
HARVARD LAW REVIEW

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IN TRIBUTE: JUSTICE STEPHEN G. BREYER

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice Stephen G. Breyer.

*Chief Justice John G. Roberts, Jr.**

This past summer, Stephen G. Breyer retired from active service after nearly three decades as a member of the Supreme Court. He occupied a seat that has a lineage dating back to the Judiciary Act of 1789. His predecessors were particularly prominent jurists. Some of them — Story, Holmes, Cardozo — could be shorthand for greatness on the bench. That lineage is a reminder that every judge stands on the shoulders of those who served before. But Justice Breyer also stands tall among them. He brought to the Court talents and perspective that harken back to past distinction and yet mark a path all his own.

Like William Cushing, whom President Washington appointed as the inaugural holder of the seat in 1789, Justice Breyer has expressed a farsighted and humane understanding of constitutional law. As chief justice of Massachusetts' supreme court, Cushing played a role in ending slavery in that state, writing that all are born free and equal and entitled to liberty. Through his opinions from the bench, and in varied fora around the globe, Justice Breyer has eloquently championed both the need for individual liberty in shaping a just society and the obligation of every member of a self-governing people to help preserve it.

Like Joseph Story, who filled the seat from 1812 to 1845, Justice Breyer has been an institutional anchor of the Court. In the course of his long service, he replicated Story's unbounded energy and optimism in building agreement. Story also came to the Court from Massachusetts, steeped in the culture of New England. But he emerged as a learned

* Chief Justice of the United States. The references to Holmes' *The Common Law* are drawn from OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Little, Brown & Co. 1938) (1881).

jurist with worldly insights who embraced the challenge of working together with his colleagues for the good of the Union. Justice Breyer likewise has been a visionary force, seeking to brook differences while firmly adhering to his principles.

Like Oliver Wendell Holmes, Jr., Justice Breyer brought his life experience to bear on legal problems, reaching out to the public through books about the law that are both masterful and practical. In *The Common Law*, Holmes famously wrote that “[t]he life of the law has not been logic: it has been experience.” Justice Breyer has taken that guidance to heart, applying abstract principles to particular facts and crafting workable legal guidance. He has brought his own rich personal background — not just as lawyer and judge, but as Eagle Scout, Army reservist, Marshall Scholar, and Senate staffer — to resolve disputes large and small.

Like Benjamin Cardozo, Justice Breyer has a love of the written word and has left us a treasure chest of opinions, articles, and books with a distinctive and memorable literary style. He writes with plain-spoken clarity that is inviting to nonlawyers. Consciously stripped clean of footnotes, his opinions provide a bounty of legal, scholarly, and factual content in accessible and measured prose.

Like Felix Frankfurter, Justice Breyer has brought the perspective of a scholar and teacher to the Court’s discussions, sharing insights that extend far beyond the law. For thirteen years before becoming a judge, Justice Breyer was a highly regarded member of Harvard Law School’s faculty. Upon his retirement from active service on the Court, Justice Breyer has returned to his academic home port as the Byrne Professor of Administrative Law and Process. Both faculty and students will benefit enormously from that association.

Like Arthur Goldberg, who left the Court to serve as the Ambassador of the United States to the United Nations, Justice Breyer has had vast influence across international borders. Fluent in multiple languages, Justice Breyer is a legal diplomat extraordinaire, literally writing the book — *The Court and the World: American Law and the New Global Realities* — about how our Supreme Court works in an increasingly connected world. After serving as Justice Goldberg’s law clerk, he enjoyed the distinct privilege, many years later, of ascending to his mentor’s seat. Justice Breyer has had the special joy of seeing one of his own outstanding law clerks, Ketanji Brown Jackson, succeed him as a Justice.

For all the ways in which Justice Breyer’s service has evoked his predecessors, he has also made enduring contributions all his own. He has brought an inimitable blend of scholarship, insight, and superbly good judgment to our Bench. Justice Breyer leaves all of us with an enduring legacy of patriotism, collaboration, and decency that will stand as a model for jurists in our country and around the world. He has made

the Court’s opinions stronger and collegiality richer. He has ensured the Court has been able to labor in good humor on the Bench and off.

But with so many years devoted to public service, he and his spouse, Dr. Joanna Breyer, have more than earned a new chapter. Their three children — Chloe, Nell, and Michael — and six grandchildren have given so much to the country in sharing Justice Breyer with us. I will miss Stephen on the Bench and in Conference. I am deeply grateful for the privilege of having served with him. And I will always be proud to be his friend.

*Justice Ketanji Brown Jackson**

I have had the privilege of clerking for three inspiring jurists: Judge Patti Saris, Judge Bruce Selya, and, of course, Justice Stephen Breyer. Each of them is an exceptional public servant, and I could not have had better role models for integrity, civility, and grace. My clerkship with Justice Breyer, in particular, was an extraordinary gift and one for which I have only become more grateful with each passing year. Justice Breyer’s dedication to an independent, impartial judiciary is unflagging. And, for him, a commitment to the rule of law is not merely a duty, it is his passion.

On the day that he announced his retirement, Justice Breyer recalled the Gettysburg Address. He recited President Lincoln’s observation that this nation was “conceived in liberty, and dedicated to the proposition that all men are created equal”¹ (though he was careful to note that President Lincoln “meant women too”²). Justice Breyer also highlighted President Lincoln’s statement that the Civil War “test[ed] whether that nation, or any nation so conceived and so dedicated, can long endure.”³ As Justice Breyer explained, the United States of America is “an experiment,” in which we must continuously reconfirm, and reaffirm, the viability of “a country that is based on human rights,” on “democracy,”

* Associate Justice, Supreme Court of the United States.

¹ Abraham Lincoln, Address at the Dedication of the Gettysburg National Cemetery (Nov. 19, 1863), in 9 COMPLETE WORKS OF ABRAHAM LINCOLN 209, 209 (John G. Nicolay & John Hay eds., Francis D. Tandy Co. 1905) (1894); see *President Biden and Justice Breyer on Retirement from Supreme Court*, at 12:05 (C-SPAN 1 television broadcast Jan. 27, 2022) [hereinafter *Justice Breyer Remarks*], <https://www.c-span.org/video/?517531-1/noting-past-divisions-retiring-justice-breyer-future-generations-make-american-experiment-work> [<https://perma.cc/24QZ-4B6B>].

² See *Justice Breyer Remarks*, *supra* note 1, at 12:11.

³ Lincoln, *supra* note 1, at 209; see *Justice Breyer Remarks*, *supra* note 1, at 12:20.

and on the “rule of law.”⁴ Justice Breyer declared himself “an optimist.”⁵ But at the same time, he explained that the experiment is “still going on,” and that it is the “next generation” that will “determine whether the experiment still works.”⁶

Justice Breyer’s remarks echoed a lesson about the law that he has been articulating for decades. A lesson in optimism. A lesson in patriotism. And a lesson in personal and professional humility. I have also been exposed to these teachings in my role as a jurist for nearly a decade now. I carry out the daunting task of interpreting and applying the law daily; in every case, I approach the task from a neutral posture, evaluating the particular facts, researching the applicable law, and interpreting that law as it applies to the facts before me. The years that I have spent in that daily practice of interpreting and applying the law have taught me that my role in the development of the law is a limited one. The Constitution empowers me to decide only cases and controversies, and only those that are properly presented. Congress writes the laws that I merely interpret and apply. And the earlier decisions of judges who have interpreted and applied those laws further constrain my decisions.

That limited judicial role is part of what Justice Breyer means when he says that our country is based on the rule of law. But the greater part of what Justice Breyer means has little to do with the contribution that an individual judge might make to our collective understanding of the law. That is, the real import of the law is not what it says, but rather what it gives us as Americans. Justice Breyer understood that point so well that he bookended his career with it.

On the day his nomination as an Associate Justice was announced, Justice Breyer explained that “the Constitution, the Bill of Rights, . . . laws and statutes, regulations, rules, common law,” this “whole mass of material,” when “seen as a whole,” are “supposed to . . . allow all people — all people — to live together in a society, where they have so many different views, so many different needs, to live together in a way that is more harmonious, that is better, so that they can work productively together.”⁷ When he announced his retirement, Justice Breyer came back to this theme, sharing that the most “meaningful” part of his career as a jurist had been his impression that, in this “complicated country” where “every race,” “every religion,” and “every point of view possible” are represented, and where people “are so different in what they think,” “[p]eople have come to accept th[e] Constitution, and

⁴ *Justice Breyer Remarks*, *supra* note 1, at 11:10.

⁵ *Id.* at 13:36.

⁶ *Id.* at 13:07.

⁷ *Supreme Court Nominee Announcement*, at 21:07 (C-SPAN 2 television broadcast May 16, 1994), <https://www.c-span.org/video/?56836-1/supreme-court-nominee-announcement> [<https://perma.cc/LR9Q-6DG7>].

they've come to accept the importance of a rule of law.”⁸ In other words, it is our shared commitment to the rule of law that is the engine that powers this great experiment. And it would not be possible for a country as diverse as our own to succeed without it.

Justice Breyer has also cautioned that the continued success of this grand and ongoing experiment requires the continuing commitment of every American. It is our “grandchildren and their children” who will answer the question that President Lincoln asked during the Civil War: whether our nation — a nation founded on shared values of liberty, equality, democracy, and rule of law, rather than more traditional bases for nation-states like geography, ancestry, or religion — can survive.⁹ At the conclusion of the war, that answer was “yes.” And generations past have continued to answer that question with a “yes.” We, and our successors, must do the same.

I hope to continue Justice Breyer’s work in maintaining that commitment to the rule of law. I too believe that that commitment is a key ingredient of our nation’s success, and I applaud not only his optimistic outlook but also his humility in realizing that whether the experiment endures is a question that “we” as a country (in addition to and apart from “we” as judges) will have to answer. Justice Breyer has been a personal friend and mentor of mine for the past two decades; having to follow in the footsteps of this deservedly celebrated jurist is certainly a daunting prospect. I would count myself lucky, indeed, to be able to do so with even the smallest amount of his optimism, patriotism, and humility.

A YOUNGER BROTHER’S PERSPECTIVE

*Judge Charles R. Breyer**

How do you account for my brother’s relentless optimism? I have two answers: time and place.

The time was the ’50s. America had overcome its most severe depression in history. We had won World War II and defeated the greatest threat to democracy we had ever faced. People were employed and consumer demand was back. Not even the Korean conflict, which ended in a truce, could dampen the widely held belief that we could prevail

⁸ *Justice Breyer Remarks*, *supra* note 1, at 9:58.

⁹ *Id.* at 13:35.

* Senior Judge, United States District Court for the Northern District of California.

over any threats to “our way of life.” Stephen was just over ten years old, and his life would be shaped by that decade’s unprecedented period of calm.

As to place . . . San Francisco, a small city with a big city’s attitude. It was ethnically mixed, had a public school system open to all, and boasted a trade-union movement that demanded and received the benefits of full employment. Elsewhere, such as in the Jim Crow South, Americans faced terrible injustice. But San Francisco was a place of relative promise.

Beyond the good fortune of time and place, we had the greater fortune of having parents committed to public service. Our father, a deputy city attorney, became the legal advisor to the school district where, in his forty-one-year tenure, he was the “go to” person for solving the district’s problems. He authored much of the California Education Code and staunchly defended the right of teachers not to be required to sign a loyalty oath as a condition of employment during the McCarthy Era. Our mother, in addition to raising Stephen’s rather willful younger sibling, was active in civic organizations such as the League of Woman Voters, the Democratic Party, and the World Affairs Council. We frequently had dinner companions from abroad who were passing through San Francisco.

Our mother understood our shortcomings as well as our strengths. To be blunt, we were not a family of athletes. We utterly lacked hand-eye coordination (N.B. bicycle mishaps in the future). Added to that woeful fact was our father’s complete lack of interest in the “outdoors.” Even the wilderness of Golden Gate Park created angst for him. This rather cramped view of California’s opportunities prompted our mother to send us to summer camp. The first time she sent us, I was two and a half, so Stephen was in charge. Over the summers, we camped and hiked in the Sierras, swam, and went horseback riding. All of these were required and, after some period of time, actually enjoyed. Scouting was next: we were expected to earn at least twenty-one merit badges to obtain the rank of Eagle Scout. Our parents also encouraged Stephen to work summers as a hasher at Camp Mather in Yosemite, the San Francisco Recreation and Parks camp frequented by families of police and firemen. (This probably was not the genesis of his passion for cooking.)

Some motherly duties were more challenging than others. How do you get Stephen to read less and socialize more? Quite a challenge. His achievements at dancing school were limited to the recognition that he was “Most Improved Dancer,” an award he won in two successive years. Had there been a third year of instruction, from which he certainly would have benefitted, he probably would have retired the trophy. He was encouraged to join the high school soccer team, helped no doubt by the fact that our father had arranged for the school to practice on the

University of San Francisco field. Stephen did score one goal that season. Regrettably, it was for the opponent.

Our neighborhood public high school primarily focused on academics. While it had illustrious alumni — Carol Channing (*Hello, Dolly!*), Alexander Calder (artist), Rube Goldberg (cartoonist), Dian Fossey (primatologist), Rick Levin (President of Yale), two Nobel Prize winners, and a multitude of judges — it was open to all students in the city, no admission tests, no quotas. Most, but not all, of its graduates attended college. Stephen was accepted at both Harvard and Stanford. Our parents worried that Harvard would focus him entirely on academics, while at Stanford he could also explore other pursuits. Stephen went to Stanford, and I suspect they were correct.

All in all, Stephen's childhood was rather "Ozzie and Harriet," with an emphasis on work ethic and community involvement.

So the '60s posed a challenge to Stephen's worldview. He was twenty-five when President Kennedy was assassinated. It shook him, as it did all of us, but he remained optimistic. As the decade wore on, our nation's troubles came into fuller view: the Vietnam War and the anti-war protests, the assassinations of Robert Kennedy and Martin Luther King, Jr., and the riots in Detroit and across the country. Only a few years later, Stephen would learn of the Pentagon Papers and then of Watergate. The President had directed wiretaps of reporters, IRS hit lists of political enemies, burglaries of citizens' offices, and the payment of hush money to obstruct justice.

Stephen had a pragmatic response: to join the Special Prosecutor's Office as an advisor to Archibald Cox. As a lawyer, Stephen had great faith that the toolkit of constitutional rights — including free speech, free press, Fourth Amendment protections, and the principle that no person was above the law — could make our institutions work better. The successful conclusion of the Watergate inquiry reinforced that belief.

Stephen has brought to his work an optimistic view of our country, tempered by pragmatic considerations as to how problems are solved within our governmental framework. To that outlook, he adds old jokes, old songs, old movies, and a wonderful ability to listen to others and not judge. I am so very fortunate to have him as my best friend.¹⁰

¹⁰ It would be out of character if I didn't also say something about myself. I am truly honored to be published in the *Harvard Law Review*. I ask only that the admissions office update my application, as I haven't heard much since being placed on the wait-list in 1963.

*Andrew Manuel Crespo**

A few months ago, on a Saturday evening in June, Justice Breyer and his former clerks gathered in the Supreme Court's great hall. It was not our first time coming together this way. Every few years we marked together the milestones in a judicial career measured in decades. This time, though, was different. We all knew walking in that it would be our last reunion. A bon voyage.

As we entered the hall, so much seemed the same. The Supreme Court famously resides in a marble palace. And marble doesn't change. The row of busts depicting Chief Justices long gone was the same. The ornate red and blue ceiling with its intricate white and gold medallions was the same. The enormous chandeliers cast the same lights, sending the same shadows across the walls, just as they had for decades.

Mingling about and catching up, each of us at some point caught our first glimpse of the Justice. Standing across the room, chatting with one old clerk or another, it seemed he hadn't changed much either. The easy smile. The warm, lilting baritone of a greeting. The twinkle of light off his bespeckled eyes. They were all the same.

Timeless places and timeless presences have a transporting quality to them. Seeing your old boss a decade or more later, looking the same as he always had, it is easy to wander back from now to then. Memories of him ambling down those wide halls, headed to conference or to argument, come forward in your mind. You see him, sitting by a roaring fire in his office (no matter the temperature or the season) talking through a draft of his latest opinion or of his latest book, about his favorite works of architecture or his favorite French novel — often all in the span of a single conversation.

Even the choreography of the evening was the same. To the chime of a bell, we filed into place for a group photo. And then on to our seats, eight clerks to each round dinner table, as the program got underway. As in years past, two large screens flanked a central podium, waiting to project prerecorded messages to Justice Breyer from his colleagues, the other Justices on the Court.

This, too, took me back. But now in a different way. Because of course while the screens were the same, the faces on them were different. New Justices had replaced those who had recorded messages in prior years. And with those new Justices had come changes — to the Court,

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to the country, to the Constitution — that hung now palpably in the air. As the screens flickered on, they sent new shadows across the hall, carrying away with them any illusion of continuity, or of normalcy, within those walls.

I wondered, watching him sit one table over from mine, how these new shadows might fall across the Justice himself. Here was a man who, the year I clerked for him, penned an eloquent dissent from the Court’s decision to close its grand front doors for security reasons and to direct the public to enter the building instead through a basement side door. “While I recognize the reasons for this change,” Justice Breyer wrote, “I find dispiriting the Court’s decision to refuse to permit the public to enter” through the “Court’s main entrance and front steps.”¹¹ A student of architecture and a champion of the Court’s public image, Justice Breyer saw in those grand doors an important “symbol of dignified openness and meaningful access to equal justice under law.”¹² And he worried what closing them might convey.

How much had changed since then. Surely it was lost on no one that the building we entered for the Justice’s final reunion was now a fortress. Closed to the public altogether, it was surrounded on all sides by ten-foot-tall riot fencing — erected, according to a string of evenly spaced signs, by “order of the Supreme Court Marshal.” Not even the basement side door remained open.

We all knew why. A few weeks earlier, a leaked draft of the Court’s opinion in *Dobbs v. Jackson Women’s Health Organization*¹³ had ricocheted across the country, letting the world know what was soon to come.¹⁴ The Court would overturn *Roe v. Wade*,¹⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁶ and numerous other precedents that for fifty years had guaranteed women the essential right to control their bodies and their lives by deciding when and whether to give birth. Writing one of the many opinions reaffirming those precedents, Justice Breyer once explained how this essential right had become a part of our constitutional fabric over “the course of a generation,” as the Supreme Court “determined and then redetermined that the Constitution offers basic protection to the woman’s right to choose.”¹⁷

Now, the Court was poised to tear that right away. Overruling *Roe*, it would actively deny women “meaningful access to equal justice under

¹¹ *Statement Concerning the Closing of the Supreme Court’s Front Entrance*, 2009 J. SUP. CT. U.S. 831, 831–32 (2010) (Breyer, J.).

¹² *Id.* at 832.

¹³ 142 S. Ct. 2228 (2022).

¹⁴ See Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> [<https://perma.cc/N3P4-WWKR>].

¹⁵ 410 U.S. 113 (1973).

¹⁶ 505 U.S. 833 (1992).

¹⁷ *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (citing *Casey*, 505 U.S. 833; *Roe*, 410 U.S. 113).

law,” not in symbol but in real life. The doors it was slamming shut, to abortion clinics across the country, would lock millions of women into a future long ago left behind.

One by one, the Justices who voted to overturn *Roe* appeared on the screens. Measured against the three decades that Justice Breyer served on the Court, most of them were newcomers. Three had served with him only a few years, each of them joining the Court under a cloud of ignominy. One was confirmed in the face of what the President who nominated him called “very credible” allegations of sexual assault.¹⁸ Two others were muscled into their seats through the modern-day equivalent of court packing, as Republican Senators twice rewrote the ground rules governing judicial confirmations in an election year.¹⁹ All three were nominated by a President who lost the popular vote by nearly three million votes and were confirmed by a bloc of senators who earned millions fewer votes than the senators opposing their nominations.²⁰

Together, these three newest Justices cast three of the five votes to overturn *Casey* and *Roe*. Without them, that outcome would have been impossible.

Now, appearing on the screens before us, they and the other Justices in the *Dobbs* majority offered their prerecorded tributes to Justice Breyer. They praised him for his decades-long commitment to the Court. They praised his even longer service to the country. Most of all, they praised his abiding allegiance to the Constitution, a copy of which, they noted, he carried with him in his breast pocket, wherever he went.

It was hard to watch.

¹⁸ Mairead McArdle, *Trump: Kavanaugh Accuser a “Credible” Witness*, NAT’L REV. (Sept. 28, 2018, 3:41 PM), <https://www.nationalreview.com/news/donald-trump-brett-kavanaugh-accuser-a-credible-witness> [<https://perma.cc/N625-67QL>].

¹⁹ As summarized by a recent presidential commission convened to study these events, when “Justice Antonin Scalia died in February 2016, the Republican majority in the Senate refused to consider President Barack Obama’s March 2016 nomination of Chief Judge Merrick Garland to fill that seat,” arguing “that the nation was poised in a matter of months to elect a new President, who should be able to appoint Justice Scalia’s successor.” PRESIDENTIAL COMM’N ON THE SUP. CT. OF THE U.S., FINAL REPORT 14 (2021). As numerous critics observed, “the Senate majority’s refusal to take any formal action at all” on Judge Garland’s nomination disregarded “longstanding norms” and broke with “historical practice dating back to the nineteenth century.” *Id.* at 15–16. Yet just two years later, when Justice Ruth Bader Ginsburg died during the final days of the Trump Administration, the same Republican Senate leadership reversed course, racing to take “up President Trump’s nomination of Judge Amy Coney Barrett and confirm[ing] her in one month, on October 26, after voting in the 2020 presidential election had already commenced.” *Id.* at 14.

²⁰ See Adam Cole, *The Supreme Court Is About to Hit an Undemocratic Milestone*, VOX (Sept. 28, 2020, 3:00 AM), <https://www.vox.com/21456620/supreme-court-scotus-undemocratic-milestone-minority-rule> [<https://perma.cc/KHY4-WY9X>] (noting that Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett were all confirmed by a bloc of Senators who “received millions fewer votes than the senators who opposed their confirmations”); see also Kenneth T. Walsh, *Clinton Wins Popular Vote by Nearly 3 Million Ballots*, U.S. NEWS & WORLD REP. (Dec. 21, 2016, 7:34 AM), <https://www.usnews.com/news/ken-walshs-washington/articles/2016-12-21/hillary-clinton-wins-popular-vote-by-nearly-3-million-ballots> [<https://perma.cc/S8QF-HL5Y>].

In part it was hard to watch them, knowing what they were about to do, and knowing that they were only just getting started. After all, as the dissenting Justices in *Dobbs* would later write, if “a new and bare majority” of the Court could eliminate “a 50-year-old constitutional right that safeguards women’s freedom and equal station,” what will happen when “the other shoe drops, courtesy of that same five-person majority”?²¹ What “other rights, from contraception to same-sex intimacy and marriage” might now be “in jeopardy”?²²

But it was also hard to watch him, watching them, knowing him as we do. Because if there is one thing we know about Justice Breyer, it is that he is and has always been the Court’s eternal optimist. The year I clerked for him, he lost, and lost, and lost again. In just the final week of the Term he authored a trio of dissents that totaled 132 pages in the *U.S. Reports* (including appendices).²³ He read two of those dissents aloud from the bench in a single day.²⁴ Through all of that, and for more than a decade on afterwards, he was optimistic. He believed in the Court, even when he disagreed with its rulings, as happened frequently in divided cases. More than that, though, he defended the Court, against anyone who might call its legitimacy into question.

Never was that defense more vigorous than during his final Term. In those last few months, prominent members of Congress introduced legislation to increase the Court’s size. If passed, such a law would give President Biden the opportunity to appoint multiple new Justices to the Court, and thus to counter the radical and ill-gotten power of the Court’s new majority.²⁵ For his part, President Biden, an institutionalist through and through, went so far as to convene a commission (on which

²¹ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2349–50 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

²² *Id.* at 2350.

²³ See *McDonald v. City of Chicago*, 561 U.S. 742, 912–44 (2010) (Breyer, J., dissenting); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 514–92 (2010) (Breyer, J., dissenting); *Holder v. Humanitarian L. Project*, 561 U.S. 1, 40–62 (2010) (Breyer, J., dissenting).

²⁴ For the oral dissents in *McDonald* and *Free Enterprise*, both delivered on the last day of the Term, see Opinion Announcement at 14:12, *McDonald* (No. 08-1521), https://apps.oyez.org/player/#/roberts4/opinion_announcement_audio/21994 [<https://perma.cc/A72K-LNK6>]; and Opinion Announcement at 13:26, *Free Enter. Fund* (No. 08-861), https://apps.oyez.org/player/#/roberts4/opinion_announcement_audio/22861 [<https://perma.cc/PH4H-J6EK>]. Two of these three dissents were later featured in these pages in a Tribute that marked Justice Breyer’s twentieth anniversary on the Court. See Martha A. Field, Tribute, Holder v. Humanitarian Law Project: *Justice Breyer, Dissenting*, in *Essays in Honor of Justice Stephen G. Breyer*, 128 HARV. L. REV. 434 (2014); Laurence H. Tribe, Tribute, *Peek-a-Boo: Justice Breyer, Dissenting*, in *Essays in Honor of Justice Stephen G. Breyer*, *supra*, at 498.

²⁵ See Judiciary Act of 2021, H.R. 2584, 117th Cong.; Judiciary Act of 2021, S. 1141, 117th Cong. The legislation drew over sixty cosponsors, including Senators Elizabeth Warren, Tina Smith, and Edward Markey, and House Judiciary Committee Chairman Jerrold Nadler. See *Cosponsors: H.R. 2584 — 117th Congress (2021–2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/2584/cosponsors> [<https://perma.cc/R6WX-5U85>]; *Cosponsors: S. 1141 — 117th Congress (2021–2022)*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/1141/cosponsors> [<https://perma.cc/J33P-793V>].

I served) to study that proposal, confirming its status as a measure worth serious consideration.²⁶

In the face of all this, the Justices were largely silent. Except for Justice Breyer. In lectures, in interviews, and in the final book he wrote while on the Court, he took to the ramparts to defend his institution's legitimacy and authority.²⁷ He warned of the perils he saw for the country if we should ever lose faith in the Court. Each time he spoke out, I heard echoes of a refrain he had delivered so many times over the years. The day the public comes to view its Justices as "junior-varsity politicians in robes," he would caution, is the day we will have lost our faith in the rule of law.²⁸

Watching him as he watched the faces on those screens, knowing that he, like us, knew what they were about to do, I couldn't help but wonder. Did he still believe it? In a strange way, when I was his clerk, I counted on Justice Breyer's optimism. Working for him for just one year, it was easy to get invested in each doctrinal battle — to take each loss as the loss. Through that, he was usually the one reassuring us. Telling us not to worry. "There's always next time," he would say.

Except now there isn't. The Justices who made his optimism possible — Justices who might sometimes vote for moderation, or restraint, or to abide by precedents they disagreed with — those Justices are gone. And so too now is he. Was his optimism gone as well? I feared perhaps it might be, as I watched the Court's new majority race him to the door, determined, it seemed, to belie his faith in its legitimacy before he could formally retire.

A few weeks after seeing him in that hall, as I sat to read his dissenting words in *Dobbs*, I could only conclude the Court had won. Coauthored with Justices Sotomayor and Kagan, these were among Justice Breyer's last words as a member of the Supreme Court. They were words I could scarcely have imagined him saying, which made them all the more powerful to read.

"*Roe* has stood for fifty years," he and his dissenting colleagues observed.²⁹ In all that time "nothing has changed to support" its elimination.³⁰ "All that has changed is this Court."³¹

Echoing Justice Breyer's long-held fears about a politicized judiciary, the dissenters cautioned once more against a mode of judging in which

²⁶ See PRESIDENTIAL COMM'N ON THE SUP. CT. OF THE U.S., *supra* note 19, at 1–2.

²⁷ See, e.g., STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* (2021); Stephen G. Breyer, Assoc. Just. of the Sup. Ct. of the U.S., *The Scalia Lecture: The Authority of the Court and the Peril of Politics* (Apr. 6, 2021), <https://youtu.be/bHxTQxDVTdU> [<https://perma.cc/J9ZN-TQWP>].

²⁸ Cf. BREYER, *supra* note 27, at 62–63.

²⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2348 (2022) (Breyer, Sotomayor, and Kagan, JJ., dissenting).

³⁰ *Id.* at 2349.

³¹ *Id.*

“constitutional protections hung by a thread” and “a new majority, adhering to a new ‘doctrinal school,’ could ‘by dint of numbers’ alone expunge” our constitutional rights.³² And yet, they lamented, it “is hard — no, it is impossible — to conclude that anything else has happened here.”³³ A “new and bare majority of this Court — acting at practically the first moment possible — overrules *Roe* and *Casey*.”³⁴ And in so doing, Justice Breyer concluded, “it undermines the Court’s legitimacy.”³⁵

In the end, even Justice Breyer, it seemed, came to concede that the public could no longer avoid the “view that ‘this institution is little different from the two political branches of the Government.’”³⁶

Junior-varsity politicians, but in robes.

At some point, the time comes for each Supreme Court Justice to say his bon voyage. I imagine, when that moment arrives, it carries with it real sadness. It is hard to say goodbye to an institution you love. How much harder still it must be when it is not you who leaves the Court, but rather the Court that leaves you. When it abandons its most optimistic and steadfast champion, leaving him so little to defend.

Exiting the hall that night, I wondered how much more the Court would change in the years to come, with Justice Breyer watching now from the sidelines. Turning to go, I said my quiet goodbye. To Justice Breyer. And to a Court that no longer deserved him.

STEPHEN BREYER AND THE SPIRIT OF LIBERTY

*Jenny S. Martinez**

Stephen Breyer is the kind of judge a constitutional democracy needs to function well. Since he announced his retirement, I have had several occasions to reflect along with other former law clerks on his service. Different groups brainstormed words to capture the man and our experiences with him. Some of the most frequently mentioned included pragmatist, relentless optimist, public servant, educator, modest, open-minded, inclusive, consensus builder.

³² *Id.* at 2350 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* (quoting *Casey*, 505 U.S. at 864).

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His opinions reflect this spirit. He cared about the impact of decisions on ordinary people. He respected the work of trial judges and government officials doing hard work on the front lines.³⁷ He cared about the Constitution's promise of equality³⁸ as well as liberty.³⁹ He tried to write clearly and candidly so that ordinary citizens could understand decisions.⁴⁰

Breyer's judicial modesty was reflected in his frequent citation of Judge Learned Hand's famous statement that "the spirit of liberty is the spirit which is not too sure that it is right."⁴¹ This spirit of liberty, Judge Learned Hand explained, is the "spirit which seeks to understand the minds of other men and women," and the "spirit which weights their interests alongside its own without bias."⁴² As a judge, this is what Breyer tried to do.

Being open-minded is not the same as lacking conviction. When I was a law clerk, Breyer was relentless in looking for ways to persuade others who did not initially see things his way. As a law clerk, you knew you had done well for the day when he would abruptly end the conversation and walk out the door saying: "That's a good point — I'm going to have to go talk to Sandra [Day O'Connor] about that." Or Tony [Kennedy]. Or Nino [Scalia]. While he agreed with some colleagues more often than others, Breyer retained a faith that it was worth continuing the dialogue with all of them. People, he would say to the clerks, sometimes change their minds.

Breyer's mentorship of his law clerks also reflected this spirit: his inclusiveness, generosity, and desire not only to share his knowledge but also to learn from others and their experiences of the world. Indeed, he was famous around the Court for seeking out the opinions of any clerk

³⁷ See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 848–49 (2007) (Breyer, J., dissenting) ("Moreover, giving some degree of weight to a local school board's knowledge, expertise, and concerns in these particular matters is not inconsistent with rigorous judicial scrutiny. It simply recognizes that judges are not well suited to act as school administrators.").

³⁸ See *id.* at 867–68 ("It was not long ago that people of different races drank from separate fountains, rode on separate buses, and studied in separate schools. In this Court's finest hour, *Brown v. Board of Education* challenged this history and helped to change it. For *Brown* held out a promise. . . . It was the promise of true racial equality — not as a matter of fine words on paper, but as a matter of everyday life in the Nation's cities and schools. It was about the nature of a democracy that must work for all Americans. It sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.").

³⁹ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

⁴⁰ STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 127 (2005) (arguing that "transparency of rationale permits informed public criticism of opinions" and "that criticism, in a democracy, plays an important role in checking abuse of judicial power").

⁴¹ Learned Hand, *The Spirit of Liberty* (May 21, 1944), reprinted in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 189, 190 (Irving Dilliard ed., 3d ed. 1960); see BREYER, *supra* note 40, at 5–6 (paraphrasing and citing Judge Hand's quote).

⁴² Hand, *supra* note 41, at 190.

he ran into, not just his own. If a friend from another chambers happened to be in the clerks' office when Justice Breyer walked in, he generally wanted to know what they thought about the case he had come to talk about as well. Moreover, the ranks of Supreme Court clerks have historically lacked diversity, but a Breyer-clerk reunion resembles America more than most. The appointment of his former law clerk Ketanji Brown Jackson as his successor on the Court reflects this part of his legacy, as well as the contributions to society of the many former Breyer clerks in public service, in distinguished roles in private practice, and throughout academia.

The list of adjectives with which this essay opens describes not only Breyer as a person, but also aligns with his normative vision of what a Supreme Court Justice ought to be. Breyer explained his judicial philosophy most clearly in his book *Active Liberty*.⁴³ Breyer drew the idea of "active liberty" from a variety of political theorists. When people think of liberty as mere freedom from government oppression, he argues, they are missing half the picture. By active liberty, Breyer also means "the freedom to participate in the government itself."⁴⁴ "[C]ourts," he argues, "should take greater account of the Constitution's democratic nature when they interpret constitutional and statutory texts."⁴⁵ The U.S. Constitution, he argues, creates a particular kind of government: "that government is democratic; it avoids concentration of too much power in too few hands; it protects personal liberty; it insists that the law respect each individual equally; and it acts only upon the basis of law itself."⁴⁶

Where courts are concerned, Breyer invokes Judge Learned Hand's spirit of liberty: they should not be too sure that they are right and everyone else is wrong. Thus, he argues generally for judicial restraint and deference to those closer to the problem and more accountable to the people,⁴⁷ except where the overall project of constitutional governance requires court intervention.⁴⁸ Moreover, he argues for attention to the practical consequences of judicial decisions as a kind of faithfulness to the democratic process.⁴⁹ In interpreting both constitutional and statutory texts, he contends judges should look at both purpose and consequences: Why did the people enact this law, and what are the

⁴³ BREYER, *supra* note 40.

⁴⁴ *Id.* at 3.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 8–9.

⁴⁷ *See id.* at 17.

⁴⁸ *Cf., e.g.,* *Glossip v. Gross*, 135 S. Ct. 2726, 2776 (2015) (Breyer, J., dissenting) ("I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.")

⁴⁹ BREYER, *supra* note 40, at 18.

consequences of one or more possible interpretations in light of those objectives.⁵⁰

As Breyer explains, all judges rely on basic instruments of interpretation, such as text, history, original meaning or intent, precedent, and consequences.⁵¹ But they mix these instruments in different ways, and with different emphasis.⁵² In different eras, Breyer notes, the Supreme Court has elevated different themes through its mix of interpretive methods.⁵³ In the early twentieth century, for example, he argues the Court overemphasized property rights in cases like *Lochner v. New York*,⁵⁴ while underemphasizing the “basic objectives of the Civil War amendments” to “draw all citizens, irrespective of race, into the community.”⁵⁵ The overarching constitutional theme Breyer thinks most consistent with the overall Constitution is that of advancing “a form of government in which all citizens share the government’s authority, participating in the creation of public policy”⁵⁶ — a “workable democratic government protective of individual personal liberty.”⁵⁷ While offering a positive theory of constitutional interpretation, Breyer’s theory of active liberty is also a critique of other ascendant modes of interpretation, including originalism, which he suggests do not fulfill the objectives of our democratic constitution as well as one that emphasizes active liberty.⁵⁸

Breyer’s enduring faith in our democracy, in public institutions, in the people themselves, and most of all in the Supreme Court may seem naïve at this moment.⁵⁹ By all accounts, we are a nation in crisis, at odds with itself. Confidence in public institutions, including the Supreme Court, is crumbling. Nothing, it seems, stands decided forever, and the words of Yeats resonate, again,⁶⁰ with this moment:

⁵⁰ *Id.*

⁵¹ *Id.* at 7–8.

⁵² *Id.* at 8.

⁵³ *Id.* at 9.

⁵⁴ 198 U.S. 45 (1905) (invalidating state law regulating maximum working hours for bakers as violative of bakers’ freedom of contract under the Due Process Clause).

⁵⁵ BREYER, *supra* note 40, at 10.

⁵⁶ *Id.* at 33.

⁵⁷ *Id.* at 34.

⁵⁸ *Cf.* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 858 (2007) (Breyer, J., dissenting) (“The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time. Hence it is important to consider the potential consequences of the plurality’s approach, as measured against the Constitution’s objectives.”).

⁵⁹ *See, e.g.*, Leah M. Litman, “*Hey Stephen*,” 120 MICH. L. REV. 1109, 1109 (2022) (reviewing BREYER, *supra* note 27) (challenging “the book’s assertion that the justices’ work should not be described as political” and disagreeing with its argument that “rule of law requires accepting the Court’s authority to issue decisions with which people will disagree”).

⁶⁰ *Cf.* CHINUA ACHEBE, *THINGS FALL APART* (1958); JOAN DIDION, *SLOUCHING TOWARDS BETHLEHEM* (1968). Yeats apparently thought the world might work in 2000-year

Turning and turning in the widening gyre
 The falcon cannot hear the falconer;
 Things fall apart; the centre cannot hold;
 Mere anarchy is loosed upon the world,
 The blood-dimmed tide is loosed, and everywhere
 The ceremony of innocence is drowned;
 The best lack all conviction, while the worst
 Are full of passionate intensity.⁶¹

But Breyer’s kind of pragmatic optimism is an essential ingredient in a constitutional democracy. Perhaps the recipe sometimes needs leavening with more clear-eyed cynicism about the relationship between politics and law, some more sharply edged and acidic contributions. But his kind of constitutional faith is a crucial binding element that holds the whole thing together — like eggs in a cake.⁶² Without it — and especially without it among high court judges — things fall apart.

At the moment, the spirit that governs the Court seems to be a spirit that is very sure that it is right.⁶³ With time, one hopes that the very different spirit of liberty Justice Breyer embodied will return. Our constitutional democracy may depend on it.

cycles, but his poem seems to resonate in more frequent cycles of societal upheaval. See Dorian Lynskey, “*Things Fall Apart*”: The Apocalyptic Appeal of WB Yeats’s The Second Coming, THE GUARDIAN (May 30, 2020, 6:00 AM), <https://www.theguardian.com/books/2020/may/30/things-fall-apart-the-apocalyptic-appeal-of-wb-yeats-the-second-coming> [<https://perma.cc/V9XB-GU3M>] (noting the frequent citation of Yeats).

⁶¹ WILLIAM BUTLER YEATS, *The Second Coming*, in MICHAEL ROBERTS AND THE DANCER 19, 19 (1920).

⁶² Everyone seems to understand sports analogies, but cooking metaphors, not so much. So see, for example, Nat’l Agric. Libr., U.S. Dep’t of Agric., *Binding Agents*, NAL AGRIC. THESAURUS (Feb. 23, 2016), <https://lod.nal.usda.gov/nalt/190792> [<https://perma.cc/V4NV-XJT7>] (defining “binding agents” as “[s]ubstances which hold particles, mixtures or blended products together, especially used in foods”).

⁶³ Compare *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853 (1992) (joint opinion of O’Connor, Kennedy, and Souter, JJ.) (“[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.”), with *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022) (“*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak”), and *id.* at 2272 (arguing that the *Casey* plurality “failed to remedy glaring deficiencies in *Roe*’s reasoning”).

*Jennifer Nou**

Stephen Breyer is not one to put on airs. He rode his bicycle to work.⁶⁴ He apparently mowed his own lawn.⁶⁵ When my fellow law clerks and I stayed late one night working on an emergency stay application, he went out to get us Chinese food. His lack of pretension — his informality — is one of Justice Breyer’s many virtues. It made him approachable, creating a culture in chambers that embraced straight talk. It allowed him to forge relationships with other Justices to find common ground. It helps explain his ability to write clear and accessible opinions. He would often remind his clerks to help keep his drafts free of “purple prose.” The law, in his view, was not for lawyers, but for ordinary people.⁶⁶

Informality is also an important quality in administrative law — one of then- and now-Professor Breyer’s specialties at Harvard Law School (and the topic I have been asked to address in this Tribute, which I am pleased to do). “Informality” is an imprecise term of art used to refer to agency actions with more relaxed procedures, if any. “Informal rules” refer to rules issued after notice and comment rather than cumbersome hearings under the Administrative Procedure Act (APA).⁶⁷ “Informal adjudication” refers to the myriad ways in which agencies issue orders without trial-type APA proceedings.⁶⁸ Beyond these categories, administrators also use a range of highly unstructured means to accomplish

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⁶⁴ John Shattuck, CEO, John F. Kennedy Lib. Found., Remarks at the Kennedy Library Forum: A Conversation with Justice Stephen Breyer (Sept. 21, 2003), <https://www.jfklibrary.org/events-and-awards/forums/past-forums/transcripts/a-conversation-with-justice-stephen-breyer-2003> [<https://perma.cc/37PB-72W8>] (describing Justice Breyer’s “regular practice of riding his bicycle to work almost every day”).

⁶⁵ Malcolm Gladwell, *Judge Breyer’s Life Fashioned Like His Courthouse*, WASH. POST (June 26, 1994), <https://www.washingtonpost.com/archive/politics/1994/06/26/judge-breyers-life-fashioned-like-his-courthouse/ed3cc454-180c-43fc-a4be-e16e166213a0> [<https://perma.cc/WQ7Z-GZHE>].

⁶⁶ See I. Glenn Cohen, Tribute, *Make It Work!: Justice Breyer on Patents in the Life Sciences*, in *Essays in Honor of Justice Stephen G. Breyer*, *supra* note 24, at 418, 425 (“[O]ne of the goals Justice Breyer himself has espoused in his writing and public talks [is] for the Court to talk to the people in a way they can understand.”).

⁶⁷ See *Brit. Caledonian Airways, Ltd. v. Civ. Aeronautics Bd.*, 584 F.2d 982, 983 (D.C. Cir. 1978) (distinguishing between “formal [and] informal rulemaking which mandate, respectively, trial type procedures and an opportunity for notice and comment”).

⁶⁸ According to Justice Breyer’s coauthored casebook, informal adjudication encompasses “an enormous residual category of discretionary agency actions,” many of which “really do involve essentially no procedures.” STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 474 (8th ed. 2017). The constitution or other statutes, of course, can prescribe some measure of independent procedural requirements. *Id.*

their goals: through guidance documents, media appearances, enforcement threats, and plain-old advice-giving by staff.⁶⁹

Before he joined the bench, then-Professor Breyer stressed the value of informality in setting regulatory policy. In his view, some problems were “best solved through informal give-and-take among many knowledgeable and affected parties,” rather than through more cumbersome notice-and-comment rules.⁷⁰ The latter, in his view, stymied the consideration of creative policy alternatives and made regulatory coordination unduly difficult.⁷¹ As a result, Breyer recommended that agencies look to “bargaining” more to help “reconcil[e] the need for simple regulatory rules with the diversity . . . of the industrial world.”⁷² In other words, informal negotiation with regulated entities could better account for complex considerations. Simply put, informality allowed agencies to *work*.

One way to understand Justice Breyer’s administrative law jurisprudence then is as an effort to foster workable agencies. Indeed, on the bench, Justice Breyer championed the interpretation of statutes with a firm view on the practical consequences. In *Azar v. Allina Health Services*,⁷³ for example, Justice Breyer wrote a dissent regarding a Medicare statute requiring the Department of Health and Human Services (HHS) to undergo notice and comment on any “rule, requirement, or other statement of policy . . . that establishes or changes a substantive legal standard.”⁷⁴ The question was whether this notice-and-comment requirement applied to an HHS guidance document changing a Medicare payment formula.⁷⁵ In declining to read the statute this way, Justice Breyer emphasized the “practical reason”⁷⁶ not to do so: the time-consuming nature of the process could become “a major roadblock” to Medicare’s implementation,⁷⁷ potentially “crippl[ing]” the entire program.⁷⁸ In other words, procedural flexibility was sometimes necessary to administer a complex statute.

In this manner, Justice Breyer sought to preserve the flexibility that administrative informality offered. He had, however, one important requirement: agencies had to offer sound reasons for their actions.

⁶⁹ See Todd D. Rakoff, *The Choice Between Formal and Informal Modes of Administrative Regulation*, 52 ADMIN. L. REV. 159, 162 (2000) (“Of course, it has always been true that administrators in the United States have achieved their purposes in large part through informal means — by giving speeches, threatening enforcement, or giving advice as to their view of the law.”).

⁷⁰ Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 574 (1979).

⁷¹ See *id.*

⁷² *Id.* at 586.

⁷³ 139 S. Ct. 1804 (2019).

⁷⁴ *Id.* at 1817 (Breyer, J., dissenting) (omission in original) (quoting 42 U.S.C. § 1395hh(a)(2)).

⁷⁵ *Id.* at 1818; *id.* at 1804 (majority opinion).

⁷⁶ *Id.* at 1821 (Breyer, J., dissenting).

⁷⁷ *Id.* at 1822.

⁷⁸ *Id.* (quoting Brief for Petitioner at 21, *Azar* (No. 17-1484)).

Reason-giving was an essential check on arbitrariness, a prerequisite for procedural minimalism.⁷⁹ In *FCC v. Fox Television Stations, Inc.*,⁸⁰ for instance, Justice Breyer in dissent noted that the Federal Communication Commission's (FCC) failure to address particular issues would have been fatal had the agency proceeded through notice-and-comment rule-making, given the legal obligation to respond to substantive matters.⁸¹ But even in FCC's informal adjudication, "the same failures [t]here — where the policy [was] important, the significance of the issues clear, the failures near complete — should [have] lead [the Court] to the same conclusion."⁸² In other words, informality did not excuse reasoned justification, a sentiment he expressed in other high-profile opinions as well.⁸³

As long as informal agencies offered sound reasons, Justice Breyer was also eager to preserve procedural flexibility through judicial deference. Because one risk of informality was arbitrariness or favoritism, Justice Breyer wanted assurance that discretion was being exercised by knowledgeable administrators who had carefully considered the specific problem at hand. Thus, he was willing to grant *Chevron* deference with a multifactor test that accounted for "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."⁸⁴ *Chevron* deference, in his view, should not turn only on procedural formality, but rather a number of expertise-related factors, lest judicial doctrine dampen incentives for agencies to proceed more flexibly.

Flexibility, however, was not the only value that drove Justice Breyer's appreciation for informality. The nimble back-and-forth between administrators and the public also fostered learning, mutual

⁷⁹ See Cass R. Sunstein, Tribute, *From Technocrat to Democrat, in Essays in Honor of Justice Stephen G. Breyer*, *supra* note 24, at 488, 488 (2014) (noting Justice Breyer's "insistence on reasoned decisionmaking . . . as an aspect of the rule of law, and as an indispensable check on arbitrariness").

⁸⁰ 556 U.S. 502 (2009).

⁸¹ *Id.* at 546, 560–61 (Breyer, J., dissenting).

⁸² *Id.* at 562.

⁸³ In *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), Justice Breyer observed that: The Federal Government makes tens of thousands, perhaps millions, of administrative decisions each year. And courts would be wrong to expect or insist upon administrative perfection. But here, the Enumeration Clause, the Census Act, and the nature of the risks created by the agency's decision all make clear that the decision before us is highly important to the proper functioning of our democratic system.

Id. at 2585 (Breyer, J., concurring in part and dissenting in part). Thus, it was "particularly important" to Justice Breyer to consider deficiencies in Commerce's reasoning as a basis for invalidating the agency's decision. *Id.*

⁸⁴ *Barnhart v. Walton*, 535 U.S. 212, 222 (2002); see also Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370–72, 381–82 (1986). Similar views can be found in Justice Breyer's concurring opinion in *City of Arlington v. FCC*, 569 U.S. 290, 308–10 (2013) (Breyer, J., concurring in part and concurring in the judgment).

understanding, and cooperation.⁸⁵ Against this backdrop, it is easy to understand Justice Breyer's support for institutions like the Administrative Conference of the United States (ACUS).⁸⁶ Established in 1964 to study and recommend ongoing improvements to the federal bureaucracy, ACUS is an agency composed of government officials as well as practitioners and academics.⁸⁷ While testifying before Congress in support of the agency, Justice Breyer revealingly praised the institution's ability to adopt recommendations regarding "ways to avoid unnecessary legal technicalities, controversies, and delays through agency use of negotiation."⁸⁸ Once again, Justice Breyer was alert to the ways in which administrators could exercise discretion responsively — and he was all the more enthusiastic about the prospect when such choices could be informed by recommendations written by experts drawn from different points of view.

Throughout his career, Justice Breyer's work as a jurist and scholar has been keenly attuned to the realities of administration: how those entrusted with public responsibilities can actually accomplish things, get things done. Now of course managing an agency is different than managing one's own chambers, but Justice Breyer also practiced what he preached: He dispensed with what were to him needless formalities. Instead of asking his law clerks to present long bench memos, for example, he preferred shorter write-ups and a more freewheeling discussion with us after he had carefully read the briefs. This give-and-take allowed him to get straight to the heart of every case. Indeed, Justice Breyer famously relished this dynamic at oral argument as well.

Finally, Justice Breyer embodied — and continues to embody — what it means to be a public servant, akin to those that work in administrative agencies every day. Over decades, he has served in all three branches of the federal government, including as a prosecutor and Chief Counsel to the Senate Judiciary Committee.⁸⁹ To invoke his own words regarding the role of lawyers in public service:

⁸⁵ See Breyer, *supra* note 70, at 582; *id.* at 586 ("Bargaining provides a practical method for identifying worst cases and obtaining effective cooperation in dealing with them.")

⁸⁶ *Administrative Conference of the United States: Hearing Before the Subcomm. on Com. & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 17 (2010) (statement of Hon. Stephen G. Breyer, Assoc. Just., Sup. Ct. of the U.S.), as reprinted in Antonin Scalia & Stephen G. Breyer, *Reflections on the Administrative Conference*, 83 GEO. WASH. L. REV. 1205, 1214 (2015).

⁸⁷ *Id.* 22–25 (statement of Hon. Antonin G. Scalia, Assoc. Just., Sup. Ct. of the U.S.), as reprinted in Scalia & Breyer, *supra* note 86, at 1206–08; *id.* at 17–18 (statement of Hon. Stephen G. Breyer, Assoc. Just., Sup. Ct. of the U.S.), as reprinted in Scalia & Breyer, *supra* note 86, at 1214–15.

⁸⁸ *Id.* at 17 (statement of Hon. Stephen G. Breyer, Assoc. Just., Sup. Ct. of the U.S.), as reprinted in Scalia & Breyer, *supra* note 86, at 1214–15.

⁸⁹ Joseph R. Biden, Jr., President of the U.S., Remarks by President Biden on the Retirement of Supreme Court Justice Stephen Breyer (Jan. 27, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/01/27/remarks-by-president-biden-on-the-retirement-of-supreme-court-justice-stephen-breyer> [<https://perma.cc/9DLR-G5GF>].

As judges and lawyers we have a . . . special responsibility, that of helping to preserve the traditions, habits, expectations of behavior that make the Constitution's guarantees of freedom a reality With every action — and inaction — we send a message to our peers and, more importantly, to the next generation. That message can say that standards matter, that law matters, that civic life matters, that participation matters. The lawyer's role as teacher is his most important role in public service, for it encompasses all the others.⁹⁰

Indeed, Justice Breyer taught those around him by example — “that standards matter, that law matters, that civic life matters, that participation matters.”⁹¹ Sometimes explicitly in high school classrooms and formal public lectures, but even more often in the quotidian day-to-day with his law clerks, the Supreme Court staff, and all those who were lucky enough to work with him. While the Court will miss this great teacher, his many students — both inside and outside the classroom — still have many lessons to learn from him in the years to come.

⁹⁰ Stephen Breyer, Assoc. Just., Sup. Ct. of the U.S., Gauer Distinguished Lecture in Law and Public Policy: The Legal Profession and Public Service 12 (Sept. 12, 2000), https://www.supremecourt.gov/publicinfo/speeches/sp_10-10-00.pdf [<https://perma.cc/NT4Q-TSBL>].

⁹¹ *Id.*