

JUSTICE STEPHEN G. BREYER

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After a distinguished career in public service and a judicial career characterized by an “overriding goal of . . . mak[ing] the government work better[.]”¹ Justice Stephen Breyer has reached the pinnacle of the legal profession: appointment to the Supreme Court of the United States. The lack of controversy concerning Justice Breyer’s appointment and confirmation to the Supreme Court reflects the Justice’s reputation as a “fair and evenhanded judge,”² further exemplifying the affluence Justice Breyer has achieved.

Justice Breyer’s successful judicial career was preceded by a number of educational accomplishments. In 1959, Justice Breyer obtained an A.M. *Phi Beta Kappa* from Stanford University and, two years later, received a B.A. from Oxford University.³ Shortly thereafter, Justice Breyer began a long and continued relationship with Harvard University School of Law both as a student, graduating *magna cum laude*, and later as a Professor of law.⁴ Justice Breyer further augmented his distinguished academic career by publishing several noteworthy articles and books.⁵

¹David C. Wagman, *Judge Breyer, Champion of Deregulation, Heads for the Court*, *FORT.*, July 1, 1994, at 36.

²*Id.* See also Thomas Sowell, *A Reassuring Appointment*, *FORBES*, June 20, 1994, at 84 (maintaining that Justice Breyer’s method of adjudication pleasantly countermands the recent trend of Judges who, in an attempt to pursue perfect justice, have “mired the legal system in judicially created ‘rights’ and technicalities that produce the far worse injustice of innocent, law-abiding people’s safety and lives being sacrificed on an escalating scale to reduce ever more remote dangers of an injustice to criminal defendants”).

³President Bill Clinton, *The Supreme Court: Excerpts From Clinton’s Remarks Announcing His Selection for Top Court*, *N.Y. TIMES*, May 14, 1994, at 10.

⁴*Id.* See also 2 *ALMANAC OF THE FEDERAL JUDICIARY*, § Supreme Court, at 2 (1994) [hereinafter *THE ALMANAC*].

⁵Justice Breyer has authored and co-authored several books, including *REGULATION AND ITS REFORM* (Harvard University Press, 1982), *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (Harvard University Press, Holmes Lectures, 1993), *THE FEDERAL POWER COMMISSION AND THE REGULATION OF ENERGY* (1974), and *ADMINISTRATIVE LAW AND REGULATORY POLICY* (3d ed., 1992). See *THE ALMANAC*, *supra* note 4, at 3. Additionally, the Justice has written over twenty-seven articles that have been published in various periodicals, such as *HARVARD LAW REVIEW* and *GEORGETOWN*

In addition to Justice Breyer's numerous academic achievements, the Justice held various positions within the United States Government, including a one year clerkship with the Honorable Justice Goldberg and positions in the Attorney General's office and the United States Senate.⁶ In 1980, President Carter nominated Justice Breyer to the United States Court of Appeals for the First Circuit, where the Justice eventually was named Chief Judge.⁷ During this time, Justice Breyer also was selected to the United States Sentencing Commission, where the Justice served as a member for four years.⁸

Sitting on the First Circuit, Justice Breyer penned several noteworthy decisions, illustrating the Justice's skill as a judge and refined legal theorist. Among those decisions is *Lydon v. Justices of the Boston Municipal Court*,⁹ which extended *habeas corpus* review to situations where a defendant has not been in actual custody.¹⁰ More recently, in *Associated Builders and Contractors v. Massachusetts Water Resources Authority*,¹¹ Justice Breyer

LAW JOURNAL. *See id.*

⁶Justice Breyer worked as Special Assistant to Assistant United States Attorney General from 1965 until 1967, as Assistant Special Prosecutor in the Watergate investigation during 1973, and as Special Counsel during the investigation of the Civil Aeronautics Board by the Administrative Practices Subcommittee to the Senate Judiciary Committee from 1974 until 1975. *See* THE ALMANAC, *supra* note 4, at 2. Additionally, Justice Breyer served as Chief Counsel to the Senate Judiciary Committee from 1979 through 1980. *See id.*

⁷*Id.*; Henry J. Reske, *Little Drama in Breyer Hearings: With a Moderate Court, Less at Stake for Interest Groups*, 1994 A.B.A. J. 16.

⁸*See* THE ALMANAC, *supra* note 4, at 2 (noting that Justice Breyer was a member on the United States Sentencing Commission from 1985 through 1989).

⁹698 F.2d 1 (1982), *rev'd*, 466 U.S. 294 (1984). Justice Breyer declared that the district court had jurisdiction to review the defendant's bench trial because the defendant was considered "in custody" for purposes of *habeas corpus* even though the defendant was released and the conviction was vacated pending a *de novo* review. *Lydon*, 698 F.2d at 2. The Justice further reasoned that a second *de novo* trial was barred by the Double Jeopardy Clause of the Fifth Amendment because the evidence at the first trial was insufficient for conviction. *Id.* at 5-10.

¹⁰*Lydon*, 698 F.2d at 4-7. Although accepting the First Circuit's decision granting *habeas corpus* review, the Supreme Court rejected the conclusion that the a second *de novo* trial would violate the Double Jeopardy Clause of the Fifth Amendment. *Lydon*, 466 U.S. 294 (1984).

¹¹935 F.2d 345, 360 (1st Cir. 1991) (en banc) (Breyer, C.J., dissenting), *aff'd and remanded*, *Building and Construction Trades Council v. Associated Builders and Contractors*, 113 S. Ct. 1190 (1993) [hereinafter *Trades Council*].

authored a dissenting opinion that was unanimously adopted by the Supreme Court.¹² In *Associated Builders*, Justice Breyer rejected the majority's holding that federal law prohibited a state from requiring unions to supply all contractors working on valuable state-funded construction projects.¹³ Rather, Justice Breyer insightfully asserted that because of the construction industry's special nature, Congress did not intend the National Labor Relations Act to preempt states from acting as private parties.¹⁴ Although inexhaustive and incomplete, these cases clearly illustrate Justice Breyer's distinct judicial capabilities and sound analytical approach to the law.

Equally telling examples of Justice Breyer's qualifications are found within the Justice's statements to the Senate Judiciary Committee during the confirmation hearings. Responding to challenging questions regarding the death penalty, Justice Breyer stated simply and honestly: "[i]t seems to me that the Supreme Court has considered that matter for quite a long time in a large number of cases. At this point it is settled."¹⁵ With similar grace, Justice Breyer answered abortion questions, stating that "[t]he case of *Roe v. Wade* has been the law for [twenty-one] years, or more, and it was recently affirmed by the Supreme Court of the United States. That is the law."¹⁶ Perhaps more revealing were Justice Breyer's comments about his belief "that the law must work for the people."¹⁷ In a resounding vote of approval, Justice Breyer's nomination was confirmed by a eighty-seven to nine vote.¹⁸

Considering Justice Breyer's outstanding judicial fitness, the Nation may confidently await the Justice's tenure on the Supreme Court of the United States. Justice Breyer's record suggests a well balanced, yet sophisticated judicial philosophy — characteristics that will serve the Justice well as he

¹²*Trades Council*, 113 S. Ct. at 1199.

¹³*Associated Builders*, 935 F.2d at 360-61 (1st Cir. 1991) (en banc) (Breyer, C.J., dissenting).

¹⁴*Id.*

¹⁵*See Reske, supra* note 7, at 16.

¹⁶*Id.*

¹⁷*Id.*

¹⁸*Id.* at 16, 17.

embarks upon the greatest challenge of his distinguished career.¹⁹ Recognizing Justice Breyer's past successes and anticipated achievements, the Editorial Board and general membership of the *Seton Hall Law School Constitutional Law Journal* proudly dedicate Volume 5 Book 1 to the 108th United States Supreme Court Justice, Stephen G. Breyer.

¹⁹As Thomas Sowell has noted: “[a]ll the good things that are being said about Judge Breyer as he awaits confirmation are not nearly as reassuring as the few criticisms of him that are being voiced.” Sowell, *supra* note 2, at 84.