would help Congress determine whether legislation is needed. Cf. 35 U.S.C. § 287(c) (limiting liability of medical practitioners for performance of certain medical and surgical procedures).

In either event, a decision from this generalist Court could contribute to the important ongoing debate, among both specialists and generalists, as

¹⁸ *LabCorp*, 548 U.S. at 133–34 (Breyer, J., dissenting from dismissal of certiorari) (italics omitted).

¹⁹ *Id.* at 138.

to whether the patent system, as currently administered and enforced, adequately reflects the “careful balance” that “the federal patent laws . . . embod[y].”²⁰

But far from getting it wrong, Justice Breyer’s opinion gets it exactly right. It was long ago established by the Court that Section 101 of the Patent Act²¹ “[e]xclude[s] from . . . patent protection . . . laws of nature, natural phenomena, and abstract ideas.”²² In a very precise and short couple of paragraphs, he ties this rule into the animating policy motivations of patent law in a way consonant with his leitmotif of “make it work”:

The justification for the principle does not lie in any claim that “laws of nature” are obvious, or that their discovery is easy, or that they are not useful. To the contrary, research into such matters may be costly and time consuming; monetary incentives may matter; and the fruits of those incentives and that research may prove of great benefit to the human race. Rather, the reason for the exclusion is that sometimes *too much* patent protection can impede rather than “promote the Progress of Science and useful Arts,” the constitutional objective of patent and copyright protection.

The problem arises from the fact that patents do not only encourage research by providing monetary incentives for invention. Sometimes their presence can discourage research by impeding the free exchange of information, for example by forcing researchers to avoid the use of potentially patented ideas, by leading them to conduct costly and time-consuming searches of existing or pending patents, by requiring complex licensing arrangements, and by raising the costs of using the patented information, sometimes prohibitively so.

Patent law seeks to avoid the dangers of overprotection just as surely as it seeks to avoid the diminished incentive to invent that underprotection can threaten. One way in which patent law seeks to sail between these opposing and risky shoals is through rules that bring certain types of invention and discovery within the scope of patentability while excluding others. And scholars have noted that “patent law[’s] exclu[sion of] fundamental scientific (including mathematical) and technological principles” (like copyright’s exclusion of “ideas”) is a rule of the latter variety. That rule reflects “both . . . the enormous potential for rent seeking that would be created if property rights could be obtained in [those basic principles] and . . . the enormous transaction costs that would be imposed on would-be users.”

Thus, the Court has recognized that “[p]henomena of nature, though just discovered, mental processes, and abstract intellectual concepts are . . . the basic tools of scientific and technological work.” It has treated fundamental scientific principles as “part of the storehouse of knowledge” and manifesta-

²⁰ *Id.* (alterations in original) (citation omitted).

²¹ 35 U.S.C. § 101 (2012).

²² *LabCorp*, 548 U.S. at 126 (Breyer, J., dissenting from dismiss of certiorari) (alterations in original) (quoting *Diamond v. Diehr*, 450 U.S. 175, 185 (1981)) (internal quotation marks omitted).

tions of laws of nature as “free to all men and reserved exclusively to none.” And its doing so reflects a basic judgment that protection in such cases, despite its potentially positive incentive effects, would too often severely interfere with, or discourage, development and the further spread of useful knowledge itself.²³

Justice Breyer then masterfully goes from this general principle to the specific patent claim 13 in this case. While conceding that the precise boundaries of what is a “natural phenomenon” are fuzzy, he concludes that the patent in this case “is not at the boundary,” but instead that “claim 13 is invalid no matter how narrowly one reasonably interprets that doctrine.”²⁴ In a rhetorically powerful move that would prefigure the fight over gene patents and testing for the BRCA1 breast cancer gene, Justice Breyer characterizes claim 13 as providing “those researchers with control over doctors’ efforts to use that correlation to diagnose vitamin deficiencies in a patient[,]” creating a Manichaean story of researchers and corporate patenting versus doctors and patients.²⁵

Treating it as beyond cavil (and essentially conceded by the parties) that “the correlation between homocysteine and vitamin deficiency set forth in claim 13 is a ‘natural phenomenon,’” he considers the patent holders’ claim “that the correlation is nonetheless patentable because claim 13 packages it in the form of a ‘process’ for detecting vitamin deficiency, with discrete testing and correlating steps.”²⁶ While conceding that the fact that a process involves a natural phenomenon would not move it beyond the scope of patentable subject matter in and of itself, Justice Breyer can find nothing worthy of patent protection beyond the correlation here:

Claim 13’s process instructs the user to (1) obtain test results and (2) think about them. Why should it matter if the test results themselves were obtained through an unpatented procedure that involved the transformation of blood? Claim 13 is indifferent to that fact, for it tells the user to use any test at all. Indeed, to use virtually any natural phenomenon for virtually any useful purpose could well involve the use of empirical information obtained through an unpatented means that might have involved transforming matter. . . . At most, respondents have simply described the natural law at issue in the abstract patent language of a “process.” But they cannot avoid the fact that the process is no more than an instruction to read some numbers in light of medical knowledge. . . . One might, of course, reduce the “process” to a series of steps, *e.g.*, Step 1: gather data; Step 2: read a number; Step 3: compare the number with the norm; Step 4: act accordingly. But one can reduce any process to a series of steps. The

²³ *Id.* at 126–28 (alterations in original) (citations omitted).

²⁴ *Id.* at 135.

²⁵ *Id.* at 134.

²⁶ *Id.* at 135.

question is what those steps embody. And here, aside from the unpatented test, they embody only the correlation between homocysteine and vitamin deficiency that the researchers uncovered. In my view, that correlation is an unpatentable “natural phenomenon,” and I can find nothing in claim 13 that adds anything more of significance.²⁷

For this reason, Justice Breyer concludes that claim 13 is not patentable subject matter.

What is the significance of the *LabCorp* opinion? In direct terms, to be frank, not very much. It was a dissent from the dismissal of certiorari as improvidently granted, it is not binding authority, and it could merely have found its way into the dustbin of Supreme Court orders. Indeed, one might ask, why bother?

But in fact, *LabCorp* proved crucial in at least three respects.

First, Justice Breyer’s description of the patent dilemma in the area of diagnostics (and, in fact, health care more generally) energized discussion among academics that is only now hitting its stride.²⁸ Indeed, the language he used is incredibly clear and readily understandable to those outside science and the law. This too is one of the goals Justice Breyer himself has espoused in his writing and public talks: for the Court to talk to the people in a way they can understand.

Second, following (and relying on) his opinion, some judges in the Federal Circuit grew more skeptical about what constitutes patentable subject matter in the life sciences, while others remained somewhat recalcitrant, setting up a further Supreme Court correction I discuss below. One good example of a Federal Circuit judge “getting the message” of Justice Breyer’s approach is Judge Moore’s dissent in *Classen Immunotherapies, Inc. v. Biogen IDEC*,²⁹ which explicitly invoked the language and ideas of Justice Breyer’s dissent to argue against the patent eligibility of immunization schedules:

Having discovered a principle — that changing the timing of immunization may change the incidence of chronic immune mediated disorders — Classen now seeks to keep it for himself. In the ’283 patent, he accomplishes this goal by claiming the use of the scientific method to study the incidence of chronic immune mediated disorders. This preempts the field of study, and prevents any investigation into any immunogen, known or

²⁷ *Id.* at 136–38 (emphasis omitted).

²⁸ See, e.g., Note, *Diagnostic Method Patents and Harms to Follow-On Innovation*, 126 HARV. L. REV. 1370, 1377 (2013) (“Justice Breyer’s dissent in *LabCorp* recited a litany of harms that might occur if the patent at issue remained in force, including that the patent may ‘force doctors to spend unnecessary time and energy to enter into license agreements,’ ‘divert resources from the medical task of health care to the legal task of searching patent files,’ and ‘raise the cost of health care while inhibiting its effective delivery.’ Yet these concerns are not specific to the *LabCorp* claims, and the problems presented by these particular patents are underexplored in the literature.” (footnotes omitted) (quoting *LabCorp*, 548 U.S. at 138 (Breyer, J., dissenting from dismissal of certiorari))).

²⁹ 659 F.3d 1057 (Fed. Cir. 2011).

unknown, and to any disease, known or unknown, over any period of time. Where, as here, a patent preempts an idea, a basic building block of science, within a field of study, the patent in practical effect is a patent on the idea itself.

The intent and effect of the Classen claims is clear: to keep others from exploring the same principle. “Patent law seeks to avoid the dangers of overprotection just as surely as it seeks to avoid the diminished incentive to invent that underprotection can threaten.” Extending patent protection here would “severely interfere with, or discourage, development and the further spread of useful knowledge itself.” To wit, nobody else can search for new immunogens, for use of new immunizations, to treat either existing or currently unknown chronic immune-mediated disorders without infringing.³⁰

Finally, the opinion set the glide path for the Court’s subsequent decisions on patentable subject matter in the face of recalcitrance from other Federal Circuit judges.³¹ Justice Breyer authored the unanimous decision for the Court in *Mayo Collaborative Services v. Prometheus Laboratories, Inc.*,³² which solidified and extended his *LabCorp* opinion’s approach as the law of the land. That case concerned a process for using the drug thiopurine to treat autoimmune diseases; specifically, different patients metabolize the drug differently and the patent holder claimed a patent for determining that correlations between metabolite levels and a particular patient’s dose were “too high, risking harmful side effects, or too low, and so likely ineffective.”³³ The patent holders’ claims recite (1) an “administering” step — instructing a doctor to administer the drug to his patient — (2) a “determining” step — telling the doctor to measure the resulting metabolite levels in the patient’s blood — and (3) a “wherein” step — describing the metabolite concentrations above which there is a likelihood of harmful side effects and below which it is likely that the drug dosage is ineffective, and informing the doctor that metabolite concentrations above or below these thresholds indicate a need to decrease or increase (respectively) the drug dosage.³⁴

Justice Breyer’s opinion for the Court continued the through line of *LabCorp* and easily found that “[t]he relation is a consequence of the ways in which thiopurine compounds are metabolized by the body —

³⁰ *Id.* at 1079 (Moore, J., dissenting) (citations omitted) (quoting *LabCorp*, 548 U.S. at 127, 128 (Breyer, J., dissenting from dismissal of certiorari)).

³¹ For example, in *Prometheus* itself, Judge Lourie of the Federal Circuit wrote: “In reaching its conclusion, the district court relied heavily on the opinion of three justices dissenting from the dismissal of the grant of certiorari in [*LabCorp*]. That dissent is not controlling law and also involved different claims from the ones at issue here.” *Prometheus Labs., Inc. v. Mayo Collaborative Servs.*, 581 F.3d 1336, 1346 n.3 (Fed. Cir. 2009) (citation omitted).

³² 132 S. Ct. 1289 (2012).

³³ *Id.* at 1295.

³⁴ *Id.* at 1297–98 (internal quotation marks omitted).

entirely natural processes. And so a patent that simply describes that relation sets forth a natural law” and is thus not patentable.³⁵ The Court answered no to the question “[D]o the patent claims add enough to their statements of the correlations to allow the processes they describe to qualify as patent-eligible processes that apply natural laws?”³⁶ Instead, the Court held that:

The upshot is that the three steps simply tell doctors to gather data from which they may draw an inference in light of the correlations. To put the matter more succinctly, the claims inform a relevant audience about certain laws of nature; any additional steps consist of well-understood, routine, conventional activity already engaged in by the scientific community; and those steps, when viewed as a whole, add nothing significant beyond the sum of their parts taken separately. For these reasons we believe that the steps are not sufficient to transform unpatentable natural correlations into patentable applications of those regularities.³⁷

In so doing, Justice Breyer reined in the “machine-or-transformation” test for patentability that the Federal Circuit had been using, indicating that while that “test is an ‘important and useful clue’ to patentability, we have neither said nor implied that the test trumps the ‘law of nature’ exclusion.”³⁸ He also addressed the question, which has subsequently come up in the gene patent and other high-profile patent decisions, of the effect on the life sciences industry, and the fear that a holding of no patentable subject matter would cripple innovation. Here Justice Breyer’s emphasis on “make it work” and evidence and expertise comes beautifully together with his respect for the coordinate branches as he writes:

Prometheus, supported by several amici, argues that a principle of law denying patent coverage here will interfere significantly with the ability of medical researchers to make valuable discoveries, particularly in the area of diagnostic research. That research, which includes research leading to the discovery of laws of nature, is expensive; it “ha[s] made the United States the world leader in this field”; and it requires protection.

Other medical experts, however, argue strongly against a legal rule that would make the present claims patent eligible, invoking policy considerations that point in the opposite direction. The American Medical Association, the American College of Medical Genetics, the American Hospital Association, the American Society of Human Genetics, the Association of American Medical Colleges, the Association for Molecular Pathology, and other medical organizations tell us that if “claims to exclusive rights over the body’s natural responses to illness and medical treatment are permitted to stand, the result will be a vast thicket of exclusive rights

³⁵ *Id.* at 1297.

³⁶ *Id.* (emphasis omitted).

³⁷ *Id.* at 1298.

³⁸ *Id.* at 1303 (emphasis omitted) (quoting *Bilski v. Kappos*, 130 S. Ct. 3218, 3225–27 (2010)).

over the use of critical scientific data that must remain widely available if physicians are to provide sound medical care.”

We do not find this kind of difference of opinion surprising. Patent protection is, after all, a two-edged sword. On the one hand, the promise of exclusive rights provides monetary incentives that lead to creation, invention, and discovery. On the other hand, that very exclusivity can impede the flow of information that might permit, indeed spur, invention, by, for example, raising the price of using the patented ideas once created, requiring potential users to conduct costly and time-consuming searches of existing patents and pending patent applications, and requiring the negotiation of complex licensing arrangements. At the same time, patent law’s general rules must govern inventive activity in many different fields of human endeavor, with the result that the practical effects of rules that reflect a general effort to balance these considerations may differ from one field to another.

In consequence, we must hesitate before departing from established general legal rules lest a new protective rule that seems to suit the needs of one field produce unforeseen results in another. And we must recognize the role of Congress in crafting more finely tailored rules where necessary. We need not determine here whether, from a policy perspective, increased protection for discoveries of diagnostic laws of nature is desirable.³⁹

The trajectory of *LabCorp* and *Prometheus* also set the table for the decision two terms ago in *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*⁴⁰ The case had been remanded for reconsideration in light of *Prometheus*, but when the case came before the Court again, the Court followed the path Justice Breyer started with *LabCorp* and unanimously held (curiously, with Justice Thomas and not Justice Breyer writing) that Myriad’s test for the BRCA1 breast cancer gene failed the test for patentable subject matter (it was a “product of nature”) as to the claims relating to isolated DNA but not as to its claims relating to complementary DNA (cDNA).⁴¹

Justice Breyer has become the patent law judge on the Court. His dissent from dismissal of certiorari in *LabCorp* set the stage for the most important Supreme Court decisions for biotech and the life sciences in the past half century. Throughout it all, the “Breyer-ly” virtues shine through: practicality, a deep interest in and understanding of how things work in the real world, a consideration of expertise, modesty, and respect for the coordinate branches.

³⁹ *Id.* at 1304–05 (alteration in original) (italics omitted) (citations omitted).

⁴⁰ 133 S. Ct. 2107 (2013). Full disclosure: I co-authored an amicus brief for Dr. Eric Lander, one of the world’s preeminent gene scientists, that was extensively discussed at oral argument by Justice Breyer and the other Justices. That amicus brief urged the Court to adopt the path it took, so I am hardly a disinterested writer.

⁴¹ See *id.* at 2116–19.

A SALUTE TO JUSTICE BREYER'S CONCURRING
OPINION IN *VAN ORDEN v. PERRY*

*Richard H. Fallon, Jr.**

Although the government has an obligation not to promote religion, not all public displays of support for religion violate the Establishment Clause. So Justice Stephen Breyer concluded in his decisive concurring opinion in *Van Orden v. Perry*,¹ in which, with the Supreme Court otherwise divided four to four, he declined to require the removal of a large Ten Commandments display that had stood for over forty years among the monuments surrounding the Texas State Capitol.² In my view, Justice Breyer made the right judgment in *Van Orden*, which he described as the kind of “borderline case” that defies wise decision under any preset formula, at least absent a thoughtful reconsideration of first principles.³ No single opinion better epitomizes what is best about Justice Breyer’s judicial philosophy — including his sensitivity to practical consequences and his belief in the importance of strengthening political democracy — than his concurring opinion in that case.

By the time the Supreme Court considered *Van Orden* in 2005, the facts in which it originated lay deep in the past. In 1961, the Fraternal Order of Eagles — which the Court’s plurality described as a “national social, civic, and patriotic organization”⁴ with a special commitment to preventing juvenile delinquency — donated a six feet high, three-and-one-half feet wide stone monolith inscribed with the Ten Commandments for inclusion among the array of other monuments on the twenty-two acres surrounding the Texas State Capitol. The Ten Commandments comprise religious tenets not shared by all religions. The context of the display at the Texas Capitol was not inherently religious. Nevertheless, nothing about the Ten Commandments monument wove its message into a broader secular narrative such as one involving great historical lawgivers.

When the Texas Legislature accepted the Ten Commandments monument, no decision of the U.S. Supreme Court marked its doing so as clearly unconstitutional. To cite just one measure of the state of the law at that time, the Court did not hold school prayer unconstitutional until the following year, 1962.⁵ But by the time a Texas lawyer who

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¹ 545 U.S. 677 (2005).

² *Id.* at 703–04 (Breyer, J., concurring in the judgment).

³ *Id.* at 700, 704.

⁴ *Id.* at 682 (plurality opinion).

⁵ See *Engel v. Vitale*, 370 U.S. 421 (1962).

regularly used the state supreme court's law library, which is located close to the Capitol, sued to challenge the Ten Commandments display in 2001, the situation had changed. In 1980, the U.S. Supreme Court held in *Stone v. Graham*⁶ that a state violated the Establishment Clause by requiring that the Ten Commandments be posted in all public school classrooms.⁷ In a case decided the same day as *Van Orden*, the Court, by a five-to-four vote, with Justice Breyer concurring, held in *McCreary County v. ACLU*⁸ that two Kentucky counties had similarly offended the Constitution when they introduced Ten Commandments displays into their courthouses.⁹

Those decisions reflected the principle, which Justice Breyer had often championed and which he rearticulated in *Van Orden*, that “[t]he government must avoid excessive interference with, or promotion of, religion.”¹⁰ Yet Justice Breyer found that principle either inapplicable or overridden in *Van Orden*. In seeking to explain why, his opinion includes several strands. Two fail to persuade me. His articulation of the third engenders not just my agreement, but also my admiration.

First, Justice Breyer suggested, the message that the Texas display of the Ten Commandments conveyed, when viewed in context, was “predominantly secular.”¹¹ In support of this analysis, Justice Breyer argued that the moral teachings of the Ten Commandments have secular components, that the tablets were given by a secular organization, that the display recognized the Eagles’ mission and donation, and that the site did not lend itself to religious activity or meditation.¹² As Justice Stevens emphasized in dissent, however, the religious character of the Ten Commandments emerges at the very outset, with the recitation that “I AM the LORD thy God. Thou shalt have no other gods before me.”¹³ As Justice Stevens also rightly pointed out, “[t]he monument is not a work of art and does not refer to any event in the history of the State.”¹⁴

Second, Justice Breyer emphasized that “40 years passed in which the presence of [the Ten Commandments] monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner).”¹⁵ He reasoned that “those 40 years suggest . . . that few individuals,

⁶ 449 U.S. 39 (1980).

⁷ *Id.* at 42–43 (per curiam).

⁸ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

⁹ *Id.* at 881.

¹⁰ *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

¹¹ *Id.* at 702.

¹² *See id.* at 701–03.

¹³ *Id.* at 707 (Stevens, J., dissenting) (quoting the Texas State Capitol version of the Ten Commandments).

¹⁴ *Id.*

¹⁵ *Id.* at 702 (Breyer, J., concurring in the judgment).

whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect [or] . . . to promote religion over nonreligion.”¹⁶ Again, this strand of analysis leaves me unmoved. As Justice Souter noted in dissent, “[s]uing a State over religion puts nothing in a plaintiff’s pocket and can take a great deal out, and even with volunteer litigators to supply time and energy, the risk of social ostracism can be powerfully deterrent.”¹⁷ Insofar as the plaintiff in *Van Orden* felt that the Ten Commandments monument served to promote religion, my sympathies lie with him.

Justice Breyer’s third ground for distinguishing prior cases, and especially *McCreary County*, seems to me to cut to the heart of the dilemma that the Supreme Court confronted. Even if the Texas monument’s long history did not dilute its religious message, that history served as a reminder that the Establishment Clause — read against the background of history — cannot, as Justice Breyer put it, “compel the government to purge from the public sphere all that in any way partakes of the religious.”¹⁸ From the beginning, religion has been woven in various ways into American public life. Recognition of this heritage does not, of course, point directly to the correct ruling in *Van Orden*. It does, however, help to identify the tension that *Van Orden* required the Court to resolve, or at least manage. Although the Supreme Court has frequently articulated a demand that the government must be neutral in matters of religion, neither that demand, nor what Justice Breyer referred to as the “Court’s other tests,” can “readily explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings; certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.”¹⁹

Without purporting to offer a comprehensive resolution to the tension that the Court’s cases exhibit, Justice Breyer’s *Van Orden* concurrence suggests a narrow prescription that embodies pragmatic good sense. Although modern governments may not initiate novel forms of support for religious institutions and beliefs, the Establishment Clause should not be read to mandate the chiseling out — which in some cases might be quite literal — of all religious symbols and practices that have long formed part of the architecture of American public life, American public buildings, and American public monuments. To read the Clause so stringently would provoke anger at and resentment of the Supreme

¹⁶ *Id.*

¹⁷ *Id.* at 747 (Souter, J., dissenting).

¹⁸ *Id.* at 699 (Breyer, J., concurring in the judgment).

¹⁹ *Id.* (citation omitted).

Court's perceived hostility to religion far disproportionate to any good that this approach would achieve.

Against my embrace of Justice Breyer's prescription of compromise, many will protest that his opinion offers no adequate answer to a decisive objection. Isolated and disputed elements of historical practice, it might be argued, should not defeat a principled reading of the Constitution's text as embodying worthy ideals, including that of governmental neutrality in matters of religion, even when past practice has not always accorded with those ideals in every particular. The Supreme Court has implicitly so recognized in interpreting the Equal Protection Clause to forbid deprivations of rights — including rights to nonsegregated education and equal treatment of women — that the Fourteenth Amendment's authors and ratifiers would not have regarded as rights.²⁰ The Court has sometimes proceeded similarly under the Due Process Clause.²¹ If a “method of text and principle”²² rightly prevails under the Equal Protection and Due Process Clauses, then it is surely arguable that the Court should follow the same method in enforcing the Establishment Clause. This, in essence, is the position that the four *Van Orden* dissenters adopted in insisting that Texas's Ten Commandments monument violated the Constitution and therefore needed to be demolished or removed.

Concurring, rather than dissenting, Justice Breyer focused attention on what he took to be the Establishment Clause's deep purpose. For the Court to countenance demands for “the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation,” along with similar demands for the rooting out of other entrenched symbols and practices, he wrote, would “create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.”²³

Without pretending that the Establishment Clause had a single historical purpose to the exclusion of all others, I concur in Justice Breyer's ascription to it of a socially and politically vital end that may sometimes require fine discriminations in the selection of means. Crediting that ascription, I also agree with him that there may be a deep difference between judicial prohibitions of initiations of support for religion and judicial demands for the eradication of monuments and symbols that have endured for generations. The difference registers as one of human psychology, not abstract logic, and would cash itself out in terms of the social divisiveness that Justice Breyer believes

²⁰ See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003).

²² I take the phrase from JACK M. BALKIN, *LIVING ORIGINALISM* 14–16 (2011).

²³ *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring in the judgment).

that the Establishment Clause aims to avert. Even though entrenched status should not confer talismanic protection, I agree with Justice Breyer that practical consequences for ill, as well as for good, should be taken into account in cases of this kind.

Here again, the prospect of disagreement of course rears its head. Judges and Justices, it might be objected, are not good at appraising social divisiveness, or practical consequences more generally. If not, perhaps they should understand their role as demanding that they blind themselves to such considerations. But Justice Breyer, throughout his career, has rejected suggestions that judges ought not pause to consider whether one or another proposed ruling might wreak practical havoc. Embracing a judicial philosophy that refuses to romanticize obliviousness, he has insisted instead that judges and Justices should make decisions in light of appraisals of their likely practical consequences. More particularly, he has written that judges and Justices should consider whether particular decisions would promote or hinder the fair and effective operation of American political democracy.²⁴

I agree. Although our democracy is strong in many ways, we live in perilous times for the spirit of mutual respect and accommodation that through much of American history has frequently united sometime political antagonists as self-conscious collaborators in a joint project of collective self-governance. Religious divisions, as Justice Breyer recognized in *Van Orden*, number among the most dangerous risks to Americans' sense of themselves as coparticipants in a venture shaped by a common heritage and shared ideals.

In this fractious state of affairs, even those who disagree with Justice Breyer's ultimate conclusion in *Van Orden v. Perry* ought to respect the candor with which he sought to identify the ultimate purposes of the Establishment Clause and the spirit of goodwill that he brought to bear in attempting to resolve an agonizingly difficult case in light of them. His method seems to me to have been exemplary. Justice Breyer did not decline to enforce the Establishment Clause based on an apprehension that doing so would occasion anger and opposition. Rather, he interpreted the Establishment Clause as requiring fine line drawing to avoid acutely divisive rulings that would achieve too little good under at least some circumstances.²⁵ My hat comes off to Justice Breyer's *Van Orden* opinion for candidly shouldering the responsibility that goes with a conception of the judicial role in which good judging requires good judgment.

²⁴ See, e.g., STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* (2010).

²⁵ See Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 583, 636–37 (2011).

HOLDER v. HUMANITARIAN LAW PROJECT:
JUSTICE BREYER, DISSENTING

*Martha A. Field**

In *Holder v. Humanitarian Law Project*¹ (*HLP*), the Project and some other organizations and individuals working in international human rights asked for guidance about whether they could continue their work without violating 18 U.S.C. § 2339B(a)(1) (2012), which makes it a crime to “knowingly provide[] material support or resources to a foreign terrorist organization.” The penalty for conviction extends to fifteen years’ imprisonment and fines. The plaintiffs sought an injunction to prevent the Government from enforcing the ban against their speech-related activities. Usually, the federal courts discourage pre-violation challenges to criminal statutes, preferring to rule upon their meaning and constitutionality only after specific facts are at issue and a prosecution has taken place. In this case, however, the Court ruled in the abstract concerning the legality of the plaintiffs’ proposed actions. It proceeded to uphold the prohibition of material support as applied even to the plaintiffs’ speech activities. Justice Breyer wrote the sole dissenting opinion, which was joined by Justices Ginsburg and Sotomayor.

OPINION OF THE COURT

The plaintiffs had been working with the Partiya Karkeran Kurdistan (PKK), seeking an independent state for the Kurds in Turkey, and the Liberation Tigers of Tamil Eelam (LTTE), seeking the same for the Tamils in Sri Lanka. They had been advising these groups to reject violence and pursue their goals of liberation through peaceful means. Both organizations, as the plaintiffs knew, had been classified as foreign terrorist organizations for their involvement in terrorist attacks, but the organizations also engaged in numerous political and humanitarian projects. The challenged statute provides that the prohibited “material support or resources” includes any tangible or intangible property, or any service, including expert advice or assistance, training in any specialized knowledge, or provision of personnel.² The plaintiffs claimed the statute was invalid insofar as it prohibited them from training PKK members to use international law to resolve disputes

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¹ 130 S. Ct. 2705 (2010).

² 18 U.S.C. § 2339A(b)(1)–(2) (2012) (internal quotation marks omitted).

without violence; teaching PKK members how to negotiate and how to petition the United Nations and others for relief; and engaging in political advocacy for the Kurds in Turkey and the Tamils in Sri Lanka.

Although the Government forcefully argued otherwise, Chief Justice Roberts, writing for six Justices, agreed with the plaintiffs that the prohibitions, as applied to the plaintiffs' work, were triggered by speech, not merely conduct, and amounted to "a content-based regulation of speech."³ Accordingly, to be upheld, he declared, they must satisfy a "demanding standard" of review.⁴ Chief Justice Roberts did not use the "strict scrutiny" formulation but nonetheless suggested that the government interest must be a compelling one and the prohibitions must be necessary in order to satisfy it.

Yet having trumpeted the necessity of a rigorous review, the Chief Justice found that prohibition of the plaintiffs' desired activities easily withstood scrutiny. Combating terrorism certainly counts as a vital government interest, but must one ban the plaintiffs' peaceful activities, designed to prevent violence, in order to combat terrorism? Pointing out the difficulty for a court to evaluate the necessity of such provisions in the foreign affairs–national security arena, the Chief Justice relied on deference to "a reasonable evaluation by the Legislative Branch"⁵ that working in coordination with these groups "serves to legitimize and further their terrorist means."⁶ The Chief Justice elaborated: "Such support . . . importantly helps lend legitimacy to foreign terrorist groups — legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds — all of which facilitate more terrorist attacks."⁷ He also stressed that any kind of support, including support meant only to promote peaceful conduct, "frees up other resources within the organization that may be put to violent ends."⁸ That argument makes any kind of support, whether money, weapons, or the teaching of negotiation skills, fungible with any other.

The Chief Justice called the prohibition acceptably narrow because it leaves individuals free to advocate independently so long as they have no tie to, and do not coordinate with, a foreign terrorist organization. He also stated: "[T]his is not to say that any future applications of the material-support statute to speech or advocacy will survive First Amendment scrutiny."⁹

³ *HLP*, 130 S. Ct. at 2723–24.

⁴ *Id.* at 2724 (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989)) (internal quotation mark omitted).

⁵ *Id.* at 2727 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981)) (internal quotation mark omitted).

⁶ *Id.* at 2725.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2730.

If this case were about only national security and foreign affairs, the Court's deferential approach would be understandable. After all, it is familiar that "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . [Such an act] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it."¹⁰

But *HLP* was a First Amendment case as well and, as Justice Breyer's dissent made clear, the Court's approach gave short shrift to First Amendment concerns. The Court had demanded little justification for the law, unlike its practice in other cases involving laws that impinge upon free speech. In *Citizens United v. FEC*,¹¹ decided just five months earlier, the Court majority, consisting of five of the six Justices in the *HLP* majority, held that the First Amendment bars Congress from restricting the amounts corporations can spend on political campaigns and invalidated a law designed to prevent corporate wealth from drowning out the votes and voices of ordinary voters. In scrutinizing the law, the Court found that the law's requirement that corporations use segregated funds for campaign spending was not sufficiently related to guarding against political corruption. It demanded solid evidentiary support from the Government for all the justifications of the law that the Government put forth.

Even in national security contexts, the Court has required strict proof of necessity. One example is *New York Times Co. v. United States*,¹² the *Pentagon Papers* case, in which the Times was permitted to publish leaked classified documents despite claims that they threatened national security, because the Government had not met its heavy burden of justification for an injunction. Similarly, in *United States v. Robel*,¹³ the Supreme Court invalidated a federal law making it a crime for members of Communist organizations to work in a U.S. defense plant. The Court held that the means adopted to strengthen national security were too broad because the ban extended to passive as well as active members of the Communist party.¹⁴ The Court has similarly required proof of strict necessity before allowing claims of national security to trump other constitutional rights.¹⁵

¹⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952) (Jackson, J., concurring).

¹¹ 130 S. Ct. 876 (2010).

¹² 403 U.S. 713 (1971) (per curiam).

¹³ 389 U.S. 258 (1967).

¹⁴ *Id.* at 265–66.

¹⁵ *See, e.g., Alderman v. United States*, 394 U.S. 165 (1969) (attempting to reconcile national security concerns with the demands of the Fourth Amendment).

In *HLP*, by contrast, imagined and unconvincing justifications accompanied by deference to the legislature carried the day. The Court upheld the material-support law based on wholly speculative justifications, such as the indirect promotion of violence. And one reason upon which it relied is totally antithetical to First Amendment jurisprudence: the fear that allowing plaintiffs to coordinate with the forbidden organizations would lend legitimacy to those organizations, so that they might win the support of others and increase their strength.¹⁶ But surely a central purpose of speech is to lend legitimacy to, or indeed to delegitimize, one thing or another — a theory, idea, person, group, or any other topic of discussion. It is to voice one’s opinion, even to attempt to persuade. The First Amendment does not allow government to punish speech on the basis that it might serve its purpose.

There are many ways in which *HLP* seems to contradict established First Amendment doctrine. The most difficult cases to reconcile are those dealing with the Communist Party, decided when it was considered a terrorist enemy tied to an international conspiracy to overthrow our government. In *Scales v. United States*,¹⁷ for example, the Court sharply limited the Smith Act’s prohibition on membership in the Communist Party, saying that a conviction would be lawful only if the defendant knew of the group’s illegality and had specific intent to bring about the violent overthrow of the United States.

Apart from specific holdings concerning group membership, a long line of cases, starting with our earliest First Amendment cases, have explored what limits to place upon speech threatening the government or the public order. In *Schenck v. United States*,¹⁸ the Court confronted speech encouraging draft-dodging during World War I. The defendant had been convicted of circulating and mailing leaflets criticizing the draft and opining that it was unconstitutional. Justice Holmes upheld the conviction under the Espionage Act of 1917, noting that the most important issue “in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”¹⁹ But Justice Holmes’ dissent in *Abrams v. United States*,²⁰ joined by Justice Brandeis, added a third factor: intent. Justice Holmes argued that no conviction was possible without an additional showing

¹⁶ *HLP*, 130 S. Ct. 2705, 2725 (2010).

¹⁷ 367 U.S. 203 (1961).

¹⁸ 249 U.S. 47 (1919).

¹⁹ *Id.* at 52; *see also* *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

²⁰ 250 U.S. 616 (1919).

that the defendant intended to hinder the U.S. war effort.²¹ He added that “a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed.”²²

In that famous and much-quoted opinion, Justice Holmes elaborated upon danger and imminence as well. Speech could not be punished unless it

produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. . . . It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.²³

And later in the opinion: “[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”²⁴

The approach first articulated in this dissent was further developed in a series of opinions, mostly separate opinions authored by Justices Holmes and Brandeis. The “clear and present danger” test was not always strictly applied, but the requirements that emerged, like those in the *Abrams* dissent, allowed punishment of speech only if it produced (1) an imminent threat of (2) a very great and significant harm, like overthrow of the Government or the public order, and (3) the speaker had a specific intent to cause it. That test was clarified and written into law in *Brandenburg v. Ohio*.²⁵ The result was that advocacy of such illegal action could be criminal only if it would cause a very great danger, if the speaker’s primary intention was to bring about that result, and if the advocated danger was imminent, not distant or speculative.

Since 1969, this basic tenet of First Amendment law has been clear: laws must be squared with *Brandenburg*’s three requirements to survive scrutiny. Free speech should triumph unless government intervention is absolutely necessary.²⁶ But *HLP* does not fit this doctrine in

²¹ *Id.* at 626–27 (Holmes, J., dissenting).

²² *Id.* at 627.

²³ *Id.* at 627–28.

²⁴ *Id.* at 630.

²⁵ 395 U.S. 444 (1969) (per curiam).

²⁶ See *United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979) (granting a preliminary injunction against the publication of how to build the hydrogen bomb because of “the likelihood of direct, immediate and irreparable injury to our nation and its people,” *id.* at 1000).

many important respects, and the Court does little to tackle any of the difficult problems. The result is that *HLP* throws wide open our present understanding of First Amendment jurisprudence. What is the dividing line separating cases to be governed by *Brandenburg* and our established First Amendment understandings from cases to be analyzed in accordance with *HLP*?

TWO SPHERES

Mindful of this problem, the Chief Justice emphasized that he was discussing foreign terrorist organizations and that his ruling does not apply domestically: “We . . . do not suggest that Congress could extend the same prohibition on material support at issue here to domestic organizations.”²⁷ But surely that dividing line is illusory. Indeed, it is American human rights workers who are the plaintiffs in *HLP* and whose free speech and association are obstructed, and some of their prospective work would take place in the United States.

In an era of instant global interconnectivity for vast numbers of individuals and groups, it is difficult if not impossible to isolate the domestic from the global. The prosecution of Private Chelsea Manning and the attempted prosecution of Edward Snowden, both charged with leaking classified national secrets to the press, already illustrate the confluence of national and global arenas. The charges of treason, or of aiding the enemy, leveled against these two Americans transform the whistleblower or leaker of classified information into a traitor and spy. Similarly, the NSA claims that its surveillance is aimed only at its “targets,” but anyone, American citizen or not, who has any communication with a target by Internet or telephone, or who even mentions a target in an email, also becomes subject to surveillance.

And how far does the material-support prohibition extend? Is the U.S. newspaper that publishes an interview with supporters of an independent Kurdish state performing a “service” for the PKK? Is the author of an op-ed arguing for liberation of the Tamils doing so, at least if she has had contact with the LTTE or any of its members? Or are newspapers free to publish anything they wish as long as they did not obtain it illegally, even if they know it has been illegally obtained, as a recent Supreme Court case has suggested?²⁸ Are speakers still protected as long as their expression does not pose a threat of great, clear, and imminent harm to serious national interests and they do not have a specific intent to bring about that harm?

Rather than neatly dividing into foreign and domestic spheres, it is likely that the *HLP* and *Brandenburg* standards will increasingly clash

²⁷ *HLP*, 130 S. Ct. 2705, 2730 (2010).

²⁸ See *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

and, when that happens, one will eventually overcome the other. *HLP* may signal that the Court will abandon *Brandenburg*'s strict test of necessity and instead uphold laws restricting speech based on flabby justifications driven by the fear of enemies.

Justice Breyer pointed out that no one argued that *Brandenburg* controlled this case: "No one contends that the plaintiffs' speech to these organizations can be prohibited as incitement under *Brandenburg*."²⁹ True, but why was that not the end of the matter? It is unclear why *Brandenburg* should not be decisive. Neither opinion discloses what the difference is that the Justices perceive between the two kinds of cases.

If *Brandenburg* applied, the plaintiffs could not be successfully prosecuted. Protecting against terrorism is a critical government interest, but a prosecution in this case would meet neither the requirement of imminence nor the requirement of specific intent. Of course *Brandenburg* is not sacrosanct, but it should not be swept aside without deliberation and reasoning. It should not be simply ignored on the basis that this case is somehow different, without coming up with a more satisfying distinction than domestic versus foreign.

JUSTICE BREYER'S DISSENT

Justice Breyer's powerful dissent eloquently and thoroughly punctures the Court's main arguments. Although he did not explain why *Brandenburg* was inapplicable, Justice Breyer was sensitive to the damage that the Court's holding would do to the First Amendment. Applying the usual First Amendment test for laws directed at speech, requiring compelling necessity and the narrowest means of achieving its goal, he found the statute wanting.³⁰ (He further noted that the statute would not withstand even intermediate scrutiny.³¹) The application of the statute here could not be upheld because the Government did not demonstrate that the restrictions on the plaintiffs' speech-related activities are necessary in the fight against terrorism.

The dissent opened by making a point neglected in the Court's opinion: that the plaintiffs were asking to engage in political speech designed to change our government's policies, the type of speech our Constitution most vigorously protects.³² The coordination prohibition also contradicted classic freedom-of-association cases, such as *Scales v. United States*, discussed above. Justice Breyer pointed out that the proposed speech in *HLP* should be even more protected than that in

²⁹ *HLP*, 130 S. Ct. at 2733 (Breyer, J., dissenting).

³⁰ *Id.* at 2734.

³¹ *Id.*

³² *Id.*

Brandenburg, where even disruptive speech or speech advocating illegality was allowed unless it was “directed to inciting or producing *imminent lawless action* and . . . *likely to incite or produce* such action.”³³ Here, by contrast, the plaintiffs merely sought to teach, to train, and to advocate achieving legal goals by legal means.

The dissent disagreed both with the Court’s interpretation of the statute and with its constitutional ruling:

I cannot agree with the Court’s conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations’ lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government’s compelling interest in combating terrorism.³⁴

The requirements Justice Breyer imposed, both in his statutory and his constitutional analysis, in effect moved sharply in the direction of *Brandenburg*’s mandates.

IMMINENCE

In disputing the connection between the plaintiffs’ activities and the statute’s goals, Justice Breyer asks: “[P]recisely how does application of the statute to the protected activities before us *help achieve* that important security-related end?”³⁵ He then analyzes the two justifications the Government had put forward.

First, he attacks the position that any help from the plaintiffs was fungible with other material support because it would free up resources to be used for terrorism. He doggedly challenges the Chief Justice’s reasoning: That the plaintiffs’ support is “fungible” with other support

is not *obviously* true. There is no *obvious* way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be re-directed, or will free other resources that can be directed, towards terrorist ends.³⁶

Accordingly, Justice Breyer asks what evidence the Government has to support its claim of fungibility. After pointing out that no empirical

³³ *Id.* at 2733 (omission in original) (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

³⁴ *Id.* at 2731.

³⁵ *Id.* at 2734.

³⁶ *Id.* at 2735.

information was presented in support, he notes that congressional statements about fungibility refer to contributions, or funds, goods, or services that by defraying costs for the terrorist organization can free up resources for them to spend on their terrorist activities.³⁷ But, Justice Breyer continues, these statements do not explain how the plaintiffs' political advocacy activities could be "fungible" and therefore capable of being diverted to terrorist use. Nor do they indicate that Congress itself was concerned with 'support' of this kind.³⁸ Hence, Justice Breyer concludes that the statute's ban does not extend to the plaintiffs' peaceful activities that are not easily converted to terroristic ends.

Justice Breyer then addresses the claim that the plaintiffs' activities would serve to "legitimize" the forbidden organizations, thereby making them more able to obtain material support that could facilitate terrorism, like money or weapons. He says that other speech legitimizing the organizations is allowed, so it is hard to see congressional worry about "legitimation" as a main impetus for the statute.³⁹ But Justice Breyer also recognizes that the legitimacy justification is inherently insufficient to suppress speech: "[W]ere the law to accept a 'legitimizing' effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place."⁴⁰

The similarity between Justice Breyer's reasoning and the "imminence" prong of *Brandenburg* becomes clear when he describes the insurmountable challenge of "distinguish[ing] when speech activity will and when it will not initiate the chain of causation the Court suggests — a chain that leads from peaceful advocacy to 'legitimacy' to increased support for the group to an increased supply of material goods that support its terrorist activities."⁴¹ With respect to both fungibility and legitimacy, the tenuousness of the connection that Justice Breyer illustrates between the plaintiffs' activities and any violent result is akin to the familiar distinction between proximate causation and "but for" causation, and indeed to *Brandenburg*'s notion of imminence rather than remoteness. There simply is not a close enough connection between what the plaintiffs want to do and any realistic threat of violence, except perhaps in the distant future. The theory that the plaintiffs will cause harm is attenuated, and the threat their activities pose is highly speculative.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 2736.

⁴⁰ *Id.*

⁴¹ *Id.*

INTENT

Justice Breyer also takes issue with the mens rea requirement for violating the statute. The statute punishes only “knowingly” providing material support, but it is quite specific as to what knowledge is entailed: the accused need only know that the organization has been designated a foreign terrorist organization or that it has engaged in terrorist activity. Justice Breyer does not think this standard is sufficient to satisfy the Constitution in speech-related cases, in light of the Communist Party cases and others. He would cure the defect in the statute by interpreting it to require that the accused know of the imminent harm that would be caused, but he would not require a purpose to cause the harm or specific intent as in *Brandenburg*.⁴²

Justice Breyer explicitly and deliberately chooses to require knowledge over specific intent. One reason undoubtedly is that “knowingly” appears in the statute (although the statute, unlike Justice Breyer, defines it very narrowly). But Justice Breyer also mentions practical reasons for preferring a knowledge requirement:

This reading of the statute protects those who engage in pure speech and association ordinarily protected by the First Amendment. But it does not protect that activity where a defendant purposefully intends it to help terrorism or where a defendant knows (or willfully blinds himself to the fact) that the activity is significantly likely to assist terrorism. Where the activity fits into these categories of purposefully or knowingly supporting terrorist ends, the act of providing material support to a known terrorist organization bears a close enough relation to terrorist acts that, in my view, it likely can be prohibited notwithstanding any First Amendment interest. Cf. *Brandenburg*, 395 U.S. 444 At the same time, this reading does not require the Government to undertake the difficult task of proving which, as between peaceful and nonpeaceful purposes, a defendant specifically preferred; knowledge is enough.⁴³

This preference for a knowledge standard and the reasons given — inclusion of willful blindness and avoidance of problems of proof — would seem to apply equally to *Brandenburg* cases, and Justice Breyer’s reasoning has a certain practical appeal. But there are also problems with convicting people for knowing they would cause harm that they did not want to cause. History suggests that requiring only knowledge, as opposed to purpose, can seriously threaten First Amendment rights.⁴⁴ The issue is an important one. A specific intent requirement was necessary to protect civil rights demonstrators, who knew they might cause great disruption but who sought to achieve integration. Changing to a

⁴² *Id.* at 2740.

⁴³ *Id.*

⁴⁴ See, e.g., *Abrams v. United States*, 250 U.S. 616 (1919).

knowledge requirement might have made a difference also in prosecutions like those of Chelsea Manning and Edward Snowden.

The dissent, then, would have interpreted the knowledge requirement to punish speech-related support only if the defendant “is aware of (or willfully blinds himself to) a significant likelihood that his or her conduct will materially support the organization’s terrorist ends.”⁴⁵ By adopting this interpretation (and limiting “fungibility” as described above), Justice Breyer sought to prevent the statute from violating the First Amendment. The intent interpretation in particular did not fit easily with the statute’s wording or structure, as the Court was quick to point out.⁴⁶ As Justice Breyer stressed, however, this would not be the first time that a court had stretched the interpretation of a federal statute in order for it to pass constitutional muster.⁴⁷

The dissent’s new interpretation of the knowledge requirement, while falling short of *Brandenburg*’s requirement of purpose, still moved the statute much closer to satisfying *Brandenburg*’s requirements. Both knowledge and specific intent are comparatively strict standards, and both are much stricter than the knowledge requirement that the statute purported to impose.

COORDINATION

A final persuasive attack on the Court’s opinion comes in Justice Breyer’s discussion of “coordination.” The Court had emphasized the “narrow[ness]” of its holding by claiming that only speech coordinated with or directed by terrorist organizations was outlawed.⁴⁸ Independent political advocacy was not within the purview of the law. The Court had also distinguished the Communist Party cases, which were largely about party membership, by saying that the material-support statute here did not forbid membership.⁴⁹ But how can one become a member without “service” or “advice” or acting as “personnel,” at least under the definitions set forth in the statute?

The personnel clause of the material-support statute is broad enough to ensnare nearly any member of a foreign terrorist organization. “Personnel” describes anyone who “work[s] under that terrorist organization’s direction,” and the personnel provided can even include oneself.⁵⁰ Only individuals who “act entirely independently of the foreign terrorist organization to advance its goals or objectives” are not

⁴⁵ *HLP*, 130 S. Ct. at 2740 (Breyer, J., dissenting).

⁴⁶ *Id.* at 2717–18 (majority opinion).

⁴⁷ *Id.* at 2742 (Breyer, J., dissenting); *see also, e.g.*, *Webster v. Doe*, 486 U.S. 592 (1988); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

⁴⁸ *HLP*, 130 S. Ct. at 2723.

⁴⁹ *Id.* at 2718.

⁵⁰ 18 U.S.C. § 2339B(h) (2012).

personnel.⁵¹ The fact that the statute does not explicitly use the word “member” does not mean that membership as commonly understood is allowed. After all, what good is it to be perfectly free to join the Communist Party so long as you never interact with the Party?

HLP again contrasts with *Citizens United* in its treatment of coordinated speech. Under *Citizens United*, independent corporate speech is allowed so long as it is not coordinated with campaigns.⁵² The result of this ruling has been a shadow play of “uncoordinated expenditures” by organizations run by former campaign staffers. Just as *Citizens United* required the Government to prove the necessity of its regulations with overwhelming evidence, corporate expenditures are now allowed so long as there is no explicit evidence of coordination.

The statute in *HLP*, however, prohibits broad swaths of speech that would not satisfy any commonsense notion of coordination, without requiring any evidence to support coordination. Offering to train an organization would not seem to be working under the organization’s direction, for instance; instead, it is a fairly one-way transfer of information. Yet under the definition of material support provided by the statute, sending pamphlets, unsolicited, that would train the organization would be prohibited. Under *Citizens United*, corporate speech is uncoordinated unless proven otherwise; under *HLP* and the Court’s apparent belief that it prohibits only coordinated speech, the speech of humanitarian organizations is presumed to be coordinated. By accepting the Government’s definitions of “material support” without any evidence that in practice it captures only coordinated speech, the Court made a ruling that is not nearly as narrow as it claims to be.

Finally, it is ironic that the Court here allows a prohibition of speech only where it intersects with another First Amendment right, free association. The Court purports cautiously to limit its holding with respect to both speech and association: its speech holding is limited to coordinated speech while it reaffirms the Communist Party cases’ freedom to be a member. The result, however, is that speech and association are protected when practiced alone, but exercising the two together can be prohibited.⁵³ One may speak as long as it is not in concert with particular organizations, or one may be a member as long as one speaks “entirely independently” of the organizations, but exercising one right closes the door to exercising the other. This is akin to saying that one may exercise a right to free speech so long as one does not

⁵¹ *Id.*

⁵² *Citizens United*, 130 S. Ct. 876, 902, 910 (2010).

⁵³ *Cf. Emp’t Div. v. Smith*, 494 U.S. 872, 881 (1990) (finding that the First Amendment bars application of neutral, generally applicable laws to religiously motivated actions only when they involve “the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press”).

speak of religion and one may enjoy a right to free exercise so long as one does not speak about it. Both rights may technically exist, but using one to limit the other in this way drastically undercuts both.

Coordinated actions may be more dangerous than individual ones, but using the exercise of one right to justify prohibition of another runs counter to established First Amendment doctrine. Under strict scrutiny, the typical First Amendment standard, such prohibitions are allowable only insofar as they are narrowly tailored to prevent the targeted harm. But, as Justice Breyer noted, there was no evidence that the plaintiffs' proposed activities would lead to any harm.⁵⁴ A statute that prohibits coordinated speech, regardless of the likelihood of resulting harm, and allows potentially harmful independent speech, so long as it is not coordinated, is both under- and over-inclusive. Although the Court claimed to apply "rigorous" scrutiny in *HLP*, it failed to consider the possibility of banning only coordinated speech that is harmful rather than prohibiting it categorically.

AN ADDITIONAL ISSUE: DUE PROCESS OF LAW

In the background of this case are other troubling facts that were not directly involved in the Supreme Court litigation but that nonetheless raise deep concern about the Court's result. The absence of any procedural safeguards suggests that the designation of a group as a "foreign terrorist organization" is not made with the kind of deliberation that would confirm the designation is reliable or fair. In *Joint Anti-Fascist Refugee Committee v. McGrath*,⁵⁵ the Supreme Court held that before condemning organizations, the government must give them notice and an opportunity to be heard.⁵⁶ In that case, the process by which the Attorney General had designated groups or individuals "Communist" violated the Due Process Clause. The same would appear to be true here.

The authority to designate an entity a "foreign terrorist organization" rests with the Secretary of State.⁵⁷ She may, in consultation with the Secretary of the Treasury and the Attorney General, so designate an organization upon finding that it is foreign, engages in "terrorist activity" or "terrorism," and thereby "threatens the security of United States nationals or the national security of the United States."⁵⁸ No notice or hearing is provided before an organization is designated a

⁵⁴ *HLP*, 130 S. Ct. at 2734–36 (Breyer, J., dissenting).

⁵⁵ 341 U.S. 123 (1951).

⁵⁶ See *id.* at 138 n.11 (plurality opinion); *id.* at 143 (Black, J., concurring); *id.* at 172–74 (Frankfurter, J., concurring); *id.* at 178 (Douglas, J., concurring); *id.* at 186–87 (Jackson, J., concurring).

⁵⁷ 8 U.S.C. § 1189(a)(1), (d)(4) (2012).

⁵⁸ *Id.* § 1189(a)(1)(C), (d)(4).

“foreign terrorist organization,” and no legally admissible evidence is required to support the designation. Neither the organization nor its supporters are even made aware that such a designation is being considered.

An organization so named first hears of the designation when it is published in the Federal Register.⁵⁹ This is the only notice given that an organization has been so designated. That publication brings about an immediate freezing of any assets in the United States and instantly makes criminal any person who continues to contribute to or support the organization.⁶⁰ The statute explicitly states that a defendant in a criminal action may not raise the invalidity of a terrorist designation as a defense at any trial or hearing.⁶¹

There is provision for judicial review of a “foreign terrorist organization” designation within thirty days of its announcement in the Federal Register.⁶² This is the only window for review. The D.C. Circuit Court of Appeals has jurisdiction, but in reality there is little for the courts to review, especially since the Secretary is not required to rely on any evidence that a court would deem reliable.

To cut off and stigmatize an American person or organization on such a summary basis would not be possible, but in *HLP* the only “foreign terrorist organizations” were the PKK and the LTTE. They could have raised Due Process arguments if their property had been seized, but they did not have bank deposits or other property in the United States. Because they had neither property nor presence in the United States (and foreign members or representatives of such organizations are forbidden entry to the United States), the Fifth Amendment Due Process Clause did not apply. It did not matter that they had suffered economic harm because the designation had made it criminal for any American to give them money. At least for foreign terrorist organizations in this position, review in the court of appeals amounts to very little review.

In this case, the LTTE did invoke its right to challenge its “foreign terrorist” designation, but it did not prevail.⁶³ Without constitutional rights, the organization was limited to the rights the statute gave it. All that remained for the court to review were the Secretary of State’s three “findings”: (1) that the organization is foreign and (2) engaged in terrorist activities that (3) threaten U.S. nationals or the national security of the United States. “National security” is defined to include threats to

⁵⁹ *Id.* § 1189(a)(2)(A)(ii).

⁶⁰ *Id.* § 1189(a)(2)(C).

⁶¹ *Id.* § 1189(a)(8).

⁶² *Id.* § 1189(c)(1).

⁶³ See *People’s Mojahedin Org. of Iran v. U.S. Dep’t of State*, 182 F.3d 17, 18–19, 25 (D.C. Cir. 1999).

the “national defense, foreign relations, or economic interests of the United States.”⁶⁴ Of those findings, the court ruled it could not consider the third, because that presented a political question not within the court’s competence.⁶⁵ It is a political judgment “of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and [has] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”⁶⁶ The court of appeals still could review the first two findings. But they were to be substantiated merely by the existence of an “administrative record” which may consist of only hearsay accounts from named and unnamed sources, press stories, or rumors on the Internet.⁶⁷ Moreover, some of the information may be classified.⁶⁸

Despite LTTE’s argument that it was not an organization but a “government,” the court found that it was a foreign organization.⁶⁹ It also found that the record contained indications that the organization had engaged in killing in order to further its political agenda.⁷⁰ Although the court of appeals upheld the Secretary’s designation of LTTE as a foreign terrorist organization, it stressed: “We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true.”⁷¹ It claimed:

[O]ur only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received — something we have no way of judging.⁷²

So even though the statute provides that the court shall set aside a designation it finds to be arbitrary and an abuse of discretion or contrary to the Constitution, the reviewing court need not review — indeed has no means of reviewing — the accuracy of the accusations against the organization. There are no further reviews of the designation.

Foreign terrorist organizations that do have property or personnel in the United States can raise Due Process objections to the designation procedure. Those objections could be heard on the merits. But even in *HLP*, the plaintiffs are American citizens living in the United States, and they are deprived of their rights to continue their work and to support the organization. Due Process might well require allowing

⁶⁴ 8 U.S.C. § 1189(d)(2).

⁶⁵ *People’s Mojahedin Org. of Iran*, 182 F.3d at 23.

⁶⁶ *Id.* (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)) (internal quotation mark omitted).

⁶⁷ 8 U.S.C. § 1189(a)(3).

⁶⁸ *Id.*

⁶⁹ *People’s Mojahedin Org. of Iran*, 182 F.3d at 24.

⁷⁰ *Id.*

⁷¹ *Id.* at 25.

⁷² *Id.*

them to challenge the validity or accuracy of a designation of the organization they wish to support.

PARTICULARITY IN FIRST AMENDMENT CASES

This lack of procedural protections under the material-support statute is relevant even if it was not challenged in *HLP*. It demonstrates that no one has made a supportable finding that the organizations at issue actually engage in terrorist activities, nor has anyone — not the Secretary of State, not the Congress, not the President, and not the reviewing court — actually made a finding that the activities of the plaintiffs will contribute to terrorism or endanger the Government in any discernible way. Justice Breyer correctly criticized the Court’s deference to Congress in this regard. He acknowledged that some deference might have been appropriate if there had been any decision, but as there had been no decision pertaining to this particular designated organization, there was nothing to defer to.⁷³

In general, particularity is required in First Amendment cases. The Court’s job is to look at particular situations and decide, on the basis of all the facts, whether the challenged speech is protected or not.⁷⁴ Recall Justice Holmes’s assessment in *Schenck*, that the true issue “is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.”⁷⁵ *HLP* was at the other end of the particularity spectrum. No reliable determination of basic facts about either the “foreign terrorist organizations” or the effect of the plaintiffs’ aid was ever made.

The plaintiffs would have been more likely to prevail if they had awaited prosecution and challenged the statute as part of their defense, for then they would have had particular facts on which to base their claim. Of course, it is understandable that they would not want to risk conviction and substantial imprisonment, and they had a good argument that they had a right to pre-enforcement review: they had not violated the law and would not be prosecuted, yet the statute affected their jobs and their life’s work. If, however, they had violated the statute and a jury had been faced with a particular case involving a human rights worker’s peaceful promotion of humanitarian ends, it might have been difficult to persuade the jury to convict. It might

⁷³ *HLP*, 130 S. Ct. 2705, 2739 (2010) (Breyer, J., dissenting).

⁷⁴ See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Brown v. Louisiana*, 383 U.S. 131 (1966).

⁷⁵ *Schenck v. United States*, 249 U.S. 47, 52 (1919).

have been equally difficult for a court, in a particular and limited context, to uphold any conviction. Instead, courts might have started to chip away at the broadest implications of the statute, as the dissent in *HLP* does.

Not only would the defense appear differently in such a contextualized challenge to the material-support statute, but also the Government might have been willing to concede more ground. As it was, the Government, defending its statute in advance, tried to win for it the broadest possible interpretation. In oral argument, for example, then-Solicitor General Elena Kagan told the Supreme Court that the prohibition would forbid even a lawyer hired by a designated “foreign terrorist group” to file an amicus brief in the United States Supreme Court.⁷⁶

First Amendment rules develop most thoughtfully when decided in particularized factual contexts. Sometimes general rules are stated, but the decision often depends upon the Justices’ weighing all the facts in context. Case law developed in this manner might distinguish between organizations like al-Qaeda and those that the plaintiffs support. It might also distinguish between giving weapons and giving negotiating advice. In *HLP*, in contrast, the Court was looking at a type of case — involving teaching international law and humanitarian values to designated foreign terrorist organizations — but not any particular fact situation. Because a post-prosecution challenge would have presented such a fact-bound question, it could have allowed for case-by-case, that is, situation-by-situation, development. In the end, this is the method of First Amendment analysis that results in the most satisfactory rules and outcomes.

Even deciding pre-enforcement, without the benefit of a particular prosecution to review, Justice Breyer paid much more attention to the factual context of the particular case than did the Court. Justice Breyer’s approach would have left more room for development on a case-by-case basis and a thoughtful working out of the contours of the material-support statute as it interacts with First Amendment interests. Eventually, perhaps, these cases involving terrorism and foreign relations would find themselves treated in the same way, with the same analysis, as *Brandenburg* cases.

This dissent is characteristic of the style and substance of Justice Breyer’s opinions. He strives to make his views understandable and accessible to ordinary people. One manifestation is his lack of footnotes. Instead, Justice Breyer often, as in his *HLP* opinion, sprinkles

⁷⁶ See Transcript of Oral Argument at 46–52, *HLP*, 130 S. Ct. 2705 (Nos. 08-1498, 09-89), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1498.pdf [<http://perma.cc/VLB4-FPA6>].

his arguments with citations and very apt quotations from classical First Amendment cases. He also takes the occasion, somewhat mischievously, to tease his colleagues on the other side by quoting their former pronouncements that contradict the positions they are taking in *HLP*.

In addition to these rhetorical techniques, the Justice decimates the arguments on the other side with probing analysis on the merits. He refutes opposing arguments point by point and detail by detail, but he also addresses the larger values of First Amendment jurisprudence. Justice Breyer has both the imagination and the practical sense to foresee problems that might develop, especially from adopting too broad rules. As well as this opinion, his separate opinion in *Clinton v. Jones*⁷⁷ attests to this ability; there he alone of the Justices, before the Monica Lewinsky affair that led to President Clinton's impeachment, expressed doubt that civil damage suits against a sitting President could be allowed without significantly distracting the President from his official duties.⁷⁸

Also typical of Justice Breyer is his drive to come up with a sensible solution, one that will work in the real world. He is ready to solve the problem at hand, even if that must entail some strained statutory interpretation. In *HLP*, a case pitting First Amendment freedoms against a legitimate desire to prevent violence toward Americans, Justice Breyer crafts a practicable solution. Although he does not follow *Brandenburg*, he honors *Brandenburg*'s requirements much more than the Court does. Justice Breyer's dissent reflects core First Amendment values and seeks to preserve them even in dangerous times.

⁷⁷ 520 U.S. 681 (1997).

⁷⁸ *Id.* at 724 (Breyer, J., concurring).

JUDICIAL STATESMANSHIP: JUSTICE BREYER'S
CONCURRING OPINION IN *VAN ORDEN v. PERRY*

*Michael J. Klarman**

On June 27, 2005, the U.S. Supreme Court decided two cases in which plaintiffs had raised Establishment Clause challenges to public displays of the Ten Commandments.¹ The Court rejected the challenge to a monument display located on the grounds of the Texas State Capitol but vindicated the challenge to framed displays on the walls of two Kentucky courthouses. Both rulings divided the Justices by five to four, and Justice Breyer was the decisive vote in both cases.

In his concurring opinion in the Texas case, Justice Breyer explained that context was critical in Establishment Clause cases, denied that any “single mechanical formula . . . can accurately draw the constitutional line in every case,”² and found it dispositive that the Texas display was roughly forty years old and had generated little controversy, while the Kentucky courthouse displays were quite recent and controversial.³ In effect, his ruling insulated from constitutional challenge the thousands of Ten Commandment markers that were erected in the 1950s and 1960s by the Fraternal Order of Eagles.⁴

Justice Breyer’s opinion in *Van Orden v. Perry* is, I submit, a laudable act of judicial statesmanship. It defends an important principle of liberal constitutionalism — a firm separation of church and state. Yet at the same time, it acknowledges political reality and makes a wise concession to the force of public opinion.

Liberal Justices have not always made such concessions in the past. In *Roe v. Wade*,⁵ the Court rejected compromise positions that would

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¹ *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005).

² *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment).

³ *Id.* at 702–03 (finding the fact that “40 years passed in which the presence of this monument, legally speaking, went unchallenged” to be a “determinative” factor, *id.* at 702); *id.* at 703 (distinguishing the companion case, *McCreary County*, “where the short (and stormy) history of the courthouse Commandments’ displays demonstrates the substantially religious objectives of those who mounted them, and the effect of this readily apparent objective upon those who view them”). It also mattered to Justice Breyer, as it did to the plurality, that the Ten Commandments were simply one of seventeen monuments and twenty-one historical markers on the twenty-two acres surrounding the state capitol. See *id.* at 681, 691–92 (plurality opinion); *id.* at 702 (Breyer, J., concurring in the judgment).

⁴ Ralph Blumenthal, *Split Rulings on Displays Draw Praise and Dismay*, N.Y. TIMES, June 28, 2005, at A17 (reporting a 2004 poll by the Pew Forum on Religion and Public Life and the Pew Research Center for the People and the Press).

⁵ 410 U.S. 113 (1973).

have corresponded more closely with public opinion on abortion. For example, the Court in *Roe* could have invalidated only the Texas statute forbidding abortion in all cases except where the mother's life was at risk — a prohibition that was supported by no more than 15% of Americans — and sustained the constitutionality of Georgia's therapeutic abortion law, which commanded much broader public support.⁶ Or the Court could have limited the abortion right to the first trimester, during which well over 60% of Americans supported a woman's right to choose an abortion in consultation with her physician, but not extended that protection into the second trimester — where public support for a woman's right to an abortion dipped well below 30%.⁷

Likewise, in *Furman v. Georgia*,⁸ the Court threatened to extinguish entirely the death penalty rather than adopting compromise positions — both substantive and procedural — that would have been more palatable to public opinion. For example, the Court could have restricted the domain of capital punishment — as it later would — to certain crimes (for example, murder) and to certain criminals (for example, those who are eighteen or older and those possessing a minimum IQ level). Similarly, the Justices could have forbidden imposition of the death penalty — as they later would — without adequate standards constraining jurors' discretion and without a bifurcated trial/sentencing proceeding and mandatory appellate review.

To take one final example, when the Massachusetts Supreme Judicial Court ruled in *Goodridge v. Department of Public Health*⁹ in favor of same-sex marriage, it explicitly rejected a compromise position — civil unions for gay couples — that commanded the support of most Americans.¹⁰

Rulings such as *Roe*, *Furman*, and *Goodridge* have vindicated important principles of liberal constitutionalism — but at a cost: by pushing beyond the limits of what public opinion would bear, these decisions have sparked dramatic backlashes. *Roe* ignited a politically potent right-to-life movement that had not previously existed in national politics, helped elect Ronald Reagan President in 1980, and made abortion the dominant issue in subsequent Supreme Court confirmation hearings.¹¹ Within a year of *Furman*, public opinion polls revealed that supporters of capital punishment outnumbered opponents by thirty-five

⁶ Ruth Bader Ginsburg, Madison Lecture, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1198–1200, 1205–08 (1992).

⁷ See, e.g., Jeffrey Rosen, *Worst Choice: Why We'd Be Better Off Without Roe*, NEW REPUBLIC, Feb. 24, 2003, at 15–16.

⁸ 408 U.S. 238 (1972) (per curiam).

⁹ 798 N.E.2d 941 (Mass. 2003).

¹⁰ MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR 179–80, 211 (2013).

¹¹ GERALD N. ROSENBERG, THE HOLLOW HOPE 185–95 (2d ed. 2008).

percentage points — up from a mere ten percentage points prior to the ruling. Within four years of *Furman*, thirty-five states enacted new death penalty statutes.¹² The Hawaii Supreme Court's provisional ruling in favor of gay marriage in 1993¹³ led thirty-five states and Congress to enact statutes “defending” traditional marriage, and the Massachusetts court's ruling in *Goodridge* inspired twenty-five states over the ensuing five years to adopt constitutional amendments barring same-sex marriage.¹⁴

Not only do such backlashes sometimes undermine the constitutional principles that the Court was attempting to vindicate, but they can also create difficulties for progressive politicians. *Brown v. Board of Education*,¹⁵ which was vastly unpopular in the American South, unleashed a political backlash that destroyed southern racial moderates like Governor “Big Jim” Folsom of Alabama and helped create or revive the political careers of racial demagogues such as George Wallace, Ross Barnett, and Bull Connor.¹⁶ *Miranda v. Arizona*,¹⁷ decided in the face of rapidly rising crime rates, facilitated Richard Nixon's victory in the 1968 presidential election on a law-and-order platform, which explicitly attacked the courts for shackling the “peace forces” in their battle against the “criminal forces.”¹⁸

Likewise, after *Goodridge*, gay marriage quickly became a prominent issue in the 2004 elections, making life miserable for Democratic politicians. Two Democratic Senate candidates — one of whom was Tom Daschle, the Senate Minority Leader — lost their races largely because of the issue.¹⁹ Gay marriage may even have cost John Kerry the presidential election, as President George W. Bush would have been defeated without the electoral votes of Ohio, a state that he won by less than two percentage points while a ballot initiative barring same-sex marriage passed in Ohio by a margin of about twenty-four percentage points. If the same-sex marriage issue either brought enough cultural conservatives to the polls who otherwise might have stayed home or induced enough swing voters to vote Republican because they preferred

¹² STUART BANNER, *THE DEATH PENALTY* 268 (2002); *see also id.* at 267–75 (describing the backlash created by *Furman*).

¹³ *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹⁴ KLARMAN, *supra* note 10, at 57–68, 89–118.

¹⁵ 347 U.S. 483 (1954).

¹⁶ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 385–408 (2004). *Brown's* backlash ultimately produced a counterbacklash, as the violent resistance to civil rights demonstrations unleashed by extremist politicians repulsed northerners and produced demands for federal civil rights legislation to suppress Jim Crow. *See id.* at 421–42.

¹⁷ 384 U.S. 436 (1966).

¹⁸ *See generally* MICHAEL W. FLAMM, *LAW AND ORDER* (2005).

¹⁹ KLARMAN, *supra* note 10, at 110–11.

that party's position on gay marriage, then it may well have determined the outcome of the presidential election.²⁰

On other occasions, Justices have made concessions to political reality in an effort to curb backlash. *Brown II*²¹ is a famous attempt by the Justices to compromise with white southerners over school desegregation by granting them an extended grace period for implementation. In 1976, the swing Justices on the Court — Potter Stewart and Byron White — capitulated to the post-*Furman* backlash by endorsing some of the newly enacted death penalty statutes, which permitted capital punishment only for certain crimes and certain criminals, and guaranteed that it would be imposed only with certain procedural protections.²² Similarly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²³ the swing Justices on the Court — Kennedy, O'Connor, and Souter — embraced several of the abortion compromises that public opinion supported but the post-*Roe* Court had rejected: parental involvement statutes, mandatory waiting periods, and informed consent requirements. Finally, the New Jersey and Vermont Supreme Courts, attempting to defuse backlash, ruled that their states had to permit gay and lesbian couples to form civil unions but not necessarily to marry.²⁴

For a Justice to know when and how to compromise in such cases is a complicated calculation. For one thing, anticipating backlash in order to ameliorate it can inadvertently foment it. For example, the Justices in *Brown II* were trying to induce white southerners to meet them halfway by appearing reasonable and accommodating, but in fact, they were perceived as weak and vacillating, which only inspired massive resistance.²⁵ In addition, “statesmanship” can appear arbitrary and unprincipled — simply an excuse for Justices to impose their “predilections” on the Constitution, as alleged by Justice Thomas in his concurring opinion in *Van Orden*.²⁶ Finally, although making some concessions to public opinion can be prudent, one principal purpose of constitutionalism and judicial review is protecting minority rights from majoritarian oppression.²⁷ Thus, for Justices to supinely submit to public opinion is judicial abdication, not statesmanship.

²⁰ *Id.* at 111–13.

²¹ *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

²² *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976).

²³ 505 U.S. 833 (1992).

²⁴ *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006); *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

²⁵ KLARMAN, *supra* note 16, at 318–20.

²⁶ *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring) (“The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges.”).

²⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . .”).

Still, it is hard to see the virtue in constitutional rulings that undermine themselves by mobilizing a hostile citizenry in opposition. Capital punishment may be wrong, but if the Court's ruling in *Furman v. Georgia* simply entrenched it in American society, can that decision be justified even in the minds of death penalty abolitionists?

Americans are a religious people.²⁸ For the Court's liberal Justices to stand too adamantly behind a stringent antiestablishment principle would guarantee an explosive political backlash. Seventy to eighty percent of Americans have always opposed the Court's rulings from the early 1960s barring even voluntary (though state-organized), non-denominational school prayer,²⁹ and those decisions contributed significantly to the reemergence of religious fundamentalists in American politics and the consequent rise of the Religious Right.³⁰ When a panel of the Ninth Circuit ruled in 2002 that the Establishment Clause forbade the inclusion of "under God" in the Pledge of Allegiance,³¹ the Senate — immediately and unanimously — upbraided the judges.³² More than seven Americans in ten have no objection to public displays of the Ten Commandments.³³

Justice Breyer's concurring opinion in *Van Orden v. Perry* acknowledges the reality that constitutional rulings that strongly contravene public opinion are likely to undermine, rather than advance, the principles for which they stand.³⁴ Justice Breyer seeks to navigate the shoals separating constitutional principle and political reality. As such, his *Van Orden* opinion represents an important and welcome act of judicial statesmanship.

²⁸ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.").

²⁹ *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

³⁰ On public opinion regarding school prayer, see Alison Gash & Angelo Gonzales, *School Prayer*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 62, 69 fig.3.2 (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

³¹ *Newdow v. U.S. Congress*, 292 F.3d 597, 612 (9th Cir. 2002), amended by 328 F.3d 466 (9th Cir. 2003), *rev'd sub nom. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004).

³² Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools*, Citing "Under God," N.Y. TIMES, June 27, 2002, at A1.

³³ Blumenthal, *supra* note 4.

³⁴ *Van Orden v. Perry*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring in the judgment) ("[A contrary result in this case] might well encourage disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the Nation. And it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid.").

CHEVRON AND THE REASONABLE LEGISLATOR

*John F. Manning**

Justice Breyer is a quintessential Legal Process judge.¹ In their influential Legal Process materials, Professors Henry Hart and Albert Sacks tell us that all law is purposive, and that interpreters should presume, if at all possible, “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”² Justice Breyer likes that idea. He tells us that “when difficult statutory questions are at issue, courts do better to focus foremost upon statutory purpose” rather than struggle with the fine points of the text.³ From this premise, it follows that a judge should ask how a “‘reasonable member of Congress’ . . . *would have wanted* a court to interpret the statute in light of present circumstances of the particular case.”⁴ This approach, Justice Breyer argues, promotes legislative accountability because the ordinary citizen evaluates laws in terms of their “general purposes” rather than the minutiae of the text.⁵ It also “means that laws will work better for the people they are presently meant to affect.”⁶

Although the Legal Process school long held sway on the Court,⁷ its premises have faced challenges in the past quarter century as the Court has become more textualist. As I argue earlier in this Volume, today’s Court is more prone to view a statute not as the instantiation of a coherent legislative purpose, but rather as a bundle of compromises, whose text takes the law so far and no further.⁸ Hence, the Court has emphasized that since “no legislation pursues its purposes at all costs,” interpreters must not assume “that *whatever* furthers the statute’s primary objective must be the law.”⁹ The Court has also suggested that “[i]nvocation of the ‘plain purpose’ of legislation at the expense of the terms of the statute . . . takes no account of the processes

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¹ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 1124 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

² *Id.* at 1378.

³ STEPHEN BREYER, *ACTIVE LIBERTY* 98 (2005).

⁴ *Id.* at 88.

⁵ *Id.* at 99.

⁶ *Id.* at 100.

⁷ See William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 698–99 (1987).

⁸ See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 22–24 (2014).

⁹ *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

of compromise.”¹⁰ Accordingly, the Court is now far less likely to extend the reach of a statutory text in order to capture the full legislative purpose or to rely on such purpose to engraft new statutory elements, such as implied rights of action.¹¹

This shift, however, has not eliminated all Legal Process reasoning from the Court’s case law. Put to one side the odd pockets of doctrine — such as implied preemption or the “borrowing” of statutes of limitations for federal statutes¹² — in which the Court still asserts power to supply the means of statutory implementation in the face of contrary legislative signals.¹³ Those doctrines represent a strong form of purposivism that is difficult, if not impossible, to square with the Court’s new approach. At the same time, however, the Court’s cases also rely on purpose in a more modest way that is consistent with its new textualism.¹⁴ In particular, the Court’s new textualism permits interpreters to read statutes reasonably and purposively — to engage in Legal Process-style reasoning — *within the margins of discretion* left by the statutory text.¹⁵

This Essay argues that the Court’s rules of judicial deference to agency interpretations of law represent an example of this more modest form of Legal Process reasoning. Though the case law on deference seems to oscillate between all-things-considered approaches that fit obviously in the Legal Process tradition and more rule-bound approaches that seem to belong to a more formalist tradition, the truth is that each move by the Court in this area has reflected Legal Process reasoning in at least one important respect: Every framework used by the Court for determining the availability of deference has rested on a legal fiction about presumed legislative intent. Not one has turned on the explicit terms of any governing statute. Rather, every Justice who has weighed in on this topic, from Justice Breyer to Justice Scalia, has

¹⁰ *Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

¹¹ *See, e.g., Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2886 (2010) (“It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.”); *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001) (limiting judicial authority to recognize implied rights of action).

¹² *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991) (plurality opinion) (authorizing the Court to “borrow” another federal statute’s limitations period for a statute that omits one itself); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343 (discussing implied preemption).

¹³ *See Manning, supra* note 8, at 71–73.

¹⁴ *See id.* at 26–29.

¹⁵ *See id.* at 26. The Legal Process materials themselves suggest some support for this approach by admonishing interpreters not to “give the words [of a statute] . . . a meaning they will not bear.” HART & SACKS, *supra* note 1, at 1374. Those materials, however, also emphasize that “[t]he meaning of words can almost always be narrowed if the context seems to call for narrowing.” *Id.* at 1376. Today’s Court, as noted, considers purpose but regards a clear statutory text as a hard constraint on its discretion. *See Manning, supra* note 8, at 26–27.

done so on the basis of his or her conception of what form of deference makes the most sense. To be sure, Justice Scalia's preferences have been more rule-like than the rest of the Court's. But they have been no less reflective of the "reasonable legislator" tradition favored by Justice Breyer.

The Court's convergence around Legal Process reasoning in this context reflects the judiciary's effort to fill a perceived gap in statutory instructions about the allocation of decisionmaking authority. To be sure, the Administrative Procedure Act (APA) instructs reviewing courts to decide "questions of law" and to "interpret . . . statutory provisions."¹⁶ But judges nonetheless properly defer to an agency's interpretation of its own organic act where Congress has delegated to the agency rather than the reviewing court the discretion to choose among reasonably available interpretations.¹⁷ In such a case, the reviewing court fulfills its duty to "interpret" the statute by determining whether the agency has stayed within the bounds of its assigned discretion — that is, whether the agency has construed its organic act reasonably.¹⁸ Since organic acts often delegate interpretive discretion without specifying explicitly to which institution the delegation runs, the Court has taken it upon itself to ask what a reasonable legislator would do.

This Essay discusses that phenomenon. Part I traces the Court's various post-World War II approaches to deference. Part II explores the implications of these developments for our understanding of the Legal Process tradition.

I. THE DEFERENCE FRAMEWORK OVER TIME

The Supreme Court has long struggled with the question of when a reviewing court should "defer" to an agency's reasonable interpretation of its organic act. It has reset its framework for analysis several times. It has not fully resolved whether it prefers a more flexible, all-things-considered approach or a more predictable, rule-like one. Each time, however, it has relied on Legal Process-style reasoning to determine the appropriate standard of review for questions of law.

Prior to 1984, one could scarcely doubt that the Court thought about deference in Legal Process terms. Its framework considered all the factors that one might imagine a reasonable legislator would care about in deciding whether a court should defer to a particular agency

¹⁶ 5 U.S.C. § 706 (2012).

¹⁷ See Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 6, 27 (1983); see also, e.g., Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L.J. 1, 21 (1985).

¹⁸ See Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 516; see also EINER ELHAUGE, *STATUTORY DEFAULT RULES* 86 (2008) (arguing that the reviewing court says what the law is when it determines the default rules for interpretation).

interpretation of a given statute.¹⁹ The famous *Hearst* case,²⁰ for example, told us that when reviewing an agency's application of broad statutory criteria to specific facts, a court should defer to the agency's accumulated experience.²¹ *Packard*,²² in contrast, stated that pure questions of law presumptively lay within the judge's wheelhouse.²³ But while *Hearst* and *Packard* supplied important starting points for the Court's reasoning, numerous other factors also figured into the Court's ultimate decision whether to exercise independent judgment or to defer.²⁴ Did the question at issue require the kind of technical expertise that an agency uniquely possesses?²⁵ Did the agency play a role in drafting the legislation it was interpreting, giving it special insight into legislative intent?²⁶ Was the agency interpretation on the books for a good long time, affording Congress plenty of opportunity to reject that interpretation if it wished to do so?²⁷ The Court was interested in these and any other common sense questions that a reasonable legislator might have wanted to ask. In what I will for convenience call the *Hearst-Packard* approach, no relevant factor was off limits.²⁸

In 1984, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*²⁹ seemed to change all of this. The Court adopted what to many looked like a crisp formula for determining when to defer. First, applying "traditional tools of statutory construction," a reviewing court would ask whether the agency's organic act speaks clearly "to the precise question at issue."³⁰ If so, then "that [was] the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."³¹ Second, if instead the organic act was "silent or ambiguous" with respect to the question at issue, the question for the reviewing court reduced to "whether the

¹⁹ See, e.g., KENNETH CULP DAVIS, ADMINISTRATIVE LAW §§ 248-51, at 893-908 (1951); Nathaniel L. Nathanson, *Administrative Discretion in the Interpretation of Statutes*, 3 VAND. L. REV. 470, 476-81 (1950).

²⁰ NLRB v. Hearst Publ'ns, 322 U.S. 111 (1944).

²¹ See *id.* at 130-31.

²² Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

²³ See *id.* at 493.

²⁴ See Gary Lawson & Stephen Kam, *Making Law out of Nothing at All: The Origins of the Chevron Doctrine*, 65 ADMIN. L. REV. 1, 21 (2013).

²⁵ See, e.g., Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist., 467 U.S. 380, 390 (1984); E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 134-35 & n.25 (1977).

²⁶ See, e.g., Zuber v. Allen, 396 U.S. 168, 192 (1969).

²⁷ See, e.g., Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294, 315 (1933); SEC v. Sloan, 436 U.S. 103, 126 (1978) (Brennan, J., concurring in the judgment).

²⁸ See Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 n.95 (1985) (identifying ten factors cited by the Court's cases).

²⁹ 467 U.S. 837 (1984).

³⁰ *Id.* at 842, 843 n.9.

³¹ *Id.* at 842-43.

agency's answer is based on a permissible construction of the statute."³² The court could "not substitute its own construction . . . for a reasonable [agency] interpretation" of the statute.³³

Although *Chevron* did not explicitly announce a break from the past, this streamlined two-step inquiry was quite different from anything that had come before it. The lower courts — led by the D.C. Circuit — quickly read *Chevron*'s approach to supplant the *Hearst-Packard* multifactor test.³⁴ The old case-by-case process would yield to a more categorical one, triggered by the mere presence of ambiguity in an agency-administered statute. As the Court later explained, *Chevron* reflected a "presumption that . . . when [Congress] left ambiguity in a statute meant for implementation by an agency, [Congress] understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."³⁵

In an influential article published two years after the *Chevron* decision, then-Judge Breyer lamented the categorical understanding of *Chevron* that was beginning to take shape.³⁶ It was wiser, he said, to consult "particular circumstance[s] to decide whether it 'makes sense,' in terms of the need for fair and efficient administration of that statute in light of its substantive purpose, to imply a congressional intent that courts defer to the agency's interpretation."³⁷ To be sure, such an approach rested on a "legal fiction" about presumed legislative intent.³⁸ But it was standard judicial practice to "imagine what a hypothetically 'reasonable' legislator would have wanted (given the statute's objective)."³⁹ Such an approach, he added, offered the "institutional virtue[]" of assuring the flexibility "to allocate the law-interpreting function between court and agency in a way likely to work best within any particular statutory scheme."⁴⁰ In contrast, a one-size-fits-all approach made no sense in an administrative state as large and diverse as our own:

[T]here are too many different types of circumstances, including different statutes, different kinds of application, different substantive regulatory or administrative problems, and different legal postures in which cases arrive, to allow "proper" judicial attitudes about questions of law to be reduced to

³² *Id.* at 843.

³³ *Id.* at 844.

³⁴ See Lawson & Kam, *supra* note 24, at 59–60.

³⁵ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 740–41 (1996).

³⁶ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 373 (1986).

³⁷ *Id.* at 370.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 371.

any single simple formula. . . . To read *Chevron* as laying down a blanket rule . . . would be seriously overbroad, counterproductive and sometimes senseless.⁴¹

The Court has now moved in Justice Breyer's direction. In *United States v. Mead Corp.*,⁴² the Court held that *Chevron* deference is not triggered by mere silence or ambiguity in an administrative statute.⁴³ Rather, the Court announced yet another new proxy for legislative intent to prescribe deference. Agencies now qualify for deference when they exercise legislatively "delegated authority . . . to make rules carrying the force of law."⁴⁴ An agency may demonstrate such a delegation "in a variety of ways, as [through its] power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."⁴⁵ In the Court's view, adjudication or notice-and-comment rulemaking powers were good proxies for the intent to delegate because they reflect "relatively formal administrative procedure[s] tending to foster the fairness and deliberation that should underlie" such delegation.⁴⁶ In the absence of such processes, the Court might still invoke *Chevron* deference if it can find "any other circumstances reasonably suggesting that Congress . . . thought of [the particular kind of agency action] as deserving the deference."⁴⁷ The Court saw this more flexible approach as necessary to "deal with . . . the great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress."⁴⁸

This time it was Justice Scalia's turn to complain. As the Court's leading formalist, he has often decried the discretion that purposive interpretation seems to confer upon judges.⁴⁹ He believes that bright-line rules better constrain the powers of unelected life-tenured judges.⁵⁰ In his *Mead* dissent, Justice Scalia worried that *Mead* had "largely

⁴¹ *Id.* at 373.

⁴² 533 U.S. 218 (2001).

⁴³ *Id.* at 227-31, 234-35.

⁴⁴ *Id.* at 226-27.

⁴⁵ *Id.* at 227.

⁴⁶ *Id.* at 230.

⁴⁷ *Id.* at 231. Even if *Chevron* deference is not available, *Mead* indicates that a litigant may invoke *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which holds that a reviewing court should give an agency interpretation the weight that it deserves in light of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140. Whether or not *Skidmore* means more than that a reviewing court should allow itself to be persuaded by a persuasive agency, *Skidmore* deference is surely not as robust as *Chevron* deference is.

⁴⁸ *Mead*, 533 U.S. at 235-36.

⁴⁹ See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 18-19 (2012).

⁵⁰ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179-80 (1989).

replaced *Chevron* . . . with that test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."⁵¹ This development, he said, destroyed *Chevron*'s main virtue — the adoption of “an across-the-board presumption” that ambiguity in an agency-administered statute effected a legislative delegation of power to the agency to resolve that very ambiguity, provided that the agency's resolution was “reasonable.”⁵² That presumption, in turn, “operate[d] as a background rule of law against which Congress [could] legislate[.]”⁵³ In contrast, *Mead*'s “principal effect” would be “protracted confusion.”⁵⁴

Whatever else one thinks of *Mead*,⁵⁵ it surely reflects yet another shift in the Court's approach to deference. The apparent safe harbors for adjudication and notice-and-comment rulemaking make it more rule-like than the old *Hearst-Packard* approach.⁵⁶ But the possibility of finding other indicia of legislative intent to apply *Chevron* deference creates new possibilities for old-school case-by-case analysis. Indeed, one Term after *Mead*, Justice Breyer's decision for the Court in *Barnhart v. Walton*⁵⁷ made good on *Mead*'s promise to be open to “other indication[s]”⁵⁸ of legislative intent.⁵⁹ Though its procedural posture is complex, what is important about *Walton* is that Justice Breyer's opinion for the Court (minus Justice Scalia) made clear that even if an agency acts outside the *Mead* safe harbors, “the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time” may justify invoking *Chevron* to assess any resulting interpretation.⁶⁰ At least as a safety valve, therefore, multifactor analysis of imputed legislative intent has made something of a comeback.

⁵¹ *Mead*, 533 U.S. at 241 (Scalia, J., dissenting).

⁵² *Id.* at 257.

⁵³ *Id.*

⁵⁴ *Id.* at 245.

⁵⁵ Whether Justice Scalia's prophecy of “confusion” has proven true is beyond the scope of this Essay. At least some scholars believe that it has. See, e.g., Lisa Schultz Bressman, *How Mead Has Muddled Judicial Review of Agency Action*, 58 VAND. L. REV. 1443, 1443–48 (2005); Adrian Vermeule, *Introduction: Mead in the Trenches*, 71 GEO. WASH. L. REV. 347, 347 (2003).

⁵⁶ See *infra* p. 464.

⁵⁷ 535 U.S. 212 (2002).

⁵⁸ *Mead*, 533 U.S. at 227.

⁵⁹ *Walton*, 535 U.S. at 222.

⁶⁰ *Id.*

II. WHAT DEFERENCE DOCTRINE TELLS US ABOUT THE LEGAL PROCESS SCHOOL

At a practical level, Justice Breyer has reason to be mostly pleased about how the Supreme Court's position on deference has unfolded in recent years. To be sure, a majority of the Court has declined to embrace his ultimate goal of returning full-on to a case-by-case approach — one that would do away with the safe harbors that *Mead* seemed to identify.⁶¹ But even if the Court has not restored the *Hearst-Packard* framework, *Mead* made a significant move in that direction, adopting a test that rests explicitly on imputed legislative intent *and* that leaves room for case-specific analysis of such intent.⁶²

If one broadens the lens even a bit, it becomes apparent that at least the more modest form of Legal Process reasoning has underwritten every approach to deference that the Court has used, including the *Chevron* framework itself. The question of deference arises when indeterminacy in an organic act effectively delegates interpretive discretion to some entity — either the agency or the reviewing court. In the absence of a clear signal from an organic act about whether Congress meant to delegate such discretion to the agency or the court, the Court under each approach has imputed a fictive intent to Congress based on the Court's judgment about which approach makes the greatest sense from an institutional perspective.

This proposition is most obvious with respect to the two regimes that bracket *Chevron*, both of which unapologetically rely on the sort of context-specific analysis that is the hallmark of Justice Breyer's "reasonable legislator" inquiry. But *Chevron* itself relies on the reasonable legislator construct no less than do these other regimes. Professors Eric Posner and Cass Sunstein write that "Congress hardly ever states its instructions on the deference question with clarity, and thus *Chevron* cannot be grounded on an explicit or implicit legislative instruction on that question."⁶³ Accordingly, nothing in the *Chevron*

⁶¹ See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1873–74 (2013) (reaffirming that *Chevron* deference applies when an agency exercises statutorily conferred rulemaking or adjudication authority within the agency's field). Justice Breyer would leave open in every case the possibility of drawing a context-specific inference that Congress did not intend the reviewing court to defer, irrespective of the formality of the agency procedure involved. See *id.* at 1875–76 (2013) (Breyer, J., concurring in part and concurring in the judgment); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1004–05 (2005) (Breyer, J., concurring).

⁶² See Lisa Schultz Bressman, Essay, *Reclaiming the Legal Fiction of Congressional Delegation*, 97 VA. L. REV. 2009, 2024–25 (2011); Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 248 (2006).

⁶³ Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1194 (2007); see also, e.g., David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 203 ("Congress so rarely discloses (or, perhaps, even has) a view on this subject as to make a search for legislative intent chimerical . . .").

opinion rested on affirmative evidence that the Clean Air Act Amendments intended to delegate to the agency the ultimate authority to define the terms of, or resolve ambiguities in, that statute.⁶⁴ Instead, the opinion seems to make the judgment that when an agency-administered statute conveys silence or ambiguity on a question, factors such as “superior agency expertise, flexibility, and political accountability” support a categorical presumption that Congress intends deference.⁶⁵ No less than the regimes that have come before and after it, therefore, *Chevron* rested on the imputed intentions that are the hallmark of the “reasonable legislator” approach.

The use of Legal Process reasoning in the deference cases raises at least two larger questions about the approach — questions that can be sketched but not answered in the span of this brief Essay.

1. Although the Legal Process approach is generally associated with context-specific inquiries into a reasonable legislator’s purpose, might a “reasonable legislator” prefer rules over standards? *Chevron* tells us that the answer is yes. In an article published not long after Justice Breyer’s, the Court’s leading formalist, Justice Scalia, offered (though not in such terms) a classic Legal Process defense of *Chevron*’s categorical framework.⁶⁶ He acknowledged right away that “the theoretical justification for *Chevron* is no different from the theoretical justification for those pre-*Chevron* cases that sometimes deferred to agency legal determinations.”⁶⁷ He did not try to ground *Chevron* in the text of any statute.⁶⁸ Rather, describing “the quest for the ‘genuine’

⁶⁴ See Bressman, *supra* note 62, at 2015 (explaining that *Chevron* “did not actually inquire into whether Congress intended to delegate interpretive authority” to the agency). In fact, the Court made plain that it did not matter whether Congress had formed an *actual* intent to delegate to the agency the authority to resolve indeterminacy in the statute. In explaining why Congress failed to resolve the question at issue, the Court thus noted:

Perhaps [Congress] consciously desired the [agency] to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency. For judicial purposes, *it matters not which of these things occurred.*

Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (emphasis added).

⁶⁵ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 149 (2005); see also, e.g., Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, 54 ADMIN. L. REV. 735, 753–54 (2002) (describing *Chevron*’s concept of an implied delegation of legislative authority as a fiction); Mark Seidenfeld, *Chevron’s Foundation*, 86 NOTRE DAME L. REV. 273, 311 (2011) (same).

⁶⁶ Scalia, *supra* note 18, at 517.

⁶⁷ *Id.* at 516.

⁶⁸ Justice Scalia later tried at least to reconcile *Chevron* with the text of the APA. See *United States v. Mead Corp.*, 533 U.S. 218, 241–42 (2001) (Scalia, J., dissenting) (arguing that the APA was enacted against a legal backdrop in which judicial review of an executive officer was princi-

legislative intent [as] . . . a wild-goose chase,” Justice Scalia opined that in “the vast majority of cases” Congress “didn’t think about [deference] at all.”⁶⁹ Instead, “any rule adopted in this field represents merely a fictional, presumed intent.”⁷⁰ To him, *Chevron* was preferable to the *Hearst-Packard* approach not because it better reflected some enacted legislative preference, but rather because it offered a clear “background rule of law against which Congress can legislate.”⁷¹ Justice Scalia’s “reasonable legislator,” in other words, placed a premium on the predictability that a rule provides.

2. Where the statutory text and accompanying legislative history offer little guidance, what should anchor the “reasonable legislator” inquiry? The Legal Process approach of course does not ignore the text; the words chosen by actual legislators offer an important — though not conclusive — indicator of what a hypothetical “reasonable legislator” might have wanted to achieve.⁷² In the deference context, no one on the Court seems to think that the texts of the APA or the organic acts offer many answers. Nor has anyone found much use for the legislative history of those statutes. Indeed, Justices Breyer and Scalia have both assumed a lack of concrete legislative guidance on the question.

How, then, is a Legal Process judge to sort among the fictions? The problem with the reasonable legislator approach is that “reasonableness” covers a lot of ground; it is not too hard to imagine many “reasonable” ways to devise an effective deference regime. The Court has come up with at least three different approaches. To those, one might add the position taken by future-Justice Kagan and future-Judge Barron that a reasonable legislator would give *Chevron* deference to any decisions authoritatively made by *the agency* as opposed to its staff.⁷³ I have a hard time ruling out any of these competing approaches as “unreasonable.” A reasonable legislator might well like the common sense feel and tailoring potential of the *Hearst-Packard* case-by-case approach. But a reasonable legislator might just as easily prefer a clear *Chevron*-like rule to guide agencies, regulated parties, and Congress itself.

pally offered through a writ of mandamus, which “generally would not issue unless the executive officer was acting plainly beyond the scope of his authority,” *id.* at 242).

⁶⁹ Scalia, *supra* note 18, at 517.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Hart and Sacks make this clear. See HART & SACKS, *supra* note 1, at 1375. So too does Justice Breyer, who takes the words of a statute seriously even if they might not be as conclusive to him as they would be to a textualist judge. Compare, e.g., *Muscarello v. United States*, 524 U.S. 125, 127–32 (1998) (Breyer, J.) (conducting a close reading of statutory language), with *Lewis v. United States*, 523 U.S. 155, 160 (1998) (Breyer, J.) (using purpose as a trump card). For a particularly telling example of the way Justice Breyer treats text and purpose, see *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81, 89–100 (2007).

⁷³ See Barron & Kagan, *supra* note 63, at 204–05.

In the absence of a clear legislative signal, I might prefer the clean lines of the *Chevron* approach. If Congress has not expressed itself clearly, then the Court might foster Congress's constitutional power to prescribe the means of implementing federal law if the Court were to adopt a clear and predictable baseline against which Congress may legislate.⁷⁴ Alternatively, what if the Court were to assume that a "reasonable legislator" pays attention to established legal practices that have withstood the test of time?⁷⁵ There is at least a hint of such Burkeanism in the Hart and Sacks materials, which counsel that deeply embedded legal practices open up "the recurrent possibilities of reading general language as subject to assumed but unexpressed qualifications in terms of customary defenses or other limiting policies of the law."⁷⁶ Here, that approach would likely have favored retaining *Hearst-Packard*. Why? By the time Congress enacted the APA and a good many of the statutes that comprise the modern administrative state, the Court had already established a well-known framework for determining when Congress intended courts to defer — the multifactor approach that ripened into the *Hearst-Packard* regime later displaced (retroactively) by *Chevron*.⁷⁷

Whether and to what extent a Legal Process judge, bereft of definitive guidance from any relevant text or legislative history, should emphasize the Burkean strain in the Legal Process materials is a matter for another day. Embedded legal practice might reflect accumulated wisdom, but it might also reflect the arbitrary product of the way power was allocated.⁷⁸ Still, if the alternative is for judges to try to figure out for themselves what deference regime is socially or institutionally optimal,⁷⁹ it is not entirely clear why they will be especially good at doing so or even how they should go about identifying precisely what values they are trying to optimize.⁸⁰ Respecting embedded interpretive practice at least provides some link between the Court's

⁷⁴ See Manning, *supra* note 8, at 68–70; see also U.S. CONST. art. I, § 8, cl. 18 (giving Congress power to enact laws "necessary and proper" to implement all constitutional powers).

⁷⁵ For a particularly thoughtful assessment of the virtues and vices of such an approach to law, see Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

⁷⁶ HART & SACKS, *supra* note 1, at 1192. Hart and Sacks emphasized that "the law rests upon a body of hard-won and deeply embedded principles and policies," which help frame the work of each session of the legislature. *Id.* at 92.

⁷⁷ See ATT'Y GEN.'S COMM. ON ADMIN. PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. DOC. NO. 77-8, at 27, 75–87 (1st Sess. 1941).

⁷⁸ Compare, e.g., DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010) (arguing for a Burkean approach), with JOHN HART ELY, *DEMOCRACY AND DISTRUST* 62 (1980) (criticizing such an approach).

⁷⁹ See Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 925–32 (2003).

⁸⁰ See JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 35–36 (2d ed., 2013) (discussing the problem of identifying baseline values).

doctrine and the concrete legal expectations against which a reasonable legislator would presumably have acted. The Court routinely assumes that Congress enacts statutes against the backdrop of established interpretive principles.⁸¹ That is why seemingly unqualified statutes of limitations are subject to equitable tolling and why unqualified criminal statutes are routinely made subject to standard common law state-of-mind requirements.⁸² Whether or not an actual legislator is subjectively aware of the law's background principles,⁸³ the whole idea of communication rests on the assumption that a "reasonable legislator" knows or should know the social and linguistic practices of the relevant community (in this case, the legal community).⁸⁴ Again, this is not the venue in which to try to resolve this issue. But the Court's pronounced shifts to and then away from *Chevron* put the question front and center.

CONCLUSION

This Essay has used the Court's deference doctrine(s) to identify larger questions about the Legal Process approach to interpretation, which (I argue) has consistently governed this area since before the advent of the APA. Though people might reasonably disagree about the merits or demerits of the competing approaches, one can hardly doubt that virtually every Justice to address this question has done so on the basis of his or her view of what form of delegation, and thus of deference, a hypothetical reasonable legislator might prefer. Whatever else, this phenomenon tells us that Legal Process reasoning continues to exert some hold on the broader legal imagination — even, on occasion, that of the Court's textualists. No one has had more to do with the preservation of that ideal than Justice Breyer.

⁸¹ See, e.g., *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 699 (1979).

⁸² See, e.g., *Young v. United States*, 535 U.S. 43, 49–50 (2002) (equitable tolling); *Staples v. United States*, 511 U.S. 600, 605 (1994) (state-of-mind requirements).

⁸³ For an interesting discussion of what a sample of congressional drafting staff know about different deference regimes, see Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons*, 65 STAN. L. REV. 901, 994–96 (2013).

⁸⁴ See, e.g., Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754, 758 (1966); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION 329, 340 (Andrei Marmor ed., 1995).

THE BIG PICTURE: JUSTICE BREYER'S DISSENT IN
BROWN v. ENTERTAINMENT MERCHANTS ASSOCIATION

*Martha Minow**

When the Supreme Court announced its decision in *Brown v. Entertainment Merchants Ass'n*,¹ First Amendment mavens and media industry spokespersons rejoiced. But Justice Stephen Breyer's striking and solo dissent showed what the nation lost with the decision. He stressed how the decision took away from parents the ability to limit purchases by their child of "a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17."² Exhibiting Justice Breyer's distinctive attention to reality, respect for democracy, and perception of the big picture,³ the dissent adheres to established precedent while insisting on candor, evidence, and common sense. His dissent illustrates respect for different actors — legislatures as well as courts, states as well as the federal government — in a constitutional democracy. It also stakes out space for moderate regulation in the face of substantial but incomplete evidence of serious risk.⁴

WHAT SHOULD WE KNOW ABOUT VIOLENT VIDEO GAMES?

Video games are one of a series of new media generating concern about potential harms to young people. In this way, video games are like comic books, jazz, rock 'n' roll, television, and live role-playing games, each of which has generated charges of danger to children's health and development.⁵ Are efforts to regulate sales of violent video games just a product of periodically recurring moral panic, or do they reflect warranted concerns about a new danger? At the Supreme Court, a majority of the Justices found a California law constitutionally defective in its effort to restrict the sale or rental of violent video

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¹ 131 S. Ct. 2729 (2011). The name of the case changed between argument and decision as Governor Edmund G. Brown, Jr., succeeded Governor Arnold Schwarzenegger.

² *Id.* at 2766 (Breyer, J., dissenting).

³ "Big picture" is defined as "the entire perspective on a situation or issue." *Big Picture*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/big%20picture> (last visited Sept. 28, 2014) [<http://perma.cc/C889-EH8M>].

⁴ A similar approach can be described as "an ounce of prevention," "the precautionary principle," or "taking steps to preserve the status quo pending further information." See generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

⁵ See LAWRENCE KUTNER & CHERYL K. OLSON, *GRAND THEFT CHILDHOOD: THE SURPRISING TRUTH ABOUT VIOLENT VIDEO GAMES AND WHAT PARENTS CAN DO* 29–56 (2008).

games to children.⁶ The word “game” may make light of the kinds of violence at issue: players in violent games are invited to maim and kill images of humans using machine guns, swords, axes, and other weapons; victims can be dismembered, urinated on, and set on fire, generating realistic images of blood and damaged body parts as well as images of victims pleading for mercy. Players receive rewards for triggering violent and degrading actions.⁷ It is understandable that policymakers worry about exposing children to such graphic depictions of violence. Yet violence has always been a part of literature, including children’s literature.

A majority of the Justices joined Justice Scalia’s opinion for the Court in finding that the First Amendment protects video games.⁸ These Justices analogized violent video games to violence in Grimm’s Fairy Tales, *The Odyssey*, *Lord of the Flies*, and comic books.⁹ Justice Alito, joined by Chief Justice Roberts, concurred in the judgment and found the law impermissibly vague,¹⁰ and Justice Thomas dissented, seeing the First Amendment in light of the views of the Founders, who saw no rights of minors as listeners or rights to speak to minors.¹¹ In his dissent, Justice Breyer takes on the task of addressing what could justify regulation of video games and what other reasons defend the law’s constitutionality.

Unlike the majority, Justice Breyer identifies special features of video games, including the physical action and interaction upon which they depend. Video games, he notes, are particularly effective in developing habits and rewarding the participant.¹² He discusses how the Armed Forces rely on video games as evidence of their power in train-

⁶ CAL. CIV. CODE §§ 1746–1746.5 (West 2009). The law covered games that give players the option to kill, maim, dismember, or sexually assault an image of a human being in a manner that “[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors,” that is “patently offensive to prevailing standards in the community as to what is suitable for minors,” and that “causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.” *Id.* § 1746(d)(1)(A).

⁷ See Petitioners’ Brief at 43, 46–47, *Brown*, 131 S. Ct. 2729 (No. 08-1448); see also *Brown*, 131 S. Ct. at 2748–51 (Alito, J., concurring in the judgment) (joined by Roberts, C.J.); *id.* at 2764–65, 2769 (Breyer, J., dissenting).

⁸ *Brown*, 131 S. Ct. at 2733 (2011) (majority opinion).

⁹ *Id.* at 2736–38.

¹⁰ *Id.* at 2742–51 (Alito, J., concurring in the judgment).

¹¹ *Id.* at 2751–61 (Thomas, J., dissenting).

¹² *Id.* at 2767–70 (Breyer, J., dissenting). Justice Alito’s opinion also devotes attention to this question. *Id.* at 2748–51 (Alito, J., concurring in the judgment). At oral argument, Chief Justice Roberts commented: “[I]n these video games, the child is not sitting there passively watching something; the child is doing the killing. The child is doing the maiming. And I suppose that might be understood to have a different impact on the child’s moral development.” Transcript of Oral Argument at 26–27, *Brown*, 131 S. Ct. 2729 (No. 08-1448), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1448.pdf [<http://perma.cc/4FMZ-8V7D>].

ing and cultivating habits.¹³ He notes that game-based rewards for aggressive play could be no less effective with children but with less desirable results.¹⁴

Justice Breyer turns to social science studies on this point. Here he does much more than rely on studies cited by the parties and friends of the Court. He reports on the results of a search of peer-reviewed academic journals, a search “on the topic of psychological harm resulting from playing violent video games” that he conducted with the assistance of the Supreme Court Library.¹⁵ Displaying his characteristic candor, Justice Breyer acknowledges the existence of studies supporting and studies failing to support or rejecting the hypothesis that violent video games are harmful.¹⁶ Indeed, facing up to uncertainty and disagreement amid potentially serious risk is a notable virtue of Justice Breyer’s thinking in other contexts.¹⁷

He offers two instructive ideas in dealing with the numerous and conflicting studies: (1) he turns to experts engaged in reviewing the field and in conducting meta-analyses (“studies of the studies”) who find that these establish harm; and (2) he uses the conclusions of experts and the meta-analyses as sufficient basis to respect the California legislature’s view. Stringent constitutional review forbids passing the buck to the legislature, but he argues that the resolutions and joint statements of research organizations, alongside studies of studies, supply enough reason for judges to respect legislative facts, involving technical matters, even in First Amendment cases.¹⁸ Justice Breyer’s approach contrasts sharply with the majority’s view, which announces its own assessment of the studies as failing to establish harm from violent video games sufficient to justify regulation.¹⁹

Justice Breyer’s use of social science steers a thoughtful path and resists the temptations to select only those sources that reinforce his conclusion or to claim omniscience in settling scholarly disputes. Justice

¹³ *Brown*, 131 S. Ct. at 2767 (Breyer, J., dissenting). The educational power of video games to instruct a player in how to follow commands, how to play a role, and how to forge an identity is widely studied and increasingly influences education in formal and informal settings. See JAMES PAUL GEE, WHAT VIDEO GAMES HAVE TO TEACH US ABOUT LEARNING AND LITERACY (rev. ed. 2007); KARL M. KAPP, THE GAMIFICATION OF LEARNING AND INSTRUCTION (2012).

¹⁴ *Brown*, 131 S. Ct. at 2767 (Breyer, J., dissenting).

¹⁵ *Id.* at 2771 (appendixes to the opinion of Breyer, J., dissenting).

¹⁶ *Id.* at 2769–71. His commitment to transparency leads to the unusual step of including two appendices with his dissent, displaying the titles of studies that support (114) and studies that do not support (34) the hypothesis of harm. He also distinguishes longitudinal and experimental studies, *id.* at 2768, and causal and correlation studies, *id.* at 2768–69.

¹⁷ See STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

¹⁸ *Brown*, 131 S. Ct. at 2770 (Breyer, J., dissenting).

¹⁹ See *id.*

Breyer's approach offers a model for informed, modest, yet rigorous use of social science research in the midst of controverted judicial reliance on expertise.²⁰ He shows enough knowledge to organize and report the findings of different types of studies and enough humility to rely on expert assessments of the disputed results. He models a judicial stance of respect for elected officials who also have access to expert views. Mindful of contested research results, he relies on the evidence of risk to reinforce reasons for modest precaution.

WHY STATES CAN PROTECT MINORS

The state's precaution at issue in the case, as Justice Breyer repeatedly notes, is modest.²¹ Justice Breyer considers social science evidence only as an aid in addressing the doctrinal question: did the state have a sufficiently compelling reason to justify restrictions on the sale of materials protected by the First Amendment? His opinion is precise in applying prior precedents. It also is candid in identifying "protection of children" rather than "depictions of violence" as the relevant First Amendment category, despite the majority's effort to treat protection of children as unprecedented. The majority tries to set aside one obvious precedent, *Ginsberg v. New York*,²² which approved restrictions on the sale of sexual material that would be obscene from the perspective of a child.²³ Throughout his opinion, Justice Breyer questions why children's exposure to sexual material is more worthy of concern, more easily defined, and more valid as a justification for state regulation than exposure to intense violence. In so doing, he grounds his analysis in the Court's prior constitutional analysis. He surfaces the Court's broader view in *Ginsberg* that the "regulation[] of communication addressed to [children] need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults."²⁴

Justice Breyer emphasizes that a decision ruling for the state would not involve creating a new category of expression unprotected by the First Amendment but instead would fall within permissible regulation. By underscoring that the video industry itself rates games based on

²⁰ See John Monahan and Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW & HUM. BEHAV. 571 (1991). On dangers, see Patrick E. Higginbotham, *Introduction: A Brief Reflection on Judicial Use of Social Science Data*, 46 LAW & CONTEMP. PROBS. 7 (1983); Martha Minow, *Reading the World: Law and Social Science*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 13 (Daniel W. Hamilton & Alfred H. Brophy eds., 2010).

²¹ *Brown*, 131 S. Ct. at 2766, 2771 (Breyer, J., dissenting).

²² 390 U.S. 629 (1968).

²³ *Brown*, 131 S. Ct. at 2735.

²⁴ 390 U.S. at 638 n.6 (quoting Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 939 (1963)) (internal quotation mark omitted), quoted in *Brown*, 131 S. Ct. at 2762 (Breyer, J., dissenting).

what would be inappropriate for children,²⁵ Justice Breyer draws attention to what truly is at stake in the case: can a state ban sales of a product to minors — leaving sales open to adults — which the producers themselves deem unsuitable for minors?²⁶ Nothing in the law limits adults' access to violent video games. Parents and other adults can purchase the games for children and adolescents. Minors can have access to games owned or rented by their families and friends. But without the law, parents have little ability to restrict their children's access to the material.

Justice Breyer agrees with the majority that video games include sufficient expressive content to trigger strict scrutiny review under the First Amendment,²⁷ but he nonetheless stresses the long-recognized compelling state interest in protecting the parental claim to authority in directing the rearing of one's own children, with laws aiding that responsibility.²⁸ Why do parents need the state's help here? Again, Justice Breyer attends to the reality of family lives. Parents need to get help through the state's restriction on sellers because "5.3 million grade-school-age children of working parents are routinely home alone."²⁹ Industry supporters may argue that the violent games are meant for adults and suggest restrictions on advertising targeting children.³⁰ Yet it is difficult to imagine the Court rejecting California's

²⁵ *Brown*, 131 S. Ct. at 2764–65 (Breyer, J., dissenting) (noting that the industry "has promulgated standards and created a review process, in which adults who 'typically have experience with children' assess what games are inappropriate for minors"); see also *ESRB Rating Process*, ENT. SOFTWARE RATING BD., http://www.esrb.org/ratings/ratings_process.jsp (last visited Sept. 28, 2014) [<http://perma.cc/5MEU-EMCY>].

As California underscored in its brief defending the law, the Court has permitted regulation of speech reaching children in other contexts. See Petitioner's Brief at 13–15, 20–21, *Brown*, 131 S. Ct. 2729 (No. 08-1448) (citing *Morse v. Frederick*, 551 U.S. 393 (2007); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Bd. Of Educ. v. Pico*, 457 U.S. 853 (1982); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)); see also *United States v. Williams*, 553 U.S. 285 (2008); *New York v. Ferber*, 458 U.S. 747 (1982).

²⁶ See *Brown*, 131 S. Ct. at 2766 (Breyer, J., dissenting) ("The statute prevents no one from playing a video game, it prevents no adult from buying a video game, and it prevents no child or adolescent from obtaining a game provided a parent is willing to help. All it prevents is a child or adolescent from buying, without a parent's assistance, a gruesomely violent video game of a kind that the industry *itself* tells us it wants to keep out of the hands of those under the age of 17." (citation omitted)).

²⁷ *Id.* at 2765.

²⁸ *Id.* at 2767. The Court is not always consistent in respecting parental guidance. See Martha Minow, *The Role of Families in Medical Decisions*, 1991 UTAH L. REV. 1.

²⁹ *Brown*, 131 S. Ct. at 2767 (Breyer, J., dissenting) (citing DEP'T. OF COMMERCE, CENSUS BUREAU, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS: SPRING 2005/SUMMER 2006, at 12 (2010)).

³⁰ See, e.g., Henry Jenkins, *Reality Bytes: Eight Myths About Video Games Debunked*, PBS, <http://www.pbs.org/kcts/videogamerevolution/impact/myths.html> (last visited Sept. 28, 2014) [<http://perma.cc/5AAY-MSUM>] ("While most American kids do play video games, the center of

rule against selling violent games to youth would be more open to restrictions on advertising appealing to children. Regulating advertising is hardly a less restrictive alternative to address a state's powerful interest in supporting parents in their fundamental right to guide and educate their children.³¹

Meantime, the vast majority of sales of violent games to minors are in fact made to their parents.³² This fact would seem to mitigate concerns about potential burdens from California's law permitting sales to adults but not minors. It also, though, supplies the reason why deferring to parents is not sufficient for those who worry about risks to children from playing violent video games. Justice Breyer credits as compelling not only California's interest in assisting parents but also its independent interest in the well-being of young people — well established by the Court elsewhere.³³ Stand back from the pigeon-holes of legal doctrine and consider the state's legitimate role in protecting minors, Justice Breyer suggests. No less relevant to First Amendment interpretation than to death penalty adjudication is the state's own authority to protect youth who can be "more vulnerable or susceptible to negative influences and outside pressures" than adults.³⁴

Realities of the lives of adults and young people inform Justice Breyer's attention to whether California could craft a less restrictive yet at least as effective law. Prior to California's decision to restrict sales of violent video games to those under 18, the Federal Trade Commission found that 70% of unaccompanied minors were able to buy such games despite the industry's voluntary labeling.³⁵ Even as the voluntary labeling program has improved, 20% of those under 17

the video game market has shifted older as the first generation of gamers continues to play into adulthood. Already 62 percent of the console market and 66 percent of the PC market is age 18 or older. The game industry caters to adult tastes. Meanwhile, a sizable number of parents ignore game ratings because they assume that games are for kids. One quarter of children ages 11 to 16 identify an M-Rated (Mature Content) game as among their favorites. Clearly, more should be done to restrict advertising and marketing that targets young consumers with mature content, and to educate parents about the media choices they are facing. But parents need to share some of the responsibility for making decisions about what is appropriate for their children. The news on this front is not all bad. The Federal Trade Commission has found that 83 percent of game purchases for underage consumers are made by parents or by parents and children together.”

³¹ See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

³² Jenkins, *supra* note 30; *Essential Facts About the Computer and Video Game Industry: 2011 Sales, Demographics and Usage Data*, ENT. SOFTWARE ASS'N 5 (2011), http://www.theesa.com/facts/pdfs/ESA_EF_2011.pdf [<http://perma.cc/P4SU-6BVW>] (stating that 91% of the time parents are present when video games are purchased or rented). Absent laws like California's, though, it is far from clear that this level of parental involvement will persist.

³³ *Brown*, 131 S. Ct. at 2767 (Breyer, J., dissenting).

³⁴ *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (internal quotation mark omitted).

³⁵ *Id.* at 2770 (citing FED. TRADE COMM'N, *MARKETING VIOLENT ENTERTAINMENT TO CHILDREN* 28 (2009)).

still can buy video games rated for adults, and this number reaches nearly 50% in the case of one large national chain.³⁶ Reality explodes the alternative of computer code filters intended to restrict access to violent video games because “it takes only a quick search of the Internet to find guides explaining how to circumvent any such technological controls.”³⁷ Justice Breyer shows Internet savvy as his dissent continues: “YouTube viewers, for example, have watched one of those guides (called ‘How to bypass parental controls on the Xbox 360’) more than 47,000 times.”³⁸ If there are any people around who have easier access to this opinion than to an Internet search engine, Justice Breyer’s citation itself will increase the number of YouTube viewings. These viewers would undoubtedly just be parents trying to catch up to their children’s digital expertise.

Commercial interests may celebrate the rejection of age-based restrictions on the purchase and rental of violent video games, but the freedom to sell to children the games labeled for adults puts at risk parental influence, young people’s healthy moral development, and common sense.

WHAT IS THE BIG PICTURE?

Justice Breyer looks up from the case to observe the strange world the Court has made, and asks:

[W]hat sense does it make to forbid selling to a 13-year-old boy a magazine with an image of a nude woman, while protecting a sale to that 13-year-old of an interactive video game in which he actively, but virtually, binds and gags the woman, then tortures and kills her? What kind of First Amendment would permit the government to protect children by restricting sales of that extremely violent video game *only* when the woman — bound, gagged, tortured, and killed — is also topless?³⁹

At oral argument, Justice Breyer asked whether such different treatment of the same 13-year-old makes common sense.⁴⁰ In his opinion, he emphasizes that this anomalous treatment stems not from the First Amendment but from the Court’s interpretation; the anomaly “disappears once one recognizes that extreme violence, where interactive, and *without literary, artistic, or similar justification*, can prove at least as, if not more, harmful to children as photographs of nudity.”⁴¹

Anchored in the realities of families’ lives and young people’s experiences, attentive to expert assessments of social science evidence, and

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 2771.

⁴⁰ Transcript of Oral Argument, *supra* note 12, at 31–32.

⁴¹ *Brown*, 131 S. Ct. at 2771 (Breyer, J., dissenting).

mindful of the entire Constitution beyond a single doctrine, Justice Breyer concludes by connecting the issues at hand to what makes democracy itself effective. Democracy requires participation by people who know how to make choices; children sometimes learn by making choices for themselves but on other occasions learn through the choices made by parents, teachers, and democratically elected government.⁴² Justice Breyer calls for respecting legislative choices to help parents choose whether their children should have violent interactive video games. If minors can obtain with no adult guidance violent video games identified by their distributors as inappropriate for minors, they may be shaped before the adults in their lives have a chance to weigh in. If the social science evidence of harm from playing such games is valid, democratic processes in the future may choose more aggression, more toleration of violence, and reduced sensitivity to human suffering.

Justice Breyer has powerfully championed sensible risk regulation in the contexts of the environment, natural resources, and consumer protection.⁴³ He has also effectively updated the old idea of ordered liberty as active liberty, enabling citizens to share with officials and experts the tasks and opportunities of governance.⁴⁴ In his dissent in *Brown v. Entertainment Merchants Ass'n*, Justice Breyer warns against elevating an abstract idea of liberty only to jeopardize the liberties to parent, to grow up without being drilled in violence, and to engage in self-governance with its requisite respect for others. Moderate regulations can preserve enough of what we have until we know enough about what we can lose. Using common sense, close analysis, and big picture thinking, Justice Breyer models the respect for others that his reasoning summons.

⁴² *Id.*

⁴³ STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

⁴⁴ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2006).

SHAW'S SUPERMARKETS, INC. v. NLRB —
A FIRST CIRCUIT OPINION

*Todd D. Rakoff**

We write to celebrate Justice Breyer. But before Justice Breyer there was Judge Breyer of the First Circuit Court of Appeals; and before Judge Breyer there was Professor Breyer of the Harvard Law School, teaching administrative law. One of my favorite Stephen Breyer opinions, emblematic of his sure touch as regards the fundamentals of administrative law, is his 1989 decision for the First Circuit in *Shaw's Supermarkets, Inc. v. NLRB*.¹ Indeed, it — rather than any Supreme Court opinion — is the very first case presented in the chapter on “Scope of Review of Administrative Action” in the casebook on administrative law that I coedit.²

The factual matrix of *Shaw's Supermarkets* is straightforward. Five days before a union representation election, the company's vice president told workers that if the union were chosen, the baseline from which bargaining of the initial contract would begin would be the legally guaranteed minimum wage and workmen's compensation rather than their current, considerably higher, wages. Did this, in Judge Breyer's words, “innocently represent a legal truth about how the collective bargaining process works, [and] legitimately remind employees that a union might trade certain payments or benefits that many workers now enjoy in order to obtain other payments or benefits”; or did it “improperly constitute a threat that, if the union wins, the employer will strip benefits back to the minimum, forcing the union to struggle even to keep the status quo”?³ If making the statement — unaccompanied by any other untoward behavior — amounted to a “threat of reprisal,” it violated the protected right of employees to join a union free of employer coercion.

In the event, the union lost the election; the National Labor Relations Board determined that making the statement violated the National Labor Relations Act; the Board ordered a new election; the company resisted; and the Board petitioned the First Circuit to enforce its order.

But as in many straightforward tales, the questions presented to the First Circuit proved to be subtle. Was the Board authorized by

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¹ 884 F.2d 34 (1st Cir. 1989).

² PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 928 (11th ed. 2011).

³ *Shaw's Supermarkets*, 884 F.2d at 36.

the Act to decide that, in the context of a union election, merely making a “bargaining from scratch” statement constituted an unfair labor practice? The court, wrote Judge Breyer, would “likely” sustain such a decision, and the rest of the opinion was written on that assumption.⁴ But the Board, although it had addressed such statements many times, had not in fact enunciated such a flat rule. Instead, it had said that sometimes such statements were coercive, and sometimes not; the circumstances mattered. And if one worked through those precedents (many of them very recent) with an eye to the present facts — as the court’s opinion did at some length — the instant case appeared to fall on the innocent side of the line. The Board could have tried to distinguish the exonerating cases, but neither the Board in its opinion nor its counsel in court suggested how this was to be done.⁵ Or the Board could have, but had not, overruled them. The Board having failed to do one or the other, the order was not to be enforced; rather, the case was remanded to the Board.

If one assumes that it is within the Board’s statutory authority to find an unfair labor practice on these facts, and to order a new election, why should one go on to say that the Board can do so only if it addresses its precedents and either distinguishes or overrules them? That is the real issue of *Shaw’s Supermarkets*. Judge Breyer cites and quotes many cases supporting the doctrine. But if we take his penultimate paragraph, speaking in his own voice, as stating the gist, the Board has to address its existing rulings because: “Unless an agency either follows or consciously changes the rules developed in its precedent, those subject to the agency’s authority cannot use its precedent as a guide for their conduct; nor will that precedent check arbitrary agency action.”⁶

I must confess that the first of these two points — that the rules of precedent importantly protect private reliance — seems to me rather a makeweight. The Board could have reached its result by overruling the troublesome precedents and applying its new disposition “retroactively” — that is, to the case at hand. Judge Breyer’s opinion recognizes this possibility.⁷ Speaking more broadly, while there are judicially enforced limits to retroactive changes by administrative agencies, the limits fall far, far short of any notion of a fixed concept of binding

⁴ *Id.*

⁵ *Id.* at 39.

⁶ *Id.* at 41.

⁷ *Id.* at 37 (“It is, of course, true that the Board is free to adopt new rules of decision and that the new rules of law can be given retroactive application.” (quoting *NLRB v. Int’l Union of Operating Eng’rs, Local 925*, 460 F.2d 589, 604 (5th Cir. 1972))).

precedent. To the contrary, reliance must be impressive and independently shown.⁸

The more important claim is that judicially requiring conscious attention to existing precedents will “check arbitrary agency action.” Here, I think, we must distinguish two possible meanings of “arbitrary.” One possible claim is that requiring an agency to address its existing rules and precedents will prevent it from doing mindless acts, acts in which it simply gives no thought to the fact that in other cases it has done things differently. Whatever might be the force of this idea elsewhere, it seems to me to have little force in the situation at hand. Labor Board cases are formally structured, contested affairs, much like civil trials; it would seem safe to rely on one party or another to draw to the attention of the Board its prior decisions. Assuming competent counsel, it is unlikely the precedents will remain hidden.

What is at stake is not the “mindless” form of arbitrary action, but rather the “willful” form — the form that says: “We’re doing it now differently from what we did before because that’s what we want to do — period!” The court’s corresponding claim, as said in one of the cases that Judge Breyer quotes, is that “there may not be a rule for Monday, another for Tuesday.”⁹

Now, it is not inherently arbitrary to do one thing on Monday and another on Tuesday. We do it all the time. Indeed, sometimes the reason for doing a particular thing on Tuesday is precisely that it is different from what we did on Monday. “We had pizza for dinner yesterday” is a reason for not having pizza for dinner today, not a reason for having it again. The claim that having done something one way yesterday is a *prima facie* reason for doing it the same way today is not an unalterable claim of all rational thinking, but rather a claim of a specific cultural form. It is a claim of the legal order for action to be justified based on reasoning of a specific sort.

Whether governmental administration of the economy, “regulation,” comprises acts of will or acts of reason — or perhaps better put, the extent to which it comprises acts of will and acts of reason — is a classic question of administrative law. It is often seen through the lens of the structural Constitution, and converted into the question of whether there are administrative law “substitutes” for the separation of powers set out in Articles I, II, and III. But Judge Breyer cites no constitutional provision, nor indeed any provision of the Administrative Procedure Act, to support his claims, and it is probably fairer to say that he is simply relying on what he sees as a fundamental demand of the

⁸ For discussion and cases, see 2 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 13.2 (5th ed. 2010).

⁹ *Shaw's Supermarkets*, 884 F.2d at 37 (quoting *Int'l Union of Operating Eng'rs*, 460 F.2d at 604) (internal quotation mark omitted).

legal order.¹⁰ (If one wanted a constitutional text, I suppose it would be “due process” seen in its most general form, as a claim to official action having to be grounded on a legal regime.)

The demand that administrative action be partly an act of reason as the legal order understands acts of reason reverberates in the very structure of *Shaw's Supermarkets*. Much of the opinion consists of restating in individual paragraphs a great many NLRB opinions that did, or did not, find a “bargaining from scratch” statement to be a violation of the Act. Those that did are distinguished from the facts at hand in the way common law cases would be distinguished: both by enunciating a general distinguishing principle (“In almost all these cases, the ‘bargaining from scratch’ speech was accompanied by other serious unfair labor practices.”¹¹) and by pointing to particular factual wrinkles that colored what the Board had said (“In sum, the cases draw a boundary between the lawful and unlawful. And, given that boundary, this case is not borderline, but, rather, lies tucked well within the boundary of the lawful.”¹²). One can almost hear the voice of the law professor conducting the analysis.

The legal order in question is not a legal order that plays out primarily in the courts, but rather one that fundamentally takes place within the agency. Ordering a new election on these facts may be, as Judge Breyer assumes, within the constitutional and statutory power of the agency, but the agency has to think about its task, and justify its task, in a certain way. Thus, after holding that the Board’s order cannot be enforced, the rescript is to remand the case to the Board. The agency has to act as if it were part of the legal regime — and should be given another chance to do so. The court’s job is to provide a context that encourages the agency so to act; Judge Breyer’s analysis of the Board’s opinions is a demonstration lesson for the Board to follow. When he writes: “[T]he Board remains free to modify or change its rule; to depart from, or to keep within, prior precedent, as long as it focuses upon the issue and explains why change is reasonable,”¹³ what counts as a precedent, as an issue, and as a reasonable explanation all are seen as framed within a legal context.

In the broad sweep of time, this emphasis on judges’ requiring agency action to grow from an internal legal order represents the

¹⁰ As Professor Thomas Merrill says in the analogous context of requiring agencies to follow their own regulations: “[I]t is just one of those shared postulates of the legal system that cannot be traced to any provision of enacted law. . . . These rules are not written down in any authoritative text. They are simply foundational assumptions vital to the operations of our legal system.” Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 598–99 (2006).

¹¹ *Shaw's Supermarkets*, 884 F.2d at 40.

¹² *Id.* at 41.

¹³ *Id.*

compromise of history between the era of court-applied doctrines of substantive due process and the New Deal explosion of federal administrative action.

At a personal level, however, it seems to me natural that Judge (and Justice) Breyer would emphasize the need for an internal legal order because of two characteristic traits that, to my eye, show up in many of his opinions. First, he thinks that official decisions — the passage of statutes and the carrying out of statutory plans through administrative action — are usually based on reasons. These reasons may be very various — they can include functional realities, social mores, and changing circumstances — but they are not fairly described as merely the compromise of wills. Second, he thinks that if a judge does his homework, the judge can, at least usually, understand the substance of regulation. The reasons that stand behind legislative and administrative action are not that arcane; even when decisions are based on expert judgment, “applied expertise” is not the same as “can’t be understood.” These two propositions, put together, support the judicial demand that the agency develop the reasons for what it is doing in a legal form — that is, in a form that judges can understand.

A brace of Justice Breyer’s recent Supreme Court opinions further exemplify these traits in action. In the 2007 *Zuni Public School District No. 89 v. Department of Education*,¹⁴ his opinion for the Court interpreted a complicated federal aid-to-education statute by first addressing at some length the practical problem the statute was intended to solve and the history of federal practice in solving that problem, before turning to the statute’s language.¹⁵ This, complained some of his colleagues, was exactly the contrary of the order mandated by the *Chevron* doctrine, which accorded primacy to Congress’s words.¹⁶ But, said Justice Breyer in effect, if you really understood what this statute was about, you would see that the statute simply states the reasonable solution to the problem at hand. Yet more recently, in dissent in *FCC v. Fox Television Stations, Inc.*,¹⁷ which concerned a change in the FCC’s policy toward the broadcasting of “dirty” words, he insisted that: “To explain a change requires more than setting forth reasons why the new policy is a good one. It also requires the agency to answer the question, ‘Why did you change?’”¹⁸ This stands in contrast to Justice Scalia’s contention, in the opinion for the Court, that the agency only need show that there were reasons supporting the new policy considered by itself, “and that the agency *believes* it to be better,

¹⁴ 550 U.S. 81 (2007).

¹⁵ *See id.* at 90–93.

¹⁶ *See id.* at 107 (Kennedy, J., concurring); *id.* at 108–09 (Scalia, J., dissenting).

¹⁷ 556 U.S. 502 (2009).

¹⁸ *Id.* at 549 (Breyer, J., dissenting).

which the conscious change of course adequately indicates.”¹⁹ Justice Breyer wants the reason, and not just the expression of will. To me, his opinions in both of these cases turn on his starting from the proposition that the thinking behind official action is usually, and should be, intelligible to judges on review — which forms a psychological, if not logical, predicate for insisting that action at the agency level should assume a legal form in the sense of exemplifying reasons as understood in the legal order.

Judge and Justice Breyer’s joint propositions — that administrative action does rest on reasons, and that judges can understand them because they are reasons of a certain sort — are neither self-evident nor universally accepted. Without going into the matter at length, it seems to me that much modern thinking about administrative law is based either on the idea that regulatory expertise has become so arcane that judges (or more broadly the generalists of the legal order) cannot understand it, or on the idea that regulatory policy routinely arises from compromises that cannot be described except in terms of the clash of wills. Certainly there is something to be said for each of these views. But, compared to either view, Stephen Breyer’s approach represents an implicit assertion that administrative action and legal reason can live together and indeed strengthen each other. It represents the hopeful view that things need not fall apart, that the center can hold.

How can you do better than that?

¹⁹ *Id.* at 515 (majority opinion).

JUSTICE BREYER, *GROKSTER*, AND THE FOUR CHORDS SONG

*Joseph William Singer**

File sharing is both a blessing and a curse. It is a social good for there to be more information in the world and for more people to have access to it. It is indeed a blessing to share access to knowledge and beauty and joy. But it is a social bad if property is stolen or if information is shared in a way that deters people from working to create new information or music or art or techniques for finding and disseminating these things. Information, culture, and markets are complicated social practices; so too is the institution of private property. It is simply not the case that the more property rights we have, the better off we are; nor is it the case that greater legal protection for property always leads to more of it being created or enhanced in value. Property rights can promote value and enhance its distribution, but they can also destroy property and prevent it from being enjoyed, shared, or transferred. Figuring out the right legal framework for a private property system is delicate, hard work. Justice Breyer understands this, and his concurring opinion in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*¹ is a mini-seminar in the complexity of property law.

Grokster held that a file-sharing distributor violates copyright law if it distributes the software with the intent to induce others to infringe on the rights of copyright owners.² Justice Souter's opinion for the unanimous Court distinguished the *Sony*³ decision, which had held that it is not a violation of the copyright law to sell a device like the VCR, which is capable of substantial noninfringing uses.⁴ Because Justice Souter found that *Grokster* had subjective intent to market its product for the purpose of enabling and encouraging others to share copyrighted music illegally, he did not reach the question of whether the *Grokster* software was capable of noninfringing uses.

Justices Ginsburg and Breyer wrote concurring opinions on precisely this question. Justice Ginsburg (along with Chief Justice Rehnquist and Justice Kennedy) thought it unlikely that an impartial factfinder could determine that *Grokster* had substantial noninfringing uses.⁵ Justice Breyer (along with Justices Stevens and O'Connor) disagreed,

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¹ 545 U.S. 913 (2005).

² *Id.* at 919.

³ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

⁴ *Id.* at 456.

⁵ *Grokster*, 545 U.S. at 945–46 (Ginsburg, J., concurring).

concluding that it was not only possible but more likely than not that the *Grokster* software might be found to have substantial noninfringing uses.⁶ But the difference between the opinions was more than a dispute about the facts; it was a conflict of approaches and frames of reference. That difference is highly instructive.

Justice Ginsburg emphasized that there was “little beyond anecdotal evidence of noninfringing uses”⁷ while “there was evidence that *Grokster*’s . . . products were, and had been for some time, overwhelmingly used to infringe, and that this infringement was the overwhelming source of revenue from the products.”⁸ This evidence was “insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time.”⁹ Because the evidence of noninfringing uses was so slight and because the existence of those uses could not be determined without a full trial, summary judgment for *Grokster* was inappropriate.

Justice Breyer approached the issue differently. While concluding that the *Grokster* software did have substantial noninfringing uses,¹⁰ he argued that that was the wrong question. He began by emphasizing that the issue involved *contributory* rather than direct liability.¹¹ The *Sony* test applied only when there was a conflict between the rights of copyright owners to protection of their property and the freedom of others to engage in “substantially unrelated areas of commerce.”¹² He worried that the careful weighing of evidence proposed by Justice Ginsburg would discourage the creation of new technologies, inventions, and products.¹³ To avoid this possibility, Justice Breyer explained, *Sony* had created a protective shield for such technologies; they could not be blamed for the way they were used if they were “merely . . . capable of substantial noninfringing uses.”¹⁴

Justice Ginsburg’s opinion focused on the rights of copyright owners and viewed the case from their perspective. She saw owners with rights and she wanted to protect them. To immunize a contributory actor from copyright liability when they provide the means to steal is like immunizing the person who gives a gun to his friend knowing that he is intending to use it to kill another person. In contrast, Justice Breyer took the vantage point of an institutional designer looking at

⁶ *Id.* at 952 (Breyer, J., concurring).

⁷ *Id.* at 945 (Ginsburg, J., concurring).

⁸ *Id.* at 948 (citation omitted).

⁹ *Id.*

¹⁰ *Id.* at 955 (Breyer, J., concurring).

¹¹ *Id.* at 950.

¹² *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)).

¹³ *Id.* at 959–60.

¹⁴ *Id.* at 950 (quoting *Sony*, 464 U.S. at 442 (emphasis added)).

the case from a systemic or God's-eye point of view. What mattered was not only the property rights of composers but the relation between the property rights of composers and the property rights of software creators. More fundamentally, the question was not just a choice between conflicting property rights but about defining the appropriate framework for a property system. That framework includes a technological and legal infrastructure that enables property to be created, invented, marketed, and transferred.

For private property to exist, many things must remain in the public domain. The Thirteenth Amendment ensures that we own our own labor and the First Amendment protects our right to speak. Those things cannot be owned by others. The fair use doctrine ensures that we have the power to repeat, discuss, criticize, praise, and enjoy the products of culture. This does not mean that we do not have a system of intellectual property with exclusionary rights designed to protect authors. It does mean that if rights regarding intangible property were absolute, then cultural life could not exist at all.

Consider the Four Chords Song composed by the comedy rock band The Axis of Awesome.¹⁵ In a virtuosic display, the band demonstrates that dozens and dozens of pop songs rely on the same chord progression. They demonstrate this by playing the four chords (I, V, vi, IV, or an E major triad, followed by a B major triad, then a C# minor triad, and an A major triad) over and over again while they sing snippets of dozens of melodies on top of the chord progression. That chord progression is expressive; it is beautiful; it is haunting. It fits the physics of our ears and our brains by tracing the harmonics that sound above any fundamental note and by reinforcing the musical relations among the notes that form the major scale. The chord progression starts from the consonant stability of the tonic I chord to the dissonant instability of the later chords; it presses forward to create a sense of movement, of time, of progression, and it frames a poignant search for the return of the tonic chord where dissonance is resolved and tension released. This four-chord progression is expressive, and at some point it was an original work of authorship. But can it be reduced to private property?

If the answer is yes, then we all might be paying the great-great-great-great-granddaughter of Franz Joseph Haydn for the privilege of composing or performing any new piece of pop music. Indeed, because copyright law gives the owner the right to prevent others from using her property (unless the use is "fair"), Haydn's descendant could be empowered to determine what music gets played, sold, and

¹⁵ The Axis of Awesome, *The Axis of Awesome: 4 Chords Official Music Video*, YOUTUBE (July 20, 2011), <https://www.youtube.com/watch?v=oOIdewpCfZQ>.

performed. She would be a czar of culture. We would have, not a free market in music, but a feudal regime with a lord of culture. For pop music to exist, we must socialize access to basic chord progressions. Those four chords cannot be reduced to private property; they must be in the public domain if we want the cultural practice of music even to exist. The four-chord progression is part of the infrastructure of music, and if we want musical life to exist, this chord progression must be open to all and free to be used by all.

Consider public accommodation laws that require businesses to serve the public without unjust discrimination. The Supreme Court of New Mexico has recently held that the state public accommodation law applies to a photography business that offers its services to the public. Because that law prohibits discrimination based on sexual orientation, the business could not lawfully refuse to take pictures at a same-sex commitment ceremony because of the owner's religious beliefs.¹⁶ The court rejected the claim that the business had the right to choose its customers as it pleased merely because photography is an expressive art. "The reality is that because it is a public accommodation, its provision of services can be regulated, even though those services include artistic and creative work."¹⁷ Nor did the owner's religious beliefs offer a reason to engage in discriminatory conduct when the owner chose to sell services on the open market.¹⁸ The right to exclude is limited in order to create a legal infrastructure for private property that ensures equal access to the marketplace regardless of race or other invidious factors. The free market is an open one; it is not limited to those of particular castes or races or religions. The legal infrastructure of a free and democratic society requires that property rights be shaped and defined so as to avoid apartheid, slavery, and racial caste.¹⁹ If property rights could not be limited, then democratic societies could not exist.

Justice Breyer's *Grokster* opinion showed his acute sensitivity to the legal and technological infrastructure of private property. He understood why property rights cannot have absolute protection; they must be limited to safeguard the rights and freedoms of others. Property rights cannot be defined without attending to the consequences of exercising those rights on others and society as a whole. They must be

¹⁶ *Elane Photography v. Willock*, 309 P.3d 53, 59 (N.M. 2013).

¹⁷ *Id.* at 66.

¹⁸ "Under established law, 'the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes).'" *Id.* at 73 (quoting *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks omitted)).

¹⁹ See generally Joseph William Singer, *The Anti-Apartheid Principle in American Property Law*, 1 ALA. C.R. & C.L. L. REV. 91 (2011).

understood *systemically* in a way that comprehends the connections among property rights and among markets. Nor can property rights be understood without reference to the legal infrastructure that promotes and protects new technologies that allow property to be transferred, shared, stored, and managed. Property rights must be defined so that they are compatible with rules of the game that enable individuals to exercise liberty, to enjoy the fruits of their labor, and to live with others in an environment of mutual respect and dignity. Justice Breyer taught us that the fact that one owns property is not a sufficient reason to create a legal rule protecting that property — at least when the exercise of that property right has externalities on other owners and other markets. Property has a legal infrastructure, and Justice Breyer emphasized that no property rights can be defined in isolation from their social context. For that, we owe him our thanks.

FROM TECHNOCRAT TO DEMOCRAT

Cass R. Sunstein*

There is an epistemic argument for judicial deference to the decisions of administrative agencies and legislatures: courts do not have easy access to relevant information, and they should defer to those who do. People who are steeped in technical issues, and alert to the importance of those issues, might well be inclined to embrace judicial modesty. In administrative law, then-Professor Stephen Breyer pioneered the view that judge-made doctrines reflect unarticulated assumptions about regulatory policy, and he urged that such doctrines could not be evaluated without a sense of the underlying substance and the likely human consequences. In light of the complexity of the substance, Justice Breyer argued for a degree of modesty. On the Supreme Court, Justice Breyer has often embraced judicial modesty as well, emphasizing the importance and relevance of complex judgments of fact (sometimes with the aid of what we might call “the Breyer Appendix”). The principal qualification is his insistence on reasoned decisionmaking, which he appears to regard as a *quid pro quo* for deference, as an aspect of the rule of law, and as an indispensable check on arbitrariness.

As a law professor, Justice Breyer specialized in the field of administrative law, where his most important contribution was to challenge the view that the exclusive focus of the field should be on judicial review of agency action. On Justice Breyer’s account, it is not possible to understand what agencies do, or to evaluate judicial judgments, without having some sense of the substance of regulatory policy as well.¹ It is not easy to overstate the importance of this claim, which has transformed a once-arid field.

Justice Breyer’s great casebook, written with Professor Richard Stewart, is pointedly called not *Administrative Law*, but *Administrative Law and Regulatory Policy*.² Originally published in 1979, it lived up to its title. In area after area, the casebook attempted to inform judicial decisions with materials on the substantive problems involved. It pointedly suggested that such decisions cannot be understood in a policy vacuum, and that beneath seemingly dry debates about doctrine,

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¹ This view permeates *Administrative Law and Regulatory Policy*. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* (1st ed. 1979).

² *Id.* Full disclosure: as a research assistant for Professor Stewart, I worked on the book in the late 1970s, and along with Professors Michael Herz and Adrian Vermeule, I am a coeditor of the current edition.

courts were often making controversial assumptions about complex questions of policy and about the human consequences of alternative courses of action. A careful reader of the casebook might well conclude that those who understand the substance will be inclined to take a significantly more cautious approach to review by generalist judges, who should afford specialized agencies a large measure of respect.

It is fair to say that as a law professor, Justice Breyer ushered administrative law into the modern era. It is also fair to say that because of his insistence on the importance and relevance of substantive questions, he called for a heightened degree of judicial deference to democratic processes.³ In administrative law, he was both a technocrat and a democrat (in the sense of an advocate for judicial modesty). Indeed, he was a democrat in significant part because he was a technocrat. This form of judicial humility emerged from Justice Breyer's brand of pragmatism, not from abstractions or high-flown theory.

To be sure, there are multiple potential tensions between a belief in technocracy and a belief in democracy. Those tensions lie at the heart of contemporary administrative law (and in a sense public law more generally). Technocrats are enthusiastic about a large role for insulated, independent experts, immersed in complex questions. Democrats are worried that such experts lack accountability and may have an agenda of their own. If we are concerned about fidelity to popular will, we might not be so enthusiastic about insulated experts. The potential tension might be defused in various ways, perhaps by ensuring ultimate accountability for judgments of policy while creating procedural safeguards designed to ensure that technical expertise is in fact being deployed.⁴

I am bracketing those larger questions here. What I seek to emphasize is that if the question is judicial review of regulations and statutes, courts might opt for modesty in large part because of an awareness of what judges are unlikely to know. This argument for modesty offers one reason why a judge with technocratic inclinations might well be a democrat.⁵

In my view, Justice Breyer's academic writing, with its close attention to regulatory substance, much helps to explain his work on the Supreme Court. His general respect for democratic judgments is, in significant part, epistemic; it stems from an emphasis on the importance

³ See, e.g., Stephen Breyer, Comment, *Vermont Yankee and the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978).

⁴ Some of these issues are addressed in Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

⁵ Justice Breyer's book *Active Liberty* offers a host of reasons, as well as a distinctive understanding of democratic ideals, but I believe that the epistemic strand in his work deserves particular emphasis. STEPHEN BREYER, *ACTIVE LIBERTY* (2005).

of the consequences, on the impossibility of evaluating doctrine without a sense of those consequences, and on an insistent recognition of what judges do not know. There is a lesson here about what makes Justice Breyer's work distinctive, even unique. We might speak here of "the Breyer Appendix," a worthy successor to the Brandeis Brief, in which Justice Breyer accompanies his opinions with an appendix citing a range of technical or historical materials.⁶

There is also a lesson about the possibility of a distinctly epistemic argument for judicial deference, one that involves the limits of judicial knowledge of fact, and that (in my view) deserves a far larger place in constitutional law and jurisprudence than it now occupies.⁷ This argument is very different from that of Justice Oliver Wendell Holmes, captured in his famous words: "[I]f my fellow citizens want to go to Hell I will help them. It's my job."⁸ Justice Breyer is also interested in judicial humility, but not at all because he wants to assist his fellow citizens in going to Hell. On the contrary, his belief in humility is rooted in a belief that good outcomes, and a better place, are more likely if judges play a modest role in the constitutional order.

We can find the core of the idea in his short essay on the *Vermont Yankee* case, which repays careful reading, even though it was published over twenty-five years ago.⁹ Justice Breyer wrote in the midst of a heated doctrinal debate over whether courts should be allowed to require agencies to adopt more procedures than the Administrative Procedure Act mandates.¹⁰ Characteristically, and somewhat oddly for the time, Justice Breyer stepped back from the narrow doctrinal debates and asked more broadly about the role of the courts in the controversy over nuclear power. He objected that judges were "intruding too deeply upon the administrative process, perhaps without full realization of their implicit premises or of the potential consequences."¹¹ In making this argument, he emphasized the importance of "the 'substantive' issues in the case," which he engaged in detail.¹² In good realist

⁶ See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2579–91 (2014); *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2771–79 (2011) (Breyer, J., dissenting); *Eldred v. Ashcroft*, 537 U.S. 186, 267–69 (2003) (Breyer, J., dissenting); *Rubin v. United States*, 525 U.S. 990, 996 (1998) (Breyer, J., dissenting from denial of certiorari); *United States v. Lopez*, 514 U.S. 549, 631–44 (1995) (Breyer, J., dissenting).

⁷ The best account is Adrian Vermeule's *Judging Under Uncertainty*. ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* (2006).

⁸ Letter from Oliver Wendell Holmes to Harold J. Laski (Mar. 4, 1920), in 1 *HOLMES-LASKI LETTERS* 248, 249 (Mark DeWolfe Howe ed., 1953).

⁹ See Breyer, *supra* note 3.

¹⁰ See, e.g., Clark Byse, *Vermont Yankee and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Richard B. Stewart, *Vermont Yankee and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

¹¹ Breyer, *supra* note 3, at 1833.

¹² *Id.*

fashion, he suggested that “in practice, the reviewing standards courts apply often reflect unarticulated assumptions about, or attitudes toward, the substantive aspects of the subject matter being reviewed.”¹³

Steeping himself in that substance, he insisted that “potentially adverse health, safety, or environmental effects lie not on one side, but on all sides, of the nuclear power issue.”¹⁴ It followed that “application of a more stringent standard of review means delay and favors the status quo,” with delay turning out not to be irrelevant or innocuous, but significantly affecting “the outcome of the energy debate.”¹⁵

In the 1970s, federal courts had treated nuclear power as posing unique dangers, but Justice Breyer showed that the then “most recent comparison of the health and safety effects of coal and nuclear energy suggests that coal plants are likely to cause seven to twelve times as many deaths as nuclear plants, and four to six times as much sickness and injury.”¹⁶ In what may well be the first prominent reference to climate change in the legal literature, he added that reliance on coal “could aggravate the ‘greenhouse effect,’ whereby excess carbon dioxide (which accompanies coal burning) traps heat inside the earth’s atmosphere, thus possibly melting the icecaps and raising the level of the oceans.”¹⁷ With these points, Justice Breyer drew attention to the problem of “health-health tradeoffs” and its relationship to administrative law.¹⁸

Justice Breyer also explored the consequences of court-imposed delays, which, he said, “are not ‘neutral.’ They affect the decision-making process, tending to move the decisions of those who actually build power plants in the direction of coal, which may well prove more hazardous and environmentally destructive than nuclear plants.”¹⁹ This point was poorly understood at the time, and it is not sufficiently appreciated today, because those who stress doctrinal requirements, and the importance of judicial safeguards, tend to miss the systemic effects of judicial invalidations and remands.²⁰ Justice Breyer’s support for the Court’s conclusion in *Vermont Yankee* was based on his judgment, rooted in a sense of the likely consequences, that courts “should play a limited role, affecting as little as possible the outcome of

¹³ *Id.* For a contemporary argument to the same general effect, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. (forthcoming 2015).

¹⁴ Breyer, *supra* note 3, at 1835.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1836.

¹⁸ For a general discussion, see Cass R. Sunstein, *Health-Health Tradeoffs*, 63 U. CHI. L. REV. 1533 (1996).

¹⁹ Breyer, *supra* note 3, at 1840.

²⁰ A classic treatment is *The Struggle for Auto Safety*. JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* (1990).

that debate. Judges, after all, are neither elected representatives nor experts in energy technology.”²¹

It is revealing that Justice Breyer’s principal academic writings in the general area of administrative law deal mostly with substance and real-world effects, not procedure and doctrine. *Regulation and Its Reform* emphasizes the need to “match” market failures (such as externalities) with particular tools (such as Pigouvian taxes); it contends that a principal source of regulatory problems is “mismatch” between failure and tool.²² With that claim, the book helped to reorient administrative law teachers away from their standard preoccupation with the appropriate intensity of judicial review. In *Breaking the Vicious Circle*, Justice Breyer contends that the United States government devotes excessive resources to small problems and insufficient resources to large ones.²³ He argues that a cadre of experts, schooled in technical matters, should have the authority to ensure that scarce dollars are doing the most good.²⁴

These books do not much engage the question of the judicial role, but they have a great deal of continuity with Justice Breyer’s opinions on the Court, which also emphasize the importance of facts and the human consequences. His frequent votes in favor of validating the outcomes of democratic processes — resisting occasional trends toward heightened judicial scrutiny²⁵ — reflect the epistemic case for judicial modesty. The same is true for his interest in longstanding historical practices.²⁶

I will offer some details shortly, but we should begin with an obvious puzzle. One might expect that Justice Breyer would be the Court’s most enthusiastic defender of the *Chevron* principle, which requires courts to uphold reasonable agency interpretations of law in the face of statutory ambiguity.²⁷ One defense of *Chevron* is precisely that agencies have technical expertise and should be allowed to apply that expertise to resolve ambiguities.²⁸ Perhaps surprisingly, Justice Breyer has, in fact, been the Court’s most consistent critic of *Chevron*, contending that its approach is far too simple and rule-like, and that the appropriate degree of deference should turn on a multifactor balancing

²¹ Breyer, *supra* note 3, at 1845.

²² STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982).

²³ STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE* (1993).

²⁴ *See id.* at 59–61.

²⁵ *See, e.g.*, *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2761 (2011) (Breyer, J., dissenting); *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 615 (1995) (Breyer, J., dissenting).

²⁶ *See NLRB v. Canning*, 134 S. Ct. 2550, 2559–60 (2014).

²⁷ *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²⁸ The Court referred to that point in *Chevron* itself. *Id.* at 865.

test.²⁹ Is it possible to square his skepticism about *Chevron* with his embrace of judicial modesty?

For two reasons, I believe that it is. First, Justice Breyer wholeheartedly embraces *Chevron* when technical expertise is involved,³⁰ in the sense that it bears on resolution of statutory ambiguities. For this reason, he embeds a recognition of technical expertise into his preferred framework — though in my view, his call for a multifactor test produces undue complexity in the law and creates a risk of judicial overreaching (a point for Justice Scalia).³¹ But second, and more importantly, Justice Breyer has been found, in a large data set, to be the most deferential Justice on the Court.³² Ironic but true: the Court's most vocal critic of a strong reading of *Chevron* is the most deferential Justice in practice, while Justice Scalia, the Court's most vocal *Chevron* enthusiast, is the least deferential.³³

More particularly, Justice Breyer voted to uphold agency interpretations 82% of the time, whereas Justice Scalia did so merely 52% of the time.³⁴ Also remarkably, Justice Breyer's validation votes did not depend on whether the sitting President was Republican or Democratic.³⁵ He voted to uphold the interpretations of Republican administrations 80% of the time — and thus showed no statistically significant difference between Republican and Democratic administrations.³⁶ By contrast, Justice Scalia voted to uphold the interpretations of Republican administrations 60.5% of the time but Democratic administrations just 42% of the time — a striking difference.³⁷

To be sure, we should not overread these numbers; an investigation of the actual cases would be necessary to justify a full evaluation. If we put the numbers to one side and investigate Justice Breyer's opinions, we will see that he is often concerned to investigate and to muster facts, sometimes appearing in the body of his opinions, sometimes appearing in technical appendices. Who else, for example, would write the following sentence: "With the assistance of the Supreme

²⁹ See Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986). The same essential view can be found in *Barnhart v. Walton*, 535 U.S. 212 (2002), as well as Justice Breyer's concurring opinion in *City of Arlington v. FCC*, 133 S. Ct. 1863, 1875 (2013) (Breyer, J., concurring in part and concurring in the judgment).

³⁰ See Breyer, *supra* note 29.

³¹ See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 247–49 (2006).

³² Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 825–26 (2006). This data set includes all relevant decisions from 1989 through 1995. To be sure, it would be most valuable to examine the evidence to the present day.

³³ *Id.* at 826, 832 tbl.1.

³⁴ *Id.* at 832 tbl.1.

³⁵ *Id.* at 874 app. tbl.1.

³⁶ *Id.*

³⁷ *Id.* at 833, 879 app. tbl.1.

Court Library, I have compiled these two appendixes listing peer-reviewed academic journal articles on the topic of psychological harm resulting from playing violent video games”³⁸ It is noteworthy that the two appendixes come in an opinion calling for judicial deference to a legislative decision to prohibit the sale or rental of violent video games to minors.³⁹ In arguing for such deference, Justice Breyer emphasized that many or most of the peer-reviewed “articles were available to the California Legislature or the parties in briefing this case. . . . And consequently, these studies help to substantiate the validity of the original judgment of the California Legislature, as well as that judgment’s continuing validity.”⁴⁰

The modern era of occasionally careful judicial scrutiny of congressional authority under Article I began with *United States v. Lopez*,⁴¹ where the Court struck down the Gun-Free School Zones Act. In his dissenting opinion, Justice Breyer placed a great deal of emphasis on the facts, contending, “[n]umerous reports and studies — generated both inside and outside government — make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts.”⁴² Among other things, he pointed to “evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work force with a basic education,”⁴³ and that “a widespread, serious, and substantial physical threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied.”⁴⁴ He also offered a lengthy appendix, complete with a list of congressional materials, other materials from the federal government, and a host of associated writing, with empirical papers from the *American Economic Review*, *Journal of Political Economy*, *Review of Economics and Statistics*, and *Journal of the American Medical Association*.⁴⁵

In the area of “substantial evidence” review, the Court’s most important opinion in recent decades is *Allentown Mack Sales & Services, Inc. v. NLRB*,⁴⁶ where the majority gave unusually careful scrutiny to a decision of the National Labor Relations Board, striking it down for lack of sufficient evidentiary support. In dissent, Justice Breyer made a characteristic set of objections, emphasizing agency expertise and contending that “words of a technical sort that the Board has used in

³⁸ *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

³⁹ *See id.* at 2770.

⁴⁰ *Id.* at 2772.

⁴¹ 514 U.S. 549 (1995).

⁴² *Id.* at 619 (Breyer, J., dissenting).

⁴³ *Id.* at 622.

⁴⁴ *Id.* at 622–23.

⁴⁵ *Id.* at 636–44.

⁴⁶ 522 U.S. 359 (1998).

hundreds of opinions . . . have suddenly disappeared, leaving in their place what looks like an ordinary jury standard that might reflect not an agency's specialized knowledge of the workplace, but a court's common understanding of human psychology."⁴⁷ Stressing the agency's "accumulated expertise,"⁴⁸ he objected that the majority had substituted "its own judgment for that of the Board and the ALJ in respect to such detailed workplace-related matters."⁴⁹

Justice Breyer offered closely related arguments in *FDA v. Brown & Williamson Tobacco Corp.*,⁵⁰ in which he dissented from the Court's decision to invalidate the FDA's assertion of authority over tobacco products. In explaining his dissent, he drew attention to the agency's "broad jurisdictional authority"⁵¹ and pointed to changing understandings of facts over time: he noted that "such a statutory delegation of power could lead after many years to an assertion of jurisdiction that the 1938 legislators might not have expected. Such a possibility is inherent in the very nature of a broad delegation."⁵²

But there is an important exception to Justice Breyer's usual posture of deference, and it involves the duty of reasoned decisionmaking. He appears to find that duty to be part of the rule of law, and he insists on its exercise as a kind of quid pro quo for deference. We can find the central idea in his relatively rare votes to strike down acts of Congress and also to invalidate federal regulations.

Consider, for example, Justice Breyer's dissenting opinion from the Court's decision to uphold Congress's twenty-year extension of the copyright term.⁵³ He emphasized not only that this was "the longest blanket extension since the Nation's founding," but more fundamentally its "practical effect," which is to inhibit rather than to promote the progress of science.⁵⁴ In explaining this conclusion, Justice Breyer offered a technical appendix, relying on a brief from economist George Akerlof and his coauthors to support the view that his "text's estimates of the economic value of 1998 Act copyrights relative to the economic value of a perpetual copyright, as well as the incremental value of a 20-year extension of a 75-year term, rest upon the conservative future value and discount rate assumptions set forth in the brief of economist *amici*."⁵⁵

⁴⁷ *Id.* at 390 (Breyer, J., concurring in part and dissenting in part).

⁴⁸ *Id.* at 393.

⁴⁹ *Id.* at 394.

⁵⁰ 529 U.S. 120 (2000).

⁵¹ *Id.* at 165 (Breyer, J., dissenting).

⁵² *Id.* at 166.

⁵³ *Eldred v. Ashcroft*, 537 U.S. 186, 242 (2003) (Breyer, J., dissenting).

⁵⁴ *Id.* at 243.

⁵⁵ *Id.* at 267 (citations omitted).

Insistence on the duty of reasoned decisionmaking also helps to account for Justice Breyer's refusal to join the majority opinion upholding the FCC's change in its policy with respect to the use of "fleeting expletives" on the airwaves. In *FCC v. Fox Television Stations, Inc.*,⁵⁶ his objection was simply that the FCC did not give a sufficient explanation for its change, which would allow it to punish stations for allowing such expletives. In his view, the agency's explanation lacked "empirical or other information" to justify its new conclusion.⁵⁷ Invoking the requirement of reasoned decisionmaking, he suggested that

FCC's answer to the question, 'Why change?' is, 'We like the new policy better.' This kind of answer, might be perfectly satisfactory were it given by an elected official. But when given by an agency, in respect to a major change of an important policy where much more might be said, it is not sufficient.⁵⁸

The most important point here is that an agency may not defend its policy simply by asserting its preference. It has to offer reasons. To be sure, there is a risk that a judicial demand for reasoned decisionmaking will serve, in practice, as a judicial demand for reasons with which judges agree. In *FCC v. Fox Television*, the FCC did not merely assert its preferences; it attempted to explain them,⁵⁹ and for that reason, there is a strong argument that the majority was right. Nonetheless, a requirement of reason-giving can be seen as an effort to ensure that technical expertise is in fact being applied, and that agencies are not merely bowing to political winds.⁶⁰

Justice Breyer has been on the Court for two decades. In that period, his thinking has not so much changed as broadened. Once focused principally on administrative law and regulatory policy, he is now concerned with issues of constitutional theory and self-governance. But he continues to emphasize the importance of immersion in the facts; he continues to defend a modest judicial role. More than any Justice in the Court's history, he remains a technocrat, and he is a democrat, emphasizing the importance of judicial humility, in part for that reason.

Let's allow him the final words (and note the contrast with Holmes's very different suggestion about where he would help his fellow citizens to go): "I also suggest that by understanding that its actions have real-world consequences and taking those consequences into account, the Court can help make the law work more effectively . . .

⁵⁶ 556 U.S. 502 (2009).

⁵⁷ *Id.* at 567 (Breyer, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 517–18 (majority opinion) (citing Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 & Mar. 8, 2005, 21 FCC Rcd. 13299 (2006)) (cataloguing the FCC's justifications for its decision).

⁶⁰ See Jody Freeman & Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51.

[and] thereby better achieve the Constitution's basic objective of creating a workable democratic government."⁶¹

⁶¹ STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* xiv (2010).

PEEK-A-BOO: JUSTICE BREYER, DISSENTING

*Laurence H. Tribe**

It's not often that a single opinion displays essentially all of a Justice's characteristic strengths and priorities at once, but Justice Breyer's masterful dissent in the relatively little-noted case striking down the limits on the SEC's removal power over members of the Public Company Accounting Oversight Board (PCAOB) created by the Sarbanes-Oxley Act of 2002¹ as Congress's response to "a series of celebrated accounting debacles"² is just such a case.

The Court's majority, in an opinion delivered by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, and Alito, finds a fatal flaw in the statute — an ostensible flaw that it proceeds to correct and sever from the rest of the law — in what it calls the law's "double for-cause removal provisions," quoting the dissent of Judge Kavanaugh in the court below.³ Those are provisions the Court says "combine to eliminate any meaningful Presidential control over the [Board]."⁴ Continuing the unsteady project of limiting the reach of *Humphrey's Executor v. United States*⁵ in pursuit of the elusive deregulatory goal of dismantling the administrative state by insisting on a "unitary executive," the Court objected to what it called "a Board that is not accountable to the President, and a President who is not responsible for the Board."⁶ The Court describes the Board as "a Government-created, Government-appointed entity, with expansive powers to govern an entire industry," including "[e]very accounting firm — both foreign and domestic — that participates in auditing public companies under the securities laws."⁷ Its objection is not that the members of this Board cannot be removed for purely political reasons, without cause and thus without judicial protection, by the President — a "flaw" that would doom nearly every supposedly independent agency created to implement federal law — but that its members are protected from such removal by the SEC, whose members are in turn protected

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¹ Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code).

² *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd. (PCAOB)*, 130 S. Ct. 3138, 3147 (2010).

³ *Id.* at 3149 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 697 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

⁴ *Id.* (alteration in original) (quoting *PCAOB*, 537 F.3d at 697 (Kavanaugh, J., dissenting)) (internal quotation mark omitted).

⁵ 295 U.S. 602 (1935).

⁶ *PCAOB*, 130 S. Ct. at 3153.

⁷ *Id.* at 3147.

from such removal by the President. The simple arithmetic of the matter ($1 + 1 = 2 > 1$) is said to doom the structure as a violation of the separation of powers.

The Court, without going so far as insisting that all agencies with such sweeping powers be run by individuals who serve at the pleasure of the President — an aspiration that Justice Scalia some time ago described as simply too ambitious to be realistic — objected to the *layered structure* of the Board's supposed insulation from presidential direction and control, describing that two-level insulation as a violation of "the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'"⁸ Invoking a familiar reductio technique, the Court opined:

[I]f allowed to stand, this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third? At oral argument, the Government was unwilling to concede that even *five* layers between the President and the Board would be too many. The officers of such an agency — safely encased within a Matryoshka doll of tenure protections — would be immune from Presidential oversight, even as they exercised power in the people's name.⁹

Taking aim directly at Justice Breyer's familiar emphasis on a functional rather than formalistic approach to the interpretation of constitutional structure and at his vaunted appreciation of the benefits of flexibility and expertise, the majority repeats the truism that a procedure's efficiency, convenience, or utility "in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution,"¹⁰ whose aim of ensuring representative democracy must not be confused with the single-minded pursuit of convenience or efficiency.¹¹ "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts."¹² Ouch. Chief Justice Roberts really knows how to hurt a guy.

"The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that

⁸ *Id.* at 3154 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in the judgment)).

⁹ *Id.* (citation omitted).

¹⁰ *Id.* at 3156 (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)) (internal quotation mark omitted).

¹¹ *Id.*

¹² *Id.*

of the people. This concern is largely absent from the dissent's paean to the administrative state."¹³ Double ouch!

To a beginning law student, all of this must sound powerful indeed — and suitably democratic, with a small “d.” The trouble, in the double-layered language of Justice Breyer's dissent, joined by Justices Stevens, Ginsburg, and Sotomayor, is that it is “wrong — very wrong.”¹⁴ Although the dissent is lengthy and detailed, and a brief synopsis cannot really do it justice, it's worth marching through the analysis with enough care to display how fully justified that dissenting conclusion is.

First, the dissent locates the legal question the case presents at “the intersection of two general constitutional principles,”¹⁵ one recognizing the “broad power [of Congress] to enact statutes ‘necessary and proper’ to the exercise of its specifically enumerated constitutional authority,”¹⁶ including “broad authority to ‘create’ governmental ‘offices’ and to structure those offices ‘as it chooses,’”¹⁷ and the other acknowledging that “the opening sections of Articles I, II, and III of the Constitution separately and respectively vest ‘all legislative Powers’ in Congress, the ‘executive Power’ in the President, and the ‘judicial Power’ in the Supreme Court (and such ‘inferior Courts as Congress may from time to time ordain and establish’) . . . imply[ing] a structural separation-of-powers principle.”¹⁸ Explaining why neither of those general principles can be “absolute in its application to removal cases,”¹⁹ the dissent proceeds to show that neither text, nor history, nor precedent “provides any clear answer.”²⁰ Making a strong case for the proposition that “the Court in these circumstances has looked to function and context, and not to bright-line rules,” and that this approach “embodies the intent of the Framers” while “permit[ting] Congress and the President the flexibility needed to adapt statutory law to changing circumstances,”²¹ the dissent to that point seems almost as homily-filled as the majority. Is this, then, merely a clash of conflicting approaches to interpretation?

In part, the answer is yes. But it is at this point that the dissent begins to run circles around the majority. To begin, the dissent is far

¹³ *Id.*

¹⁴ *Id.* at 3184 (Breyer, J., dissenting).

¹⁵ *Id.* at 3165.

¹⁶ *Id.* (quoting U.S. CONST. art. I, § 8, cl. 18).

¹⁷ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (per curiam)) (internal quotation marks omitted).

¹⁸ *Id.* (citing *Miller v. French*, 530 U.S. 327, 341–42 (2000)).

¹⁹ *Id.*

²⁰ *Id.* at 3167.

²¹ *Id.* at 3167–68.

more subtly attuned to the realities of power than the majority when it focuses on

the various ways presidential power operates within this context — and the various ways in which a removal provision might affect that power. As human beings have known ever since Ulysses tied himself to the mast so as safely to hear the Sirens' song, sometimes it is necessary to disable oneself in order to achieve a broader objective. Thus, legally enforceable commitments — such as contracts, statutes that cannot instantly be changed, and, as in the case before us, the establishment of independent administrative institutions — hold the potential to empower precisely because of their ability to constrain.²²

To sharpen the point, Justice Breyer focuses on the context of agencies charged with adjudicatory responsibilities, noting that when a President “seeks to regulate through impartial adjudication, then insulation of the adjudicator from removal at will can help him achieve that goal.”²³ Nor is this just one of the hypotheticals for which the Justice is so famous. On the contrary, it turns out — in a point that would surprise someone whose only familiarity with the work of the PCAOB had come from reading the majority opinion in this case — that “[f]irst and foremost, the Board *adjudicates* cases,”²⁴ something the Court “all but ignores . . . when conducting its analysis.”²⁵ Worse, “when [the Court] finally does address that central function (in a footnote), it simply asserts that the Board *does not* ‘perform adjudicative . . . functions,’ an assertion that is inconsistent with the terms of the statute.”²⁶

How does the majority deal with the ample Supreme Court precedent recognizing the “appropriateness of using ‘for cause’ provisions to protect the personal independence of those who even only sometimes engage in adjudicatory functions”?²⁷ Well, it doesn't. It simply *pretends* that this Board does not fit the paradigm that it most clearly *does* fit after all. Justice Breyer is smart enough not to rub the point in. Unlike what some other Justices who will remain unnamed might do with a dagger once inserted, Justice Breyer doesn't twist the knife; he just lets it sink in so readers can figure out for themselves what the majority is up to.

Equally impressive is the dissent's detailed demonstration of why, in “practical terms, no ‘for cause’ provision can, in isolation, define the

²² *Id.* at 3169.

²³ *Id.*

²⁴ *Id.* at 3173 (emphasis added) (citing 15 U.S.C. § 7215 (2012)).

²⁵ *Id.* at 3174.

²⁶ *Id.* (alteration in original) (citation omitted) (quoting *id.* at 3160 n.10 (majority opinion) (emphasis added)).

²⁷ *Id.* at 3173 (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 623–28 (1935)).

full measure of executive power.”²⁸ Drawing without ostentation on his deep familiarity with how both Congress and administrative agencies actually function in the world, Justice Breyer carefully explains how the “President’s power to get something done” is less likely to be shaped by the presence or absence of “for-cause removal” protection than by “the way in which the statute defines the scope of the power the relevant administrator can exercise, the decision as to who controls the agency’s budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress’s ability to assert influence).”²⁹ And, as Justice Breyer notes almost in passing, “notwithstanding the majority’s assertion that the removal authority is ‘the key’ mechanism by which the President oversees inferior officers in the independent agencies, it appears that no President has ever actually sought to exercise that power by testing the scope of a ‘for cause’ provision.”³⁰ He then patiently lays out, offering an elegant lesson in “elementary logic,”³¹ why — even on the Court’s own assumptions — the layered form of the PCAOB’s insulation could not possibly affect the impact of the statute’s limits on the SEC’s removal authority except in the most unusual of circumstances. Understating effectively, Justice Breyer confesses that he does “not know if [such circumstances] have ever occurred,”³² making clear without having to say so expressly that the majority certainly doesn’t demonstrate the contrary. His conclusion, which the majority in no way refutes, is that, “with respect to the President’s power, the double layer of for-cause removal sometimes might help, [and] sometimes might hurt,” which leads him — and would lead any reader who is not precommitted to striking down the structure Congress has put in place to enhance the political independence of the PCAOB — “to conclude that its overall effect is at most indeterminate,”³³ particularly given the degree to which the “political environment, reflecting tradition and function, . . . would impose a heavy political cost upon any President who tried to remove [a member of an otherwise supposedly independent] agency without cause.”³⁴

Having made his point, Justice Breyer then goes on to score in overtime by destroying many of the majority’s other assertions about the supposed limits of the SEC’s power over what the PCAOB either does or fails to do, making it clear that the majority is even wrong

²⁸ *Id.* at 3170.

²⁹ *Id.*

³⁰ *Id.* (emphasis omitted) (citation omitted) (quoting *id.* at 3157 (majority opinion)).

³¹ *Id.* at 3171.

³² *Id.* at 3172.

³³ *Id.*

³⁴ *Id.* at 3183.

“when it says that ‘the Act nowhere gives the Commission effective power to start, stop, or alter’ Board investigations.”³⁵ “On the contrary,” he shows, “the Commission’s control over the Board’s investigatory and legal functions is virtually absolute,” and “the Commission has general supervisory powers over the Accounting Board itself.”³⁶ “What is left?” he asks.³⁷ His irrefutably Talmudic reply is, appropriately, another question: “The Commission’s inability to remove a Board member whose perfectly *reasonable* actions cause the Commission to overrule him with great frequency?”³⁸ The Justice then asks a question that answers itself: “What is the practical likelihood of that occurring, or, if it does, of the President’s serious concern about such a matter?”³⁹ To nail the point down: “Everyone concedes that the President’s control over the Commission is constitutionally sufficient. And if the President’s control over the Commission is sufficient, and the Commission’s control over the Board is virtually absolute, then, as a practical matter, the President’s control over the Board should prove sufficient as well.”⁴⁰

Lest one think that all of Justice Breyer’s references to “practical” considerations generate some kind of Achilles’ heel in his analysis and that the majority’s preference for a mechanical, bright-line test of constitutionally mandated presidential removal power at least has predictability and certainty going for it, Justice Breyer proceeds — calmly, always calmly — to show in great detail that the Court in fact fails to create such a test “because of considerable uncertainty about the scope of its holding — an uncertainty that the Court’s opinion both reflects and generates.”⁴¹

Justice Breyer leaves the best for last. The Court’s entire analysis — both its ultimate holding and the rationale underlying that holding — rests on the premise that it is dealing with some novel kind of un-American Matryoshka doll in which the PCAOB is encased in two distinct layers of “for-cause” insulation. But for that mathematical reality — that two layers of protection are qualitatively distinct from one — the majority’s entire opinion evaporates before the naked eye. But *are* there two layers here? I must confess that I had always supposed that, whatever Congress might have recently provided with respect to the members of the PCAOB, it had indeed long since encapsulated the SEC Commissioners within the protections of tenure by

³⁵ *Id.* at 3173 (quoting *id.* at 3158–59 (majority opinion)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (citation omitted).

⁴¹ *Id.* at 3177.

permitting their removal only “for-cause.” The Brief for the United States referenced that “common understanding” even though a footnote at the end of the pertinent sentence aroused my suspicion when it said that this “understanding exists even though the provision of the Exchange Act establishing the Commission (15 U.S.C. 78d(a)) does not expressly limit the President’s power of removal.”⁴² The Brief for Respondents similarly noted that “[n]o statute restricts [the President’s] removal authority,”⁴³ at which point a footnote observed that, “[b]ecause the SEC was created in the years between *Myers* and *Humphrey’s Executor*, Congress likely believed it lacked authority to restrict removal.”⁴⁴

Justice Breyer properly makes quite a mountain out of that mountain. “Unless the Commissioners themselves are *in fact* protected by a ‘for cause’ requirement, the Accounting Board statute, on the Court’s own reasoning, is not constitutionally defective.”⁴⁵ Such restrictions on presidential removal power are not to be imposed “by mere inference or implication,”⁴⁶ the dissent rightly observes, also noting a 2009 memorandum written to the Principal Deputy Counsel to the President by First Circuit Judge David J. Barron in his capacity as Acting Assistant Attorney General of the Office of Legal Counsel, in connection with the removability of the Federal Coordinator for Alaska Natural Gas Transportation Projects. And, echoing a point made in Respondents’ Brief about the SEC having been created in the nine-year period *after* the Court had decided *Myers*, thereby casting grave doubt on the constitutionality of all “for-cause” removal provisions, but *before* the decision in *Humphrey’s Executor*, removing such doubt with respect to most independent agencies, Justice Breyer explains why the absence of a “for-cause” limitation in the statute creating the SEC is unlikely to have been accidental, given the creation of that agency “at a time when, under this Court’s precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause.”⁴⁷ Worse, just a month after *Humphrey’s Executor* was decided, “Congress returned to its pre-*Myers* practice of including such provisions in statutes creating independent commissions.”⁴⁸

⁴² Brief for the United States at 43 & n.15, *PCAOB*, 130 S. Ct. 3138 (No. 08-861).

⁴³ Brief for Respondents Public Company Accounting Oversight Board, *et al.* at 31, *PCAOB*, 130 S. Ct. 3138 (No. 08-861).

⁴⁴ *Id.* at 31 n.9.

⁴⁵ *PCAOB*, 130 S. Ct. at 3182 (Breyer, J., dissenting).

⁴⁶ *Id.* at 3183 (quoting *Shurtleff v. United States*, 189 U.S. 311, 315 (1903)) (internal quotation mark omitted).

⁴⁷ *Id.*

⁴⁸ *Id.* (referencing the creation of the National Labor Relations Board with explicit removal protections).

Of course, as the dissent would have to concede, given its earlier demonstration that agency independence depends on much more than the presence or absence of “for-cause” protection, this hardly means that we have all been mistaken to think of the SEC as an “independent agency.”⁴⁹ What it *does* mean is that the majority went out of its way to decide the case on the artificial assumption that the Commissioners of the SEC cannot be removed by the President without a judicially reviewable showing of good cause. Without that assumption, the majority’s entire house of cards collapses.

Most significantly, what this exposes — again without rubbing the point in — is the majority’s barely disguised deregulatory agenda: its eagerness to stretch the law in order to eliminate a degree of independence that Congress sought to create, here for the PCAOB, by engaging in the very *opposite* of what Chief Justice Roberts has often praised as a key principle of constitutional avoidance, a principle he underscored in his decisions on the D.C. Circuit and in his confirmation hearing, and a principle on which he leaned heavily in order to construe as a constitutional tax the key provision of the Affordable Care Act that he upheld only two years ago in *National Federation of Independent Business v. Sebelius*.⁵⁰ Here the Court “created a constitutional defect in a statute and then relied on that defect to strike [the] statute down as unconstitutional.”⁵¹ Justice Breyer wrote that he was aware of no “other instance in which the Court has similarly (on its own or through stipulation)” taken such a step.⁵² Neither am I. And he quoted Justice Scalia, from a decision handed down earlier the same month, insisting that the Court “cannot” add “provisions to a federal statute . . . especially [if] . . . separation-of-powers concerns . . . would [thereby] arise.”⁵³

There is, of course, much more — including a thirty-four-page Frankfurterian appendix that lays out more than you ever wanted to know about just which twenty-four *stand-alone* federal agencies or departments have heads who are, *by statute*, removable by the President only “for-cause” and which twenty-four additional offices, boards, or bureaus *embedded within departments* are likewise subject, *by statute*, to for-cause removal protections. The appendix is organized to highlight those instances in which a “for-cause” office is embedded within a “for-cause” stand-alone agency or department, which the dissent points out “are essentially indistinguishable from this case,”

⁴⁹ *Id.*

⁵⁰ 132 S. Ct. 2566 (2012).

⁵¹ *PCAOB*, 130 S. Ct. at 3182 (Breyer, J., dissenting).

⁵² *Id.*

⁵³ *Id.* (alterations and omissions in original) (quoting *Alabama v. North Carolina*, 130 S. Ct. 2295, 2312 (2010)) (internal quotation mark omitted).

with — the dissent observes with tongue in cheek — “the notable exception that the [PCAOB itself] may *not* be *statutorily* subject to two layers of for-cause removal,” given the dissent’s surprising (to us administrative law novices) demonstration that the SEC probably is *not* such a layer, the majority’s assumption notwithstanding.⁵⁴ The irony that the majority’s inversion of the classic constitutional avoidance principle of *Ashwander v. Tennessee Valley Authority*⁵⁵ not only decisively affects the defensibility of its holding but also alters the way an accurate organization chart of the United States government is to be composed is not lost on a careful reader of this magnificent dissent.

To be sure, there is a tension that Justice Breyer fails to acknowledge: If he is right that the absence of for-cause removal protection does not in itself doom the political independence of an agency in the Executive Branch, then isn’t it unlikely that the Court’s invalidation of that protection for the PCAOB would in itself doom that board’s political autonomy and credibility and thereby seriously undercut its regulatory clout? Perhaps. But had the back-and-forth in the Roberts-Breyer debate gone into *double* overtime, Justice Breyer would have had a ready response. Recall that the Justice had recognized, in the famous pair of 2005 decisions about the Ten Commandments⁵⁶ about which Professors Michael Klarman and Richard Fallon are writing for this set of essays — the pair in which only Justice Breyer voted with both majorities, permitting the old Ten Commandments monuments to remain in the public square while forbidding the new ones to be installed in the local courthouse — that there is a key social and cultural difference between removing something monumental that had long been taken for granted and indeed assimilated into public understanding, and declining to install (or even taking down) something with no similar provenance. If he was right in that supposition — admittedly a different context, given the focus there on the public meaning of the displays at issue under the so-called “endorsement test” — then he could well have argued that there may be a difference between deciding that the members of an agency long-since established as independent of direct presidential control (such as the SEC) are in theory removable at will by the President — a decision unlikely to have much practical impact on the agency’s actual independence decades after its functional independence had long been taken for granted — and robbing a baby agency like the PCAOB, aptly referred to by some as “Peek-A-Boo,” of the protection provided at its recent birth by statutory guarantee of its members’ independence in

⁵⁴ *Id.* at 3184.

⁵⁵ 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

⁵⁶ *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in the judgment).

the form of a “for-cause only” removal provision. A formal step that might make little difference to an aging agency whose members a President would not dare to remove without cause despite the absence of statutory protection against such removal,⁵⁷ might make all the difference in the world to an infant agency, robbed in the cradle of that veneer of protection, and barely launched on its regulatory trajectory. Path dependence, here as almost always, may make all the difference. But perhaps the dissent should have made this analysis more explicit.

With that limited reservation, it’s hard not to agree with Justice Breyer’s judgment that the Court has not faithfully performed its duty by reading into a law enacted by Congress a “for-cause removal” phrase that Congress never wrote and probably did not mean to write;⁵⁸ with his demonstration that the Court did so “in order to strike down, not to uphold, another statute”;⁵⁹ and with his conclusion that, in proceeding as it has, the majority has risked creating “an obstacle, indeed pos[ing] a serious threat, to the proper functioning of that workable Government that the Constitution seeks to create — in provisions this Court is sworn to uphold.”⁶⁰

⁵⁷ *PCAOB*, 130 S. Ct. at 3183 (Breyer, J., dissenting).

⁵⁸ *Id.* at 3184 (internal quotation marks omitted).

⁵⁹ *Id.*

⁶⁰ *Id.*

JUSTICE BREYER AND THE PARTIAL DE-DOCTRINALIZATION OF FREE SPEECH LAW

*Mark Tushnet**

In the 1960s and 1970s free speech law became doctrinalized. We came to understand that content-based regulations of persuasive speech could be justified only if courts could identify a relatively tight causal connection between the regulated speech and social harms, that speech that operated through noncognitive mechanisms could be regulated when the speech caused harm by its very utterance, and that speech falling within some specific categories such as obscenity and commercial speech could be regulated on a lesser showing of causation. We also came to understand that content-neutral regulations (formerly described as “time, place, and manner” regulations) could be justified by important governmental interests when the regulations had relatively small effects on the overall dissemination of speech. This is of course only a sketch of First Amendment doctrine as of the turn of the twenty-first century, but it gives a flavor of what I mean by “doctrinalization.” Doctrinalization replaced alternatives best described as (1) balancing, and (2) enumerating and evaluating relevant considerations, a process that lacked significant analytical structure and in which a wide range of considerations might be relevant in every case.

As the preceding description suggests, doctrinalization involves the creation of a structured set of categories and rules. The rules are triggered by the identification of one of a relatively small number of features doctrine makes relevant (“Is this a content-based regulation?”), and the structure allows for the development of qualifications and exceptions, each itself triggered by the identification of another one of a relatively small number of features (“Is this ‘commercial speech?’”). The rules and the triggering facts generate results that then provide guidance for decisionmakers.

Sometimes the relevant decisionmakers are said to be future Supreme Court Justices, but it is better to see the relevant decisionmakers as legislators and executive officials in the political branches, and judges on lower courts.¹ The reason is this: The Justices themselves are always able to ensure that the results they arrive at are consistent with their judgments about the best outcome in each specific

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¹ My argument here omits a fair number of qualifications and details, some of which I develop in a chapter in MARK TUSHNET, *ADVANCED INTRODUCTION TO COMPARATIVE CONSTITUTIONAL LAW* 70–93 (2014).

case, because they can always distinguish or if necessary overrule precedents said to hem them in. They do not need doctrine to guide them; their own judgments about outcomes are sufficient. Other decisionmakers, though, do need guidance to reach the results the Justices think best overall, because those decisionmakers need not share the Justices' values and preferences.

Doctrinalization always carries with it two risks. The first is instability, because cases will inevitably arise in which the Justices' view of the proper result cannot readily be accommodated within the existing set of rules and categories. But, because doctrinalization allows for the creation of exceptions and qualifications, each such case becomes a candidate for the creation of a new exception or qualification. And, the reasons the Justices have for the result they think best provide the triggering facts or features that allow the new exception to fit within the doctrinal structure (without disrupting it). As rules, exceptions, and qualifications proliferate, each accompanied by a rationale explaining the relevance to the aims of the First Amendment of the new triggering fact or feature, the complex doctrinal structure comes to resemble a collection of results that are compatible with, and might more easily be arrived at by, consideration of all relevant features of the problem. Doctrinalization can transform itself into — or, as doctrinalizers might say, degenerate into — balancing. If that occurs, doctrinalization loses its ability to guide other decisionmakers.

The second risk arises from the techniques available to resist degeneration. Those techniques lead either to outcomes that are inconsistent with the Justices' own views of the best outcomes in specific cases, or to arbitrariness. Consider a case as to which existing doctrine dictates a result against the claimant. Often, perhaps always, the claimant's advocates will be able to generate a reasoned basis for creating an exception or qualification to existing doctrine, and the doctrinal structure including the exception would dictate a result *for* the claimant. Suppose the Justices agree that the claimant "ought" to prevail, given their own views. The Court can then reject the proposed exception only by asserting that accepting it would complicate the doctrinal structure so much that it could no longer serve its functions of constraining future courts and providing guidance to lower courts and other decisionmakers. Doing so, though, requires that the Court accept results that the Justices believe to be erroneous. The upshot is that the Court makes "mistakes" from its own point of view in some cases it decides, so as to ensure that other decisionmakers will have

sufficient guidance from the Court to make fewer mistakes.² I call this an “institutional risk of error” argument for doctrinalization.

Further, once doctrinalization takes hold, the doctrinal structure will already have become reasonably complex. The argument against excessive complexity will ordinarily be unable to explain, in a reasoned way, why this specific new exception will be the straw that breaks the camel’s back. “This far but no farther” is then arbitrary, at least when the Court does not explicitly make — as it never has — the “institutional risk of error” argument.

A number of recent cases have presented the Supreme Court with problems arising out of the First Amendment’s doctrinalization. Justice Breyer’s positions in some of these cases suggest that at least a partial de-doctrinalization would benefit the nation.³ The majority in *Brown v. Entertainment Merchants Ass’n*⁴ held unconstitutional a California statute seeking to regulate the distribution of violent video games to young people. Justice Scalia, writing for the majority, wrote a doctrinal opinion declining to create a “new categor[y]” of content-based regulations that would allow legislatures to regulate depictions of violence without showing a strong connection between those depictions and concrete social harms, as is required by the core doctrine on content-based regulations.⁵ Justice Breyer dissented.

After a false start,⁶ Justice Breyer wrote that he “would apply . . . a strict form of First Amendment scrutiny.”⁷ That form required that the statute “be ‘narrowly tailored’ to further a ‘compelling interest,’ without there being a ‘less restrictive’ alternative that would be ‘at least as effective.’”⁸ The internal quotation marks signal an opinion that presents itself as doctrinalized. Yet, Justice Breyer

² Implicit in this account is the proposition that the Court lacks the institutional capacity to review every decision made by lower courts or legislatures. If it has that capacity, it can reach correct results, from its own point of view, in every case, and need not worry about providing guidance to other decisionmakers.

³ I regard this Essay as a tribute to Justice Breyer, though not a celebration of his work, because it takes him to be articulating a serious jurisprudential position about important “meta” issues in constitutional adjudication.

⁴ 131 S. Ct. 2729 (2011).

⁵ *Id.* at 2734. Justice Alito, joined by Chief Justice Roberts, would have held the California statute unconstitutionally vague and so did not have to address the question of doctrinalization. *Id.* at 2742 (Alito, J., concurring in the judgment). (Internal evidence from the opinions suggests that Justice Alito’s opinion began as a proposed opinion for the Court, but was found unsatisfactory by Justice Scalia and others who eventually constituted the Court majority.)

⁶ Justice Breyer began by working with the doctrinalization process, writing that the relevant “category” was not “depictions of violence,” but “protection of children.” *Id.* at 2762 (Breyer, J., dissenting) (quoting *id.* at 2736 (majority opinion)).

⁷ *Id.*

⁸ *Id.* at 2765 (quoting *Reno v. ACLU*, 521 U.S. 844, 863 n.30, 874, 875, 879 (1997)).

continued, he would “not apply this strict standard ‘mechanically.’”⁹ Rather, he “would evaluate the degree to which the statute injures speech-related interests, the nature of the potentially-justifying ‘compelling interests,’ the degree to which the statute furthers that interest, the nature and possible effectiveness of possible alternatives, and, in light of this evaluation, whether, overall, ‘the statute works speech-related harm . . . out of proportion to the benefits that the statute seeks to provide.’”¹⁰ This phrase is consistent with an “all relevant considerations” approach except that it is presented within a doctrinalized framework.

I forgo detailed discussion of most of Justice Breyer’s analysis in *Brown* but focus on his treatment of alternatives to California’s regulatory ban because that discussion will eventually allow me to suggest that Justice Breyer’s partial de-doctrinalization of the First Amendment might not fully address the arguments for doctrinalization. Justice Breyer considered the alternatives of voluntary measures to limit sales of violent video games to minors, and the use of technology embedded in the videos to prevent minors from viewing them without parental permission. Both, he said, were unlikely to be as effective as the state’s regulatory ban. A voluntary system unaccompanied by state enforcement had been tried, and studies showed “serious enforcement gaps,” and technological fixes could be defeated by circumvention techniques that were readily available.¹¹ So — either “on balance” or “taking everything into consideration” — the California statute was constitutionally permissible.

Justice Breyer’s concurrence in the judgment in *United States v. Alvarez*¹² provides another example of partial de-doctrinalization. He agreed with the plurality that the Stolen Valor Act of 2005,¹³ making it a federal crime for a person to lie about having received certain military honors, was unconstitutional, but, he wrote, “I do not rest my conclusion upon a strict categorical analysis” of the sort he thought characterized the plurality opinion.¹⁴ He said that the approach he would take had sometimes been called “intermediate scrutiny,”¹⁵

⁹ *Id.* (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting)).

¹⁰ *Id.* at 2766 (alteration in original) (quoting *Playboy*, 529 U.S. at 841 (Breyer, J., dissenting)).

¹¹ *Id.* at 2770.

¹² 132 S. Ct. 2537 (2012); *id.* at 2551 (Breyer, J., concurring in the judgment). His opinion was joined by Justice Kagan. For my analysis of the problem presented in *Alvarez*, written before the Supreme Court decided the case, see Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* (Harvard Pub. Law Working Paper No. 11-02, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930 [<http://perma.cc/3W53-VXWH>].

¹³ 18 U.S.C. § 704 (2006), *invalidated by Alvarez*, 132 S. Ct. 2537.

¹⁴ *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring in the judgment).

¹⁵ *Id.* (internal quotation marks omitted).

sometimes “‘proportionality’ review,” and sometimes “an examination of ‘fit.’”¹⁶ Here is how he described the approach: it involves “examin[ing] speech-related harms, justifications, and potential alternatives. In particular, it . . . take[s] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so.”¹⁷ Notice that this formulation — of *intermediate* scrutiny — is not noticeably different from Justice Breyer’s formulation of the “strict form” of scrutiny in *Brown*. Understood as a process of movement from a doctrinal structure to a balancing or “all relevant considerations” approach, de-doctrinalization may frequently call for this sort of blurring of doctrinal lines.¹⁸

Justice Breyer “concede[d] that many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful.”¹⁹ But, he continued:

Those prohibitions . . . tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.²⁰

Finally, after concluding that the Stolen Valor Act did advance “a substantial countervailing objective,” Justice Breyer turned to “whether it is possible substantially to achieve the Government’s objective in less burdensome ways.”²¹ Acknowledging that the statute, as he interpreted it, required that the speaker be shown to have knowledge of the falsity of the statement — thus reducing some burdens on free expression — he remained concerned that the statute’s overbreadth remained significant. Referring to “the limitations on the scope of many other kinds of statutes regulating false factual speech,” he concluded that “it should be

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ An alternative path to de-doctrinalization, discussed earlier in this Essay, is the proliferation of categories and qualifications to the point where the doctrinal structure collapses of its own weight. Roughly speaking, the rise of reasonableness standards in the common law occurred through the path of the collapse of doctrinal complexity, though sometimes with some blurring of categorical lines as well. Professor L. Michael Seidman pointed out to me the contrast between the view developed here — that over time doctrine becomes so encrusted with exceptions and qualifications that it collapses into ad hoc decisionmaking — and the view that doctrine develops after courts accumulate enough cases decided in an ad hoc way to allow them to generalize a doctrine unifying the outcomes.

¹⁹ *Alvarez*, 132 S. Ct. at 2553–54 (Breyer, J., concurring in the judgment).

²⁰ *Id.* at 2554.

²¹ *Id.* at 2555.

possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute,” giving as examples a statute that distinguished among military awards or a requirement that the false statement be shown to have caused, or was quite likely to cause, “specific harm.”²²

One might wonder here. Justice Breyer’s discussions of overbreadth and existing bans on false statements initially dealt with *all* “false factual statements,” that is, with the possibility, associated with doctrinalization, of creating a categorical exception to the First Amendment for lies as such.²³ Creating a categorical exception posed risks to free expression “in social contexts, where they may prevent embarrassment, protect privacy,” and more; “in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical . . . contexts, where . . . examination of a false statement . . . can promote a form of thought that ultimately helps realize the truth.”²⁴ All this may be true, but the “less restrictive means” analysis should deal with the specific statute at issue. What Justice Breyer should have done is identify situations in which a lie about having received a military award “serve[s] useful human objectives” of the sort he earlier identified and then show — as I doubt that he could — that the number of such occasions was large enough, relative to the number of occasions on which these lies did not serve such objectives, to warrant calling the Stolen Valor Act overbroad. It is unclear to me why a statute confined to lies about having received a Congressional Medal of Honor would risk smaller harms to the First Amendment than did the Stolen Valor Act.

Justice Breyer’s overbreadth analysis focuses not only on “specific harm,” mostly to “identifiable victims” but also, with reference to the federal “false statements” statute, “where a lie is likely to work particular and specific harm by interfering with the functioning of a government department.”²⁵ Perhaps the harm associated with Stolen Valor Act lies is not visited on identifiable individuals, though we can identify the class that is harmed — those who have actually received the medals and now find the recognition the medals represent worth less.

²² *Id.* at 2555–56.

²³ *Id.* at 2553.

²⁴ *Id.* Justice Breyer’s parenthetical after his invocation of “technical” contexts (“even if made deliberately to mislead”) suggests his awareness of the weakness of the argument. His example is “Socrates’ methods,” but characterizing Socrates as “deliberately misleading” imposes a short-term time frame on Socrates’ longer-term project.

²⁵ *Id.* at 2554. Justice Breyer’s observation that the statute requires that the false statement be material offers a response to the point that conviction under the false-statement statute does not require that the government show that government operations have actually been disrupted; the materiality requirement narrows the statute’s application enough that conviction without a showing of actual disruption does not substantially burden First Amendment rights.

Yet experience suggests that such lies are often uttered in circumstances where the person claiming to have received a military honor seeks some material advantage — sympathy in a criminal trial, concessions in sentencing, special treatment in processing claims for government benefits, and the like.²⁶ True, the Stolen Valor Act was not limited to these contexts, but it is unclear to me why Congress could not reasonably conclude that Stolen Valor Act lies occurred often enough in such contexts that a general prohibition was justified, especially when the lies uttered in other contexts concededly diluted the value of the military honors themselves.

Justice Breyer's discussion of less restrictive means in *Alvarez* illustrates two features of de-doctrinalization. First, the discussion consists of Justice Breyer's seat-of-the-pants evaluation of alternative means, here not backed up, as it was in *Brown*, by empirical studies. Consider a statute requiring a showing of specific harm or a reasonably high likelihood of being harmful or banning lies in contexts where they "are most likely to cause harm" (identifying such contexts with some specificity to avoid vagueness problems).²⁷ The evidentiary burdens imposed by such a statute would of course reduce the number of successful prosecutions, and thereby reduce the risk to the First Amendment, but only at the cost of reducing as well the statute's deterrent effect. De-doctrinalization requires that the judge take both effects into account. The second feature makes that point in institutional terms. Justice Breyer's discussion does not deal with the possibility that Congress might have concluded that alternative means of "preserv[ing] intact the country's recognition of . . . sacrifice in the form of military honors" were unlikely to be as effective in accomplishing that goal.²⁸

I have offered some criticisms of Justice Breyer's project of partial de-doctrinalization, but of course it has important virtues. The main one is that it avoids the arbitrariness associated with the project of doctrinalization. Advocates for California's statute in *Brown* offered reasons for grafting a new exception on to the existing doctrinal structure. The majority offered only the arbitrary "This far and no farther" as a response. Justice Breyer's partial de-doctrinalization, in its discussion of "all relevant circumstances," is reasoned in a way that a doctrinalized rejection of a new exception cannot be. And, even with its

²⁶ See *Secured Targets*, STOLEN VALOR, <http://stolenvalor.com/target.cfm?source-link&sort=> (last visited Sept. 28, 2014) [<http://perma.cc/ML7N-249Y>] (providing examples of lies related to military service told in order to receive tangible benefits). The Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (codified at 18 U.S.C. § 704 (Supp. I 2013)), enacted in response to *Alvarez*, makes it a federal offense to fraudulently hold oneself out as a recipient of the military honors covered by the original Stolen Valor Act, with intent to obtain money, property, or any other tangible benefit.

²⁷ *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring in the judgment).

²⁸ *Id.* at 2555.

missteps, Justice Breyer's concurrence in *Alvarez* is more transparent in its discussion of the relevant circumstances than the plurality opinion.

I now return to the general analysis of de-doctrinalization with which my remarks opened. Defenders of doctrinalization claim that it constrains and guides. It constrains the Court now and in the future in two ways: by ruling out of consideration matters that are rationally relevant to the resolution of the constitutional question, and by providing an objective checklist of features and characteristics that trigger the application of specific doctrines.

The "partial" element in Justice Breyer's project of de-doctrinalization shows why doctrinalization is not and probably cannot be objective in the desired sense. Determining what is a "sufficient" harm to justify regulation and — perhaps even more — determining that there are equally effective alternative means are nearly pure policy judgments about which reasonable people can disagree. And, they do — when the Court invalidates a statute because there are, in its judgment though perhaps not in the legislature's, equally effective means of accomplishing the regulatory aim with a smaller impact on constitutional values.

The second source of constraint is precisely the problem with doctrinalization: doctrinalization necessarily reaches a point at which arbitrariness prevails, rather than reasons. "All relevant circumstances" reasoning avoids this problem of arbitrariness, but, defenders of doctrinalization say, at the cost of a loss of guidance to other decisionmakers, and that loss is itself a form of arbitrariness.²⁹ Consider here a legislator thinking about whether to enact a statute making résumé fraud a crime, using Justice Breyer's opinion in *Alvarez* as a guide (or, even more comprehensively, using "all relevant circumstances" as a guide). Should the legislator deal with *all* forms of résumé fraud, or must she address only a subset — law school application fraud, job application fraud, fraud in applying for government contracts? In what contexts is the risk of specific harm caused by résumé fraud highly likely?³⁰ To the legislator, Justice Breyer's approach offers guidance that comes down to this: "Be responsible."³¹

²⁹ This form of arbitrariness — the inability to predict what the law is on the basis of legal considerations — is exacerbated by the fact that the Court is a they, not an it, because one Justice's evaluation of all the relevant circumstances may differ from another's, and aggregating their evaluations may produce essentially random results from the Court as an institution. Cf. Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549 (2005).

³⁰ Anecdotally, there appear to be numerous examples in which résumé fraud is discovered years after the event, after the person has been doing the job well — which suggests that, indeed, the contexts of résumé fraud vary.

³¹ With suitable modifications, the parallel point can be made about the guidance that an "all relevant circumstances" approach gives to lower court judges.

But, of course, nonarbitrary doctrinalization provides little guidance too. The reason is the complexity that inevitably accompanies the proliferation of exceptions and qualifications. In the end, then, the choice appears to be between (a) doctrinalization accompanied by some degree of complexity, with the degree of complexity limited by a refusal to complexify further because of concerns about providing guidance to other decisionmakers (the “institutional risk of error” argument), and (b) de-doctrinalization that authorizes every decisionmaker to take all relevant circumstances into account and thereby licenses a free-for-all competition among institutions for predominance. That competition might itself be constrained by a strong presumption of constitutionality of a Thayerian sort. One can detect resonances of Thayer in some of Justice Breyer’s opinions.³² For myself, full de-doctrinalization coupled with Thayerian institutional deference is preferable to institutionally oriented doctrinalization. But, of course, opinions on the shape of the world differ.

³² See especially *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), in which Justice Breyer, concurring in part, wrote that “Congress could reasonably conclude that the statute will help the typical over-the-air viewer . . . more than it will hurt the typical cable subscriber.” *Id.* at 228 (Breyer, J., concurring in part) (emphasis added).