THE EARLY CONSTITUTIONAL JURISPRUDENCE OF JUSTICE STEPHEN G. BREYER: A STUDY OF THE JUSTICE'S FIRST YEAR ON THE UNITED STATES SUPREME COURT

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I. THE BACKGROUND

As his second nominee to the Supreme Court, President Clinton chose Stephen G. Breyer,[1] the Chief Judge of the Court of Appeals for the First Circuit. The proposed successor to Justice Harry Blackmun was, like Clinton's first appointee, Ruth Bader Ginsburg, a judicial moderate with a reputation as a pragmatist on the bench.

Breyer's career has been one characterized since his youth by achievement and excellence. Breyer was born on August 15, 1938, and raised in a comfortable and successful San Francisco household. After attending prestigious Lowell High School, Breyer went to Stanford University. Following his graduation from Stanford in 1959, Breyer went to Oxford as a Marshall Scholar at Magdalen College. Breyer attended Harvard Law School, upon returning to the United States, where he excelled and graduated Cum Laude. In 1964, he clerked for Supreme Court Justice Arthur Goldberg, and in 1967 returned to Harvard to join the Law faculty. In 1979, after a lengthy tenure on the Harvard Faculty, Breyer became Counsel to the Senate Judiciary Committee, working closely with Senators Kennedy and Hatch; this association proved fortuitous when President Carter, in 1980, nominated Breyer to the Court of Appeals. Breyer's nomination was approved by the Senate Judiciary Committee, and he was sworn in on December 18, 1980.

After serving over fourteen years on the First Circuit, Breyer was nominated by President Clinton to be the 108th Justice of the United States Supreme Court. Although confirmed quite convincingly, Breyer's nomination was met with some criticism. Somewhat concerned with Breyer's professional preparation for this most prestigious legal appointment, a former colleague stated, "One of his weaknesses is the lack of life experiences he

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[1]The circumstances surrounding Justice Breyer's appointment can be found in the newspapers and magazines of the day. *See, e.g.*, Richard Lacayo, *On Second Thought . . . .*, TIME, May 23, 1994, at 40-41; Jeffrey Rosen, *Even Stephen*, THE NEW REPUBLIC, June 6, 1994, at 11-14. Most recently, see CURRENT BIOGRAPHY, June 1996, at 10-14.

brings to the Court."[2] At the time of his appointment, Breyer's experience and scholarly articles and books had been largely in the field of administrative law. Jeffrey Rosen wrote of Breyer's work on the Circuit Court of Appeals that "his opinions tended to be bolder than Ginsburg's [appellate opinions]; . . . he was more willing to work the law purely, rethinking entire doctrines from scratch; . . . yet he had not had the opportunity as an appellate judge or an administrative law scholar to think systematically about the Bill of Rights."

Notwithstanding these criticisms, it is evident, in examining Breyer's first year on the Court, that he does bring with him something valuable. This paper examines Breyer's first year on the Court, in an effort to determine the philosophic and legal approach that this exceptional and gifted man brings to the nations highest court.

II. THE OPINIONS

Breyer's opinions during his first term were models of their kind. They were free of rhetoric, crisply stated, organized, and well written, with little jargon or any ideological bent or message. Further, they were dispassionate, fact oriented, brief, and to the point, with sparse use of footnotes (unlike his colleague Justice Stevens).[3] As is true with most new appointees to the Court, in his first year Breyer was not assigned a major opinion, at least not one fraught with constitutional importance.[4] Nevertheless, he did emerge as a spokesman against the majority's activist conservative policy, especially in the field of federalism. As the Junior Justice, Justice Breyer's opinions, thus far, provide only a preview of the Justice's approach to constitutional adjudication.

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[2]Joan Biskupic, *Breyer: Pragmatic Lawyer and Judge; Supreme Court Nominee is Known as Impartial Consensus Builder*, WASHINGTON POST, June 27, 1994, at A1.

[3]In his noteworthy dissent in United States v Lopez, 115 S. Ct. 1624 (1995), there were no footnotes, as has been the case in most of his opinions for the Court.

[4]An exception was Justice William Brennan. In his first term, Justice Brennan wrote landmark decisions in the area of anti-trust, *see* United States v. DuPont, 352 U.S. 586 (1957), obscenity, *see* Roth v. United States, 353 U.S. 476 (1957), and criminal law, *see* Jencks v. United States, 353 U.S. 605 (1957). The reasons for this were several: Brennan's close and personal relationship with Chief Justice Warren, his ability to persuade and produce a consensus, his intelligence and prodigious work habits, and the make-up of the Court he joined in 1956. This was a Court on the brink of judicial revolution with Brennan and Hugo Black leading the liberal wing of the Court.

A. FEDERALISM

A substantial number of Justice Breyer's opinions have dealt with one of the great constitutional conflicts in our history — the relation of the states to the federal government. These cases involved a number of issues — the commerce power, treaty construction, and the separation of powers.

Justice Breyer, in opposing the majority of the Rehnquist Court and their efforts to scale back a broad interpretation of the Commerce Clause, has relied on decades of established doctrine. Perhaps his most philosophical and important statement was his dissent in *United States v Lopez*.[5] There the Court considered a federal statute making it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.[6] The Court held that the statute violated the Commerce Clause since, the Act "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[7] To hold the law valid, the Court stated, would be to conclude that the enumerated powers would "presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local."[8] In a more radical statement, Justice Thomas, in his concurrence, stated that it was time to review not only the substantial effects on interstate commerce but the entire commerce clause jurisprudence of the last half century since "our case law has drifted far from the original understanding of the Commerce Clause." Justice Kennedy writing for himself and Justice O'Connor, concurred in the Rehnquist opinion and argued that education is a state problem in our federal system, and because there were no commercial concerns or connections in the statute's language, the Act unconstitutionally invaded state authority. According to Justice Kennedy, "that interference contradicts the federal balance the Framers designed and that the Court is obliged to enforce."

In a dissent joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer criticized the majority for relying on "nomenclature" not reality, and on general statements, shibboleths, and formulas rather than factual analysis. "Words like 'indirect' and 'production' preclude consideration of the actual

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[5]115 S. Ct. 1624, 1657 (1995).

[6]18 U.S.C. § 922 (Supp. V 1988).

[7]*Lopez*, 115 S. Ct. at 1626.

[8]*Id.* at 1627.

effects of the activity in question upon interstate commerce."[9] Substance not form was the concern to Breyer; facts, reality and empiricism were primary.

Breyer began his dissent by defining what is known as the "substantial effects doctrine."[10] Pursuant to that doctrine, Congress may regulate even local activities if they significantly affect interstate commerce. Breyer reprimanded the Court's analysis of an isolated activities effect on commerce. The Court should not have analyzed the isolated effect of the single act of possessing a gun near a school "but rather the cumulative effect of all . . . guns possessed in or near schools."[11] Thus, according to Justice Breyer, "the specific question . . . is not whether the regulated activity sufficiently affected interstate commerce, but rather whether Congress could have had basis for so concluding."[12] Did Congress have a rational basis for determining that possessing guns near a school had a connection with commerce? Breyer answered the question affirmatively, emphasizing, "As long as one views the commerce connection, not as a 'technical legal conception', but as a 'practical one' the answer to the question must be yes."[13]

The Justice cited studies that showed the seriousness of the problem of guns in schools. The studies indicate that economic growth is traceable to increased schooling and investment in human capital.[14] Further, the studies indicated "technological changes and innovations in management techniques have altered the nature of the work place, [so] that more jobs now demand greater educational skills."[15] "[A]t least some significant part of . . . [the] productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts."[16] Surely, the Justice concluded, violence in the schools negatively affects commerce as well as our social well-being;

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[9]*Id.* at 1663 (Breyer, J., dissenting) (quoting Wickard v. Filburn, 317 U.S. 111, 120 (1942)).

[10]*Id.*

[11]*Id.* at 1658 (Breyer, J., dissenting) (citing *Wickard*, 317 U.S. at 127-28).

[12]*Id.*

[13]*Id.* at 1659 (Breyer, J., dissenting).

[14]*See id.* at 1659-61 (Breyer, J., dissenting).

[15]*Id.* at 1660 (Breyer, J., dissenting).

[16]*Id.*

therefore, Congress could certainly have found a rational basis for regulating such violence.

Justice Breyer was troubled here also by the legal uncertainty created by the Court's narrow interpretation and its return to an earlier view of commerce jurisprudence where activities were examined "problem by problem" and "instance by instance," "rather than [by] its overall effect on society."[17] To Justice Breyer such uncertainty inhibits legislators from acting since they do not know or understand the constitutionality of their efforts. Such uncertainty disrupts the necessary concept of continuity in a federal system. What Justice Stevens called a "radical" and "extraordinary" decision was just that to Breyer, because legal uncertainty is anathema to the democratic and judicial process.[18]

Allied Bruce v. Dobson[19] also involved both statutory interpretation and the Commerce Clause. In this case, Justice Breyer wrote for the majority. The case involved the Federal Arbitration Act, which makes enforceable a written arbitration provision in a contract "evidencing a transaction involving commerce."[20] A homeowner purchased termite protection, and the agreement provided for arbitration. An Alabama court held the federal statute did not apply since the contract involved intrastate commerce. Breyer disagreed and held that the federal statute did apply.

Examining the "expressive" intent of Congress, Justice Breyer, writing for the Court, determined that under the Act arbitration provisions in a contract are to be analyzed similarly to other contract terms. Further, Breyer concluded that the phrase involving commerce "signals an intent to exercise Congress's commerce power to the full."[21] The intention of the parties test is anomalous to Congressional intent. Breyer thought the contemplation of the parties test relied on by Alabama seemed contrary to the Congressional intent of speedy disposition of such arbitration clauses. Therefore, Justice Breyer concluded, the federal statute requires "only that the 'transaction' in fact involve interstate commerce . . . as it avoids the other anomalous effects

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[17]*Id.* at 1664 (Breyer, J., dissenting).

[18]Justice Breyer's dissent is deftly understated. "Not every epochal case has come in unexpected trappings. *Jones and Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough . . .; [b]ut we know what happened." *Id.* at 1657 (Breyer, J., dissenting).

[19]115 S. Ct. 834 (1995).

[20]*Id.* at 836.

[21]*Id.* at 841.

growing out of the 'contemplation of the parties test'."[22] Thus, it is evident that Justice Breyer, unlike his colleague Justice Scalia, puts emphasis on congressional intent and legislative history.

Two cases involving the Oklahoma Tax Commission were granted certiorari during Breyer's first term. The first, *Oklahoma Tax Commission v. Jefferson Lines*,[23] involved a state statute imposing a 4% tax on gross receipts for each sale of transportation for hire. A Minnesota corporation provided bus service as a common carrier in Oklahoma. In a bankruptcy action, the Tax Commission filed a proof of claim for uncollected taxes with respect to tickets for interstate travel sold by the transportation company in Oklahoma. The corporation claimed the tax violated the Commerce Clause reasoning that the tax "placed an undue burden on interstate commerce by permitting Oklahoma to collect a percentage of the full purchase price of all tickets for interstate bus travel, even though some of that value derives from bus travel through other states."[24] Rejecting this argument, a majority of the Court found for the State.

Breyer, joined by Justice O'Connor, dissented and found the tax unconstitutional.[25] Citing *Central Greyhound v. Mealy*,[26] the Justice noted the Court's reversal of the modern trend in commerce clause cases. Again he criticized the Court for failing to view the totality of the transaction. The Justice explained:

> the majority says the 'taxable event' is not transportation but a sale of a bus ticket. . . . To suggest that the tax here is constitutional simply because it lends itself to re-characterizing the taxable event as a 'sale' is to ignore economic reality. . . . [B]ecause the sales tax is framed as a percentage of the ticket price, it seems clear that the activity Oklahoma intends to tax is the transportation of passengers — not some other kind of conduct. It is a tax imposed upon interstate transit itself — the very essence of interstate commerce.[27]

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[22]*Id.* at 842.

[23]115 S. Ct. 1331.

[24]*Id.* at 1335.

[25]*Id.* at 1346 (Breyer, J., dissenting).

[26]334 U.S. 653 (1948).

[27]*Jefferson Lines*, 115 S. Ct. at 1348 (Breyer, J., dissenting).

The other Oklahoma case involved a conflict between a federal treaty with the Chickasaw Indian Nation and a state tax statute. In *Oklahoma Tax Commission v. Chicksaw Nation*,[28] the particular tax involved was a state income tax on wages the Tribe had paid to members employed by the Tribe, but who lived outside Indian country. The issue before the Court was whether the State of Oklahoma had authority over the Tribe.[29] The Court found for Oklahoma.

In a forceful dissent, joined by Justices Stevens, O'Connor and Souter, Justice Breyer emphasized the history and purpose of the treaty and found that the Treaty stated that if the Chickasaws moved west, state law would not apply to the Indian Nation. Thus, for Justice Breyer the key to the case was not the "shifting legal tax theory" employed by the majority, but rather the intent of the Treaty.[30] "The Treaty's basic objective, namely practical protection for the Tribe, suggests that this unchanging empirical impact . . . is the critical consideration."[31] Therefore, according to Justice Breyer, since the tax here was imposed on Indians who worked for the Tribe in Indian Territory and did not regulate conduct outside nor involve the issue of recovering for state services to the Tribe, the state law is an unconstitutional violation of the treaty.[32]

Reynoldsville v. Hyde[33] involved the problem of retroactivity of a Supreme Court decision as it applied to an Ohio statute. The Court had held in *Bendix v. Midveco*[34] that an Ohio law allowing tort plaintiffs an unlimited time to sue out-of-state defendants was an unconstitutional burden on interstate commerce. *Bendix* was decided while a passenger's action in negligence was pending. The Ohio Supreme Court held that *Bendix* decision could not be applied retroactively.

Writing for a unanimous Court, Breyer reversed the Ohio court on the basis of the Supremacy Clause, holding that the Constitution does not allow Ohio to continue to apply their statute to pre-*Bendix* cases. "This case does

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[28]115 S. Ct. 2214 (1995).

[29]*Id.* at 2217.

[30]*Id.* at 2226 (Breyer, J., dissenting).

[31]*Id.*

[32]*Id.*

[33]115 S. Ct. 1745 (1995).

[34]486 U.S. 888 (1988).

not involve any . . . special circumstance that might justify the result respondent seeks."[35] The case involved no new rule of law to be retroactively applied to pending cases.

B. CRIMINAL LAW AND PRISONERS' RIGHTS

Writing for the majority in *O'Neal v. McAnich*,[36] Justice Breyer stated that to deny a writ of habeas corpus in cases of grave uncertainty "would virtually guarantee that the petitioner would be held in unlawful custody — contrary to the writ's most basic tradition and purposes."[37] The case involved a habeas proceeding in which the Court had to determine whether a trial error of federal law was harmless if the judge himself were in doubt. The lower court held that if a judge is in grave doubt about the effect on the jury of this kind of error, the petitioner must lose. The Supreme Court disagreed.

For Justice Breyer, the ultimate question for the Court was whether the error substantially influence the jury's decision. If the statute is not clear as to whether an error is harmless and if a judge is in doubt about its harmlessness, Breyer wrote, the Court must rely on history and first principles, not whether some guilty petitioner might go free. "We have looked first to the consideration underlying our habeas jurisprudence and then determined whether the proposed rule would advance or interdict these considerations by weighing the marginal costs and benefits of its application on collateral review."[38]

In a 5-4 decision at the end of the Term, the Court held in *Sandin v. Conner*[39] that a prisoner's due process rights are generally limited to cases in which prison regulations impose "atypical and significant hardship" on the prisoner.[40] In *Sandin*, the State of Hawaii's prison regulations imposed the punishment of solitary confinement for violating prison rules. The petitioner was found guilty and was sentenced. Later, a review official set aside the decision and expunged it from the record. The inmate claimed that the

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[35]*Reynoldsville*, 115 S. Ct. at 1751.

[36]115 S. Ct. 992 (1995).

[37]*Id.* at 997.

[38]*Id.*

[39]115 S. Ct. 2293 (1995).

[40]*Id.* at 2300.

refusal to permit him to call certain witnesses at the original hearing was a denial of his right to due process. The petitioner, therefore, filed a "civil rights" action. Upon reaching the Court, the issue was whether solitary confinement for violating prison rules created a liberty interest under the Due Process Clause. The Court concluded that it did not, since the punishment did not "impose atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life."[41]

In dissent, Justice Breyer wrote that there was a significant change in Conner's conditions, and furthermore, that Conner was unjustifiably denied the opportunity to present witnesses on his behalf. "Thus, [Justice Breyer concluded], imposing the punishment would deprive Conner of liberty within the meaning of the Due Process Clause."[42] Replying to the majority's concern regarding interference with prison management, Breyer wrote that the Court should examine prison management's *own* specific rules. According to Justice Breyer, "the process that is 'due' in the context of prison discipline is not the full blown procedure that accompanies criminal trials; rather, 'due process' itself is a flexible concept, which, in the context of a prison, must take account of the legitimate needs of prison administration when deciding what procedural elements basic consideration of fairness requires."[43] Balancing these considerations, Justice Breyer concluded that the later expungement of the punishment could not restore the significant liberty lost.

In *Tome v. United States*,[44] a child abuse case, Breyer was joined by Chief Justice Rehnquist and Justices O'Connor and Thomas in dissent. The trial court had permitted witnesses to testify as to statements the child had made describing sexual assaults by the father. These statements were allowed to rebut the charge that the child's testimony was motivated by her desire to live with her mother. The court of appeals affirmed. The Supreme Court held that such testimony despite its relevance should not have been allowed under the Federal Rules.

In a detached analysis of Rule 801 (d)(1)(b), Justice Breyer opined that "absolute rules often allow exceptions and there are sound reasons here for permitting an exception to the timing rule where circumstances warrant."[45]

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[41]*Id.* at 2294.

[42]*Id.* at 2306 (Breyer, J., dissenting).

[43]*Id.* at 2309 (Breyer, J., dissenting).

[44]115 S. Ct. 696 (1995).

[45]*Id.* at 708 (Breyer, J., dissenting).

Thus, Justice Breyer would allow the testimony after the motive appeared, if the prior statements were consistent, and the testimony was used to "rebut a charge of recent fabrication, improper influence or motive."[46]

C. STATUTORY CONSTRUCTION

In *Heintz v. Jenkins*[47] the issue was whether the term 'debt collector' in the Fair Debt Collection Practices Act applied to lawyers who, through litigation, tried to collect consumer debts. Breyer wrote the unanimous decision holding that the statute does so apply.[48] Although a relatively straightforward opinion, one point worthy of mention is Justice Breyer's brief discussion regarding legislative history. The issue was raised when a statement by the sponsor of the Act was introduced to support the lawyers of the creditor. Rejecting the statement as legislative history, Justice Breyer stated that it could not be relevant since it was made *after* the statute became law. "It therefore is not a statement upon which other legislators might have relied."[49]

Writing for a unanimous Court in *Qualitex Co. v. Jacobson*[50] Justice Breyer held that under the Trademark Act of 1946, a color could be registered as a trademark. "If a shape, a sound and a fragrance can act as symbols why, one might ask, can a color not do the same. . . . It is the source distinguishing ability of a mark — not its ontological status as a color, shape, fragrance, word or sign — that permits it to serve these basic principles of the Trademark Law."[51]

In a case involving the Federal Arbitration Act, *First Options v. Kaplan*,[52] Justice Breyer wrote for a unanimous Court on two questions: one, whether a district court should review an arbitrator's decision that the parties agreed to arbitrate and, two, whether a court of appeals should review

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[46]*Id.* at 709 (Breyer, J., dissenting).

[47]115 S. Ct. 1489 (1995).

[48]"A lawyer who regularly tries to obtain payment of consumer debts through legal proceedings is a lawyer who regularly 'attempts' to 'collect' consumer debts." *Id.* at 1490.

[49]*Id.* at 1492.

[50]115 S. Ct. 1300 (1995).

[51]*Id.* at 1303.

[52]115 S. Ct. 1920 (1995).

a district court's decision confirming or refusing to vacate an arbitration award.[53] Since arbitration is a contract, Justice Breyer declared that courts "should apply ordinary state-law principles that govern the formation of contracts and [the courts] must have clear and unmistakable evidence that [the parties] did intend to arbitrate the issue involved."[54] Since the Court concluded that the parties did not clearly agree to arbitrate, the court of appeals "was correct that the arbitrability of the . . . dispute was subject to independent review by the Courts."[55] Otherwise courts of appeals should merely apply ordinary, not special, standards of review for arbitration awards. Justice Breyer concluded by stating a basic principle of administrative law: A review of a district court's decision "should proceed like a review of any other arbitration case, i.e., accepting findings of fact that are not 'clearly erroneous' but deciding questions of law de novo."[56]

In two cases relating to congressional enactments involving statutes of limitations, Justice Breyer concurred in one[57] and dissented in another.[58] The former case, *Plaut v. Spendthrift Farmers Inc.*, involved a statute passed after the Supreme Court decision in *Lampf v. Gilbertson*.[59] In *Lampf* it was held that private litigation in certain cases was to be governed by a uniform national limitation period. The post-Lampf statute provided that the limitation period for any private civil action commenced before the decision in December 19, 1991 and would be provided by the laws applicable in the various states. In the *Plaut* case, Justice Breyer agreed with the Court that "Congress lacks the power simply to reopen and to revise final judgments in individual cases."[60] Nevertheless, Justice Breyer proposed that the majority's absolute tone regarding this principle was unnecessary. Justice Breyer's aversion to an absolute approach is evident in the tone of his concurrence. Justice Breyer wrote:

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[53]*Id.*

[54]*Id.* at 1921.

[55]*Id.* at 1925-26.

[56]*Id.* at 1926.

[57]Plaut v. Spendthrift Farmers, Inc., 115 S. Ct. 1447 (1995).

[58]Stone v. Immigration and Naturalization Serv., 115 S. Ct. 1537 (1995).

[59]561 U.S. 350 (1991).

[60]*Plaut*, 115 S. Ct. at 1464.

> We need not, and we should not, go further to make the reopening itself, an absolute, always determinative distinction . . . or a foundation for the building of a new 'high' wall between the branches . . . . Indeed the unnecessary building of such a wall, is in itself, dangerous, because the Constitution blends, as well as separates, power in its efforts to create a government that will work for as well as protect the liberties of its citizens . . . . [I]mportant decisions of this Court have sometimes turned, not upon absolute distinctions, but upon degree.[61]

Justice Scalia, writing for the Court, professed that "[s]eparation of powers, a distinctly American political doctrine, profits from the advice authored by a distinctly American poet: 'Good fences make good neighbors'."[62] Justice Breyer's adroit reply quoted from the same Robert Frost poem: "One might consider as well that poet's caution, for he not only notes that, 'Something there is that doesn't love a wall' but also writes 'Before I build a wall I'd ask to know/ What I was walling in or walling out.'"[63]

In the other immigration case involving a Congressional enactment, *Stone v. Immigration and Naturalization Service*,[64] the Court held that a deportation order was not subject to review by the court of appeals since the petition for review was tardily filed. In a dissent joined by Justices Souter and O'Connor, Justice Breyer wrote that the particular statute did not address the timing of petitions for judicial review, hence the appellate court was free to hear the case.[65]

D. EMERGING ISSUES

In *United States v. Hayes*,[66] Justice O'Connor wrote for a unanimous Court holding that parties who did not live in a Louisiana Congressional District that was the focus of a racial gerrymandering claim, and who had not

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[61] *Id.* at 1465 (Breyer, J., concurring).

[62] *Id.* at 1463.

[63] *Id.* at 1466 (Breyer, J., concurring).

[64] 115 S. Ct. 1537 (1995).

[65] *See id.* at 1549 (Breyer, J., dissenting).

[66] 115 S. Ct. 2431 (1995).

personally been subjected to racial discrimination, lacked standing to bring suit. There were two concurring opinions joined by the so called "liberal" faction of the Court — Justices Breyer, Souter, Stevens, and Ginsburg. Justice Breyer's concurrence was brief, narrow, and did not discuss race, racial discrimination, or racial classification. Justice Breyer limited his discussion to only the facts of the case stating, "I join the Court's opinion to the extent that it discusses voters, such as those before us, who do not reside within the district that they challenge."[67]

III. VOTING ALIGNMENTS

A Statistical analysis does not evaluate judicial philosophy and is devoid of examination of particular constitutional issues before the Court. It also tends to view the Court in terms of voting blocs that are not always definitive. Despite these deficiencies, statistical analysis does, however, enable one to view voting patterns and alignments and draw certain conclusions. Even though no two Justices or group of Justices vote together "all the time," voting patterns emerge during a particular term that allow one to make certain general conclusions as to a similarity of approach to constitutional issues, consistency of alignment, and an affinity to the business of judging.

In his first year on the Court, Justice Breyer wrote a total of sixteen decisions, eight for the Court, two concurrences and six dissents. The following figures represent the percentage of time the other Justices on the Court voted with Justice Breyer:[68]

	Rehnquist	Stevens	O'Connor	Scalia	Kennedy	Souter	Thomas	Ginsburg
BREYER	67.1	70.7	74.4	59.3	72.0	82.9	58.5	82.7

Based on these figures, it is evident that Justice Breyer is philosophically allied with Justices Souter and Ginsburg, and least likely to be joined by Justices Scalia and Thomas. Peculiarly enough, however, Justice Breyer votes more often with Justice O'Connor than he does with Justice Stevens (the latter considered more "liberal") and occasionally finds himself allied with Justice Kennedy. Out of a total of sixteen 5-4 decisions by the Rehnquist Court this Term, Breyer was in the majority six times. In

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[67]*Id.* at 2439 (Breyer, J., concurring).

[68]The statistics used can be found in *The Supreme Court, 1994 Term — Leading Cases*, 109 HARV. L.REV. 111, 340-43 (1995).

those cases the alignment was as follows:[69]

1. Twice with Stevens, O'Connor, Souter and Ginsburg.
2. Twice with Stevens, Kennedy, Souter and Ginsburg.
3. Once with Rehnquist, O'Connor, Scalia and Thomas
4. Once with Stevens, O'Connor, Kennedy and Ginsburg.

Among the Rehnquist Court's "conservative majority," Justices O'Connor and Kennedy occasionally join with the more moderate group of Justices Stevens, Souter and Ginsburg and form a "new" majority. As we have seen in the discussion of Justice Breyer's opinions, there have been differences among the "minority bloc." For instance, Justices Stevens and Ginsburg took a much broader view of the due process issue in the Hawaii prison case, *Sandin v. Conner*,[70] than did Breyer. Justices Breyer, Souter, and Ginsburg have emerged as formidable, articulate adversaries of the equally formidable intellectual leader of the more conservative wing of the Court, Justice Antonin Scalia. None of the three have the mercurial nature, outspokenness, and volubility of the popular Scalia, but each is a cerebral match for him.

IV. CONCLUSION

In 1994, Justice Breyer joined a Court led by Chief Justice Rehnquist which in the late 80's and early 90's was generally a conservative activist Court, challenging many of the established constitutional principles of the previous decades. Except for the Chief Justice who is 72 and Justice Stevens, the senior and eldest member at 76, it is a fairly young Court, with an average age of 62. Should Justice Stevens and Rehnquist (who suffers from serious back ailments) retire, a President would be in a position to transform the future outlook of the Court. The current minority "bloc" of Justices Souter, Ginsburg, and Breyer might be strengthened and possibly become the majority of the Court if President Clinton were to appoint more Justices. In contrast, a Republican President would likely strengthen the "conservative" bloc of the Court. Such forecasts are obviously suspect due to so many imponderables, not the least of which is the relationship of the President with the Congress.

With possibly twenty years of service ahead of him on the Court,

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[69]*Id.* at 343.

[70]115 S. Ct. 2293 (1995).

Justice Breyer, whether in the majority or in dissent, will be a Justice to observe carefully. His careful and pragmatic approach to constitutional interpretation, coupled with his keen intelligence and brilliance, will be put to use as a "consensus builder." Unlike the redoubtable, iconoclastic, former Justice William 0. Douglas, Breyer's talents will not be applied as an outspoken loner. A recent article rather harshly criticized Justice Breyer as an "icy moderate" who passes for a liberal.[71] From his first rather uneventful year on the Court, the moderation, technical skill, and measured analysis are certainly there. As his tenure on the Court continues, as the issues change, as the moderate group perhaps expands in numbers, as his reasoned opinions and persuasive powers grow in influence, the adjective "icy" should be tempered.

A Supreme Court Justice has more independence and intellectual freedom than an appellate judge, which Breyer had been for fourteen years. In the next two decades, Breyer will have the opportunity to accept that challenge and turn his many talents to defining his understanding of the meaning of our Constitution and to assume a position of influence and leadership. What we have seen from his first year will probably be characteristic of his future career on the Court. Stephen Breyer, whose lucid and well crafted opinions disdain absolutes and definitive positions, is a Justice who defies easy categorization.

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[71]Jeffrey Toobin, *Annals of Law*, THE NEW YORKER, July 8, 1996, at 44.