



# PENN STATE LAW REVIEW

## The Legacy of a Supreme Court Clerkship: Stephen Breyer and Arthur Goldberg

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### I. INTRODUCTION

Stephen Breyer, who clerked for Arthur Goldberg, is the fourth of five Supreme Court Justices who began their legal careers as clerks to earlier Justices. Not surprisingly, these pairs tend to be in at least general ideological harmony: the conservative leaning Justice Jackson and his

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clerk William Rehnquist,<sup>1</sup> the liberal Justice Rutledge and his clerk John Paul Stevens,<sup>2</sup> and, in a second generation choice, Rehnquist's own conservative clerk, John Roberts.<sup>3</sup> One pairing, that of Chief Justice Vinson and his clerk Byron White, departs from that pattern, with athletic prowess arguably its strongest common bond, a semi-professional baseball player hiring a star football player.<sup>4</sup> It is easy, perhaps too easy, to assign Breyer's clerkship with Arthur Goldberg to the top of the first category, two clearly liberal Justices whose paths crossed in the Court's 1964 Term and whose jurisprudence would naturally reflect their shared perspective. The reality is both more complicated and more interesting.

The commonalities shared by Goldberg and Breyer are easily identified. Both grew up, a generation apart, in urban Jewish families; both achieved early and remarkable academic success; both spent some time working in other branches of government, Goldberg in the Kennedy cabinet and Breyer as counsel to the Senate Judiciary Committee; and both brought to the Court a decidedly liberal approach to issues of individual rights, an adventurous openness to the relevance of foreign law, a nuanced approach to the Establishment Clause, and a willingness to consider opposing views with civility. Yet there are equally identifiable points of divergence in their judicial conduct. Where Goldberg, the decisive fifth vote for the Warren Court majority and a lifelong advocate of its decisions, was candid about his judicial agenda and his commitment to an activist bent in pursuing it, Breyer has both described and demonstrated a quite different sense of the judicial role,

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1. For an examination of the differences between Jackson and Rehnquist, see Laura Krugman Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535 (1996).

2. Laura Krugman Ray, *Clerk and Justice: The Ties that Bind John Paul Stevens and Wiley B. Rutledge*, 41 CONN. L. REV. 211 (2008).

3. For an account of Roberts' citation to Rehnquist in the new Chief Justice's first Supreme Court majority opinion, see Laura Krugman Ray, *The Style of a Skeptic: The Opinions of Chief Justice Roberts*, 83 IND. L.J. 997, 1024 (2008).

4. Vinson tried out for a slot with the Cincinnati Reds after law school but was unsuccessful and began a legal career instead. John Henry Hatcher, *Fred M. Vinson*, THE SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, 421, 422 (Clare Cushman ed., 2nd ed. 1995). According to his biographers, Vinson "actually signed a contract to play professionally" with a Lexington, Kentucky team in the Blue Grass League but was dissuaded by his mother's "'judgment that I ought not to get side-tracked from the legal profession.'" JAMES E. ST. CLAIR & LINDA C. GUGIN, CHIEF JUSTICE FRED M. VINSON OF KENTUCKY: A POLITICAL BIOGRAPHY 13 (2002). White, an All American running back at the University of Colorado, played professional football with the Pittsburgh Pirates (later called the Steelers) and then the Detroit Lions. DENNIS J. HUTCHINSON, THE MAN WHO ONCE WAS WHIZZER WHITE, 43-70, 97-122 (1998). White, who deferred his Rhodes Scholarship to join the team, "was the highest-paid player of the day." Dennis J. Hutchinson, *Byron R. White*, in SUPREME COURT JUSTICES: ILLUSTRATED BIOGRAPHIES, 1789-1995, *supra*, at 461, 462.

one that prefers to take each case on its own merits with an eye to empirical data and pragmatic consequences. And where Goldberg's vote during his brief tenure on the Court was resolutely predictable, Breyer has retained over his more than fifteen terms the capacity to surprise. Although he has written warmly of his clerkship year with Goldberg,<sup>5</sup> Breyer's opinions reflect not the direct influence of a mentor but rather the indirect and subtle ways in which one Justice may influence the future judicial performance of another.

## II. ARTHUR GOLDBERG

### A. *A Brief Judicial Career*

Arthur Goldberg's brief tenure on the United States Supreme Court—two years and nine months—has been remembered most often for his early exit. Goldberg took the judicial oath on October 1, 1962, and, dramatically, resigned from the Court on July 25, 1965, to become President Lyndon Johnson's Ambassador to the United Nations, a move that historians and the principals involved have characterized in a variety of conflicting accounts.<sup>6</sup> What fell between, Goldberg's three full terms of service, has been accurately summarized as the arrival of the dependable fifth vote that began the Warren Court revolution in criminal procedure and individual rights.<sup>7</sup> Yet, in the years between his resignation and his death a quarter century later, much of what was written about Goldberg's jurisprudence was written by Goldberg himself.<sup>8</sup> The author of the only biography, who describes his objective as "to capture those aspects of Goldberg's life and career of greatest significance," devoted only a single, thirty-five page chapter to his

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5. See Stephen Breyer, *Clerking for Justice Goldberg*, J. SUPREME COURT HISTORY 4 (1990).

6. See *infra* text accompanying notes 144 to 156.

7. See, e.g., LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 211 (2001); BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT—A JUDICIAL BIOGRAPHY 449-50, 457 (1983); DAVID L. STEBENNE, ARTHUR J. GOLDBERG: NEW DEAL LIBERAL 317 (1996).

8. According to a bibliography of his work, Goldberg published fifteen law review articles during that period dealing with such issues as the death penalty, the First Amendment, executive power, and the role of the Supreme Court. Tim J. Watts, *A Bibliography of Arthur J. Goldberg*, 77 L. LIBRARY J. 307, 316-19 (1984-85). Goldberg also published a spirited defense of the Warren Court's jurisprudence based on a series of lectures delivered at the Northwestern University School of Law. ARTHUR J. GOLDBERG, EQUAL JUSTICE: THE WARREN ERA OF THE SUPREME COURT (1971).

subject's Supreme Court years, and all but three of those pages focus exclusively on the Justice's labor law jurisprudence.<sup>9</sup>

It is not surprising that the puzzle of Goldberg's early departure has overshadowed his judicial record. Only five Justices in the Court's history have served more briefly, and, of those, two died in office.<sup>10</sup> Two Justices in the Court's earliest years, John Rutledge and Thomas Johnson, resigned from office after less than a single year, Rutledge to become Chief Justice of the South Carolina Court of Common Pleas and Johnson for health reasons.<sup>11</sup> The only modern Justice who, like Goldberg, resigned early to assume another federal post was James F. Byrnes, who served for only fifteen months before acceding to President Franklin Roosevelt's request that he direct the Office of Economic Stabilization during World War II. Byrnes, who came to the Court from a Senate seat, was a politician who preferred an active political life to the constraints of the judicial role.<sup>12</sup> By almost all accounts Goldberg did not share that preference, left the Court reluctantly, and nursed an unrequited wish to return as Chief Justice.<sup>13</sup>

The brevity of his service is not, however, the only factor limiting Goldberg's judicial reputation. As the Warren Court's junior Justice, he authored few of the Court's major decisions and recused himself from a number of major labor law cases because of his years of union representation.<sup>14</sup> Yet his tenure, though brief, produced more than the fifth vote in support of the Court's liberal bloc. As an unabashed judicial activist, Goldberg was frequently willing to go beyond the majority's

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9. See STEBENNE, *supra* note 7, Preface, at np; 316-51. For Stebenne's discussion of Goldberg's reapportionment, criminal procedure, and individual rights cases, *see id.* at 334-37.

10. The two are Robert Trimble, appointed by President John Quincy Adams in 1826, who died in 1828, and Howell Jackson, appointed by President Benjamin Harrison in 1893, who died in 1895. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1029, 512 (Kermit L. Hall ed., 2d ed. 2005).

11. *Id.* at 519, 876.

12. *Id.* at 113, 969; Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 285-86 (2004).

13. See *infra* text accompanying notes 144-56. Byrnes subsequently served as Secretary of State under President Truman before being elected governor of South Carolina. Although Goldberg ran for governor of New York after leaving his United Nations post, he lost to Nelson Rockefeller in a campaign generally regarded as disastrous. See, e.g., Donald M. Roper, *Goldberg, Arthur Joseph*, in THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES, *supra* note 10, at 341 (referring to Goldberg's "ignominious run for governor of New York in 1970"). For a devastating account of Goldberg's campaign performance written by a harsh critic before the election, see VICTOR LASKY, ARTHUR J. GOLDBERG: THE OLD AND THE NEW 151-80 (1970).

14. According to Stebenne, "[o]f the twenty-three important such cases that the Court decided during Goldberg's three terms as an associate justice, he had to recuse himself from participating in nine." STEBENNE, *supra* note 7, at 318.

holding and propose, in concurrence, more ambitious or adventurous positions than his colleagues were then prepared to embrace; his concurrence in *Griswold v. Connecticut*, relying on the Ninth Amendment to support the right to privacy, is a case in point and remains his best known opinion.<sup>15</sup> He urged the Court, unsuccessfully, to take up the question of the constitutionality of the death penalty, an issue that the Court engaged for the first time seven years after Goldberg's departure.<sup>16</sup> And, in a quirk of history, his brief tenure may also have played a subtle part in the Court's future performance through his influence on Breyer, who went on, three decades later, to join the Court. As Goldberg himself, never shy about his accomplishments, would have been the first to insist, there is more of interest in his brief tenure than its enigmatic conclusion.

### B. *The Path to the Bench*

Arthur Goldberg's life is yet another version of the classic American success story. He was born in Chicago in 1908, the eleventh child of Jewish immigrants from Russia.<sup>17</sup> His father, a man of some education who had been a town clerk in his own country, sold produce in Chicago, delivering fruits and vegetables in a wagon drawn by a blind horse, often accompanied by his youngest son.<sup>18</sup> Goldberg's father died when he was eight, and the older children went to work to support the family. Goldberg worked too, from the age of twelve throughout his school years, at a variety of jobs, including "wrapping fish, selling shoes, and working as a page in a library"; according to his biographer, Goldberg's favorite job was selling coffee at Wrigley Field "from a large coffee urn strapped to his back."<sup>19</sup> He became the only member of his family to complete high school<sup>20</sup> and then attended Crane Junior College and DePaul University before graduating at the age of twenty-one from Northwestern University Law School in 1929 with, according to his biographer, the highest grade point average in its history; in law school he served as editor-in-chief of the *Illinois Law Review* and worked with

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15. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

16. *Furman v. Georgia*, 408 U.S. 238 (1972).

17. Robert Shaplen, *Peacemaker - I*, THE NEW YORKER, Apr. 7, 1962, at 58. Two of the Goldberg children were born and died in Russia before their parents emigrated. Another source describes Arthur as "the last of Rebecca and Joseph's six children born in this country." *Proceedings in the Supreme Court of the United States in Memory of Justice Goldberg*, 498 U.S. xv, xvii (1990).

18. Shaplen I, *supra* note 17. According to another source, the horse was blind in only one eye. *Proceedings*, *supra* note 17, at xvii.

19. STEBENNE, *supra* note 7, at 5.

20. Shaplen I, *supra* note 17, at 60.

Dean Wigmore on the third edition of his celebrated evidence treatise.<sup>21</sup> Although upon graduation Goldberg was too young to be admitted to the Illinois bar, he solved the problem by filing suit to challenge the age restriction and securing a waiver that allowed him to begin his legal career in Chicago.<sup>22</sup>

Goldberg's first job was with a Jewish law firm during the Depression, where his practice consisted principally of bankruptcies and foreclosures.<sup>23</sup> Although the position was a good one, he felt uncomfortable with its focus. According to his wife, "his idea of his work had been the law in its wider, justice-seeking scope rather than in a law practice in one specialized field. . . . I was proud that he disliked having his law work revolve around the foreclosing of mortgages."<sup>24</sup> Goldberg left the firm in 1933 to start his own practice, initially doing work for other lawyers and gradually representing union clients.<sup>25</sup> During World War II, Goldberg was recruited by William J. Donovan of the Office of Strategic Services and charged with creating an international intelligence network of labor leaders.<sup>26</sup> After leaving the OSS with the rank of major, Goldberg returned to his labor practice in Chicago, although he remained available to assist Donovan in the last months of the war.<sup>27</sup> In 1948 he became chief counsel for the Congress of Industrial Organizations and for the steelworkers union and was subsequently instrumental in engineering the merger of the C.I.O. with the American Federation of Labor, even resolving a sticking point in the negotiations by proposing a name for the new entity that was acceptable to both sides.<sup>28</sup> In 1961, when President Kennedy appointed him

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21. STEBENNE, *supra* note 7, at 5-6. In the introduction to the issue of the NORTHWESTERN UNIVERSITY LAW REVIEW dedicated to Goldberg following his death, Robert Bennett, dean of the law school, expressed skepticism about the claim that Goldberg had achieved the highest grade point average in the school's history:

The claim later heard that Goldberg attained the "highest average ever" at Northwestern is at least unverifiable and probably meaningless, given the repeated changes in grading systems since that time. But it is the kind of claim that comes to be attached to legendary figures in law schools. One still hears a similar claim made about Louis Brandeis at Harvard, and John Paul Stevens here at Northwestern.

Robert W. Bennett, *In Memoriam Arthur J. Goldberg 1908-1990*, 84 NW. U. L. REV. 807 (1990).

22. Bennett, *supra* note 21, at 6.

23. *Id.* at 7; Shaplen I, *supra* note 17, at 63.

24. DOROTHY GOLDBERG, A PRIVATE VIEW OF A PUBLIC LIFE 3 (1975).

25. Shaplen I, *supra* note 17, at 63.

26. *Proceedings*, *supra* note 17, at xviii. For a detailed account of Goldberg's activities as a "labor spy," see Shaplen I, *supra* note 17, at 73-74; STEBENNE, *supra* note 7, at 31-42.

27. STEBENNE, *supra* note 7 at 42.

28. Shaplen I, *supra* note 17, at 76, 100.

Secretary of Labor, Goldberg was immediately immersed in successful mediations that led to settlement of strikes by tugboat workers, flight engineers, and steelworkers.<sup>29</sup> The following year, Kennedy offered him what was then known as the Jewish seat on the Supreme Court following Felix Frankfurter's resignation, although the offer was apparently made with some presidential reluctance at losing Goldberg's services in the cabinet.<sup>30</sup> The nomination was approved with little controversy and without a roll call vote.<sup>31</sup> Goldberg was sworn in wearing a judicial robe bearing two union labels, the gift of two union presidents,<sup>32</sup> with another president, John F. Kennedy, in attendance.<sup>33</sup>

Despite his compelling Horatio Alger<sup>34</sup> life story and his powerful self-confidence (according to one scholar of the Warren Court, "Anyone who knew Goldberg understood that his ego dwarfed his brain,"<sup>35</sup> no mean feat), Goldberg never attempted to write an autobiography.<sup>36</sup> The best explanation for what seems an uncharacteristic modesty is Dorothy

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29. *Id.* at 70, 72, 77.

30. According to Stebenne, "The President, however, clearly would have liked him to turn down the offer, because Goldberg's key role in defining and carrying out the administration's program had made him very valuable and, in Kennedy's mind at least, indispensable. But Goldberg wanted the new assignment, which had been his dream since law school." STEBENNE, *supra* note 7, at 310. On Brandeis and Frankfurter as "distinctively Jewish justices," see ROBERT A. BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 3 (1988). Burt expressly declines to consider three other Jewish justices; Benjamin Cardozo, Abe Fortas, and Goldberg; although he finds that his argument does "have some relevance to the experience of all of these men." *Id.* at 3-4.

31. Nomination of Arthur J. Goldberg, 6 *HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916-1975* (Roy M. Mersky & J. Myron Jacobstein eds., 1977) (np, following p. 103).

32. D. GOLDBERG, *supra* note 24, at 135. The givers were Jack Potofsky, president of the Amalgamated Clothing Workers of America, and David Dubinsky, president of the International Ladies Garment Workers Union. *Id.*

33. For Goldberg's account of his swearing-in ceremony, see Arthur J. Goldberg, *A Supreme Court Vignette*, *YEARBOOK OF THE SUPREME COURT HISTORICAL SOCIETY* 24 (1986). According to Goldberg, Kennedy was "rather nonplussed and somewhat resentful at not being introduced and called upon to say a few words." *Id.* Goldberg notes that, by his own wish to avoid any "unseemly" violations of separation of powers, "during my almost two years on the Bench, I virtually had no contact with President Kennedy." *Id.* The only exception was Goldberg's acceptance of the President's invitation to travel with him to Eleanor Roosevelt's funeral at Hyde Park. *Id.* at 24-25.

34. Horatio Alger, a nineteenth century American novelist, is widely known for his numerous books in which poor but hard-working and honest boys grow up to become successful and prosperous men. Glenn Handler, *Horatio Alger*, in 1 *THE OXFORD ENCYCLOPEDIA OF AMERICAN LITERATURE* 35 (Jay Parini ed., 2004).

35. POWE, *supra* note 7, at 212.

36. In 1983, Goldberg told an interviewer that "I guess I'm driven to write my own memoirs," but he never followed through on the project. *Oral History Interview of Arthur J. Goldberg*, March 23, 1983, Lyndon Baines Johnson Library Oral History Collection, at 3.

Goldberg's enigmatic description of her husband as having "an allergy to writing memoirs."<sup>37</sup> As he told the Senate Judiciary Committee at his confirmation hearing, Goldberg considered himself to have been "an activist" in his public career,<sup>38</sup> which suggests that he preferred taking on new challenges to reflecting on past successes. Although he also told the interviewer of an oral history he contributed to the Lyndon Baines Johnson Library that "I am a historian like yourself," the text of the interview shows Goldberg as more interested in elaborating and justifying specific episodes of his public career than in identifying its unifying themes.<sup>39</sup>

### C. *On the Bench*

Although at his confirmation hearing Goldberg was proud of his activism as a labor lawyer, he was careful to distinguish his future role, insisting that "I hope now not to be such an activist."<sup>40</sup> That statement conflicts with his wife's observation in her diary that he was "on the Yale side" of the debate between Charles Black of Yale and Paul Freund of Harvard over the proper constraints on the Court.<sup>41</sup> Later observers of Goldberg's conduct on the bench have applied the activist label in both its narrow and broad senses. Justice Stephen Breyer, Goldberg's clerk during the 1964 Term, remembered him as "among the most highly intelligent, energetic and principled men I have ever met,"<sup>42</sup> perhaps a judicial version of the "energy and zeal that . . . amazed his younger colleagues" in the Kennedy administration.<sup>43</sup> Stephen J. Friedman, summarizing Goldberg's judicial career, enlarges the term from a

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37. D. GOLDBERG, *supra* note 24, at v.

38. 6 HEARINGS, *supra* note 31, at 44. In response to Senator Wiley's question about letters "intimating that you were a Communist," Goldberg replied: "Everything I have done in my life I have done openly. I have not done anything secretly or in any way that is not subject to public scrutiny. Throughout my life I have been an activist. I hope now not to be such an activist, but I have been an activist, and I have engaged in open activity." *Id.*

39. *Oral History Interview of Arthur J. Goldberg*, *supra* note 36, at 3.

40. 6 HEARINGS, *supra* note 31, at 44.

41. STEBENNE, *supra* note 7, at 317. In her memoir, Dorothy Goldberg revised her observation, this time reporting of the Freund-Black debate that "Arthur said he was neither of the one school or the other. He believed the function of the Supreme Court was to apply the Constitution without worrying about whether or not it would be received with popular acclaim," an observation that does little to clarify the point. D. GOLDBERG, *supra* note 24, at 128. Powe cites Stebenne as evidence that "Goldberg told his wife prior to taking his seat that he intended to be an activist justice." POWE, *supra* note 7, at 211. If that was in fact the case, she apparently decided to soften the point when she drew on her diary for the memoir.

42. Stephen G. Breyer, *Preface to THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS I* (Jennifer M. Lowe ed., 1994).

43. Robert Shaplen, *Peacemaker - II*, THE NEW YORKER, Apr. 14, 1962, at 49.

personal quality to an ideological approach, noting that “most apparent from the outset was Justice Goldberg’s strong commitment to an activist role on the Court,”<sup>44</sup> illustrated by his willingness “to set out a wholly new constitutional ground with a verve not ordinarily characteristic of a new Justice.”<sup>45</sup> Goldberg’s colleague, Justice Sherman Minton, was blunter in his assessment, calling Goldberg “a walking Constitutional Convention!”<sup>46</sup> Whatever Goldberg’s frame of mind before taking his seat, he had no qualms in later years about defending the Warren Court’s approach on the ground that “proper respect for the democratic process—the philosophy that underlies ‘judicial restraint’—is perfectly compatible with ‘activism’ in some areas, particularly where the rights of minorities or the health of the democratic process itself are at issue.”<sup>47</sup>

In his three terms on the Court, Goldberg’s energy level did not manifest itself through an unusually prolific opinion output. In the 1962 Term, he wrote twelve opinions for the Court, six concurrences, and three dissents, a total of twenty-one opinions.<sup>48</sup> In the 1963 Term, he wrote fourteen opinions for the Court, six concurrences, and eight dissents, for a total of twenty-eight opinions. And in his final year, the 1964 Term, he wrote ten opinions for the Court, eight concurrences, and eleven dissents, for a total of twenty-nine opinions. Although his cumulative total of seventy-eight opinions put Goldberg well behind one of his colleagues, Justice Harlan, who authored 122 opinions for the three terms, Harlan’s high number is largely accounted for by his repeated dissents from Warren Court initiatives. Compared to his allies on the Court, Goldberg was not a particularly activist opinion writer; Justice Black, for example, produced seventy-seven opinions over those three terms, and Justice Douglas, a famously rapid writer, eighty-two. In short, Goldberg was not inclined to write separately more often than other Justices with similar views.

Even though his opinions do not provide a quantitative measure of Goldberg’s energetic approach to his new position, they nonetheless reveal the “verve” noted by Friedman in another way. Goldberg was more than the Warren Court’s critical fifth vote; he was also an

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44. Stephen J. Friedman, *Arthur J. Goldberg*, in 4 *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* 2980 (Leon Friedman & Fred L. Israel eds., 1969).

45. *Id.*

46. SCHWARTZ, *supra* note 7, at 446. Minton made the comment in a 1964 letter to Felix Frankfurter, whose seat Goldberg took. Minton added of Goldberg, “Wow what an activist he is!” *Id.*

47. GOLDBERG, *supra* note 8, at 52.

48. The statistics in this paragraph are drawn from the HARVARD LAW REVIEW’S annual survey of the Court’s terms. 77 HARV. L. REV. 86 (1963); 78 HARV. L. REV. 182 (1964); 79 HARV. L. REV. 108 (1965).

independent innovator who at times was prepared to go beyond its resolution of a case. In this sense, Goldberg's concurrences tend to be a more precise reflection of both his substantive jurisprudence and his conception of a Justice's proper role than his votes or his opinions written for the Court.

### 1. Writing for the Majority

As an author of majority opinions, Goldberg was usually pragmatic and rhetorically restrained, working closely with the case record and avoiding harsh denunciations of constitutional violations. In *Gibson v. Florida Legislative Investigation Committee*,<sup>49</sup> one of his earliest and most important opinions for the Court, he rejected a legislative subpoena seeking N.A.A.C.P. membership files as part of an investigation into Communist infiltration after finding the record "insufficient to show a substantial connection between the Miami branch of the N.A.A.C.P. and Communist activities."<sup>50</sup> Although the decision found a violation of the right of free association by the committee's subpoena, Goldberg was careful to note that the opinion dealt only with "the manner in which such power may be exercised"<sup>51</sup> and refrained from any direct criticism of the committee's overreaching or any celebration of the right itself.<sup>52</sup> In *Cox v. State of Louisiana*,<sup>53</sup> Goldberg found a violation of a civil rights protester's rights of free speech and assembly in his conviction for obstructing public passages based upon a viewing of a film of the incident. Although Goldberg criticized the statute for its lack of standards to guide local officials, he also drew a broader principle from the Court's precedents: that "[t]he rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."<sup>54</sup> The tone, once again, is restrained, identifying the rival values that the Court has weighed through its examination of the factual record.

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49. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963). The case was reargued on October 10 and 11, 1962, at the start of Goldberg's first term on the Court.

50. *Id.* at 551 (emphasis removed).

51. *Id.* at 557.

52. Goldberg's opinion in *Gibson* is also noteworthy for the Court's first use of "chilling" to describe what he termed "the deterrent and 'chilling' effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association." *Id.* at 556. As Powe notes, in future cases the term "lost the single quotation marks around chilling." POWE, *supra* note 7, at 220.

53. *Cox v. Louisiana*, 379 U.S. 536 (1965).

54. *Id.* at 554.

The same muted tone and practical assessment inform two Court opinions handed down at the close of Goldberg's first term, *Escobedo v. State of Illinois*<sup>55</sup> and *Aptheker v. Secretary of State*.<sup>56</sup> In *Escobedo*, the Court extended the Sixth Amendment right to counsel to the time when a police investigation has "focus[ed] on a particular suspect."<sup>57</sup> Adopting "a functional rather than a formal test" of the point at which this occurs,<sup>58</sup> Goldberg rested the decision on a principle formulated to avoid any direct accusation of deliberate police practices: the "lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."<sup>59</sup> In *Aptheker*, the Court struck down as facially unconstitutional a provision making the application for or use of a passport by a member of a Communist organization a felony.<sup>60</sup> Goldberg took note of the opposing national security interest behind the statute, quoting his own statement in *Kennedy v. Mendoza-Martinez* that "while the Constitution protects against invasions of individual rights, it is not a suicide pact."<sup>61</sup> Nonetheless, finding that this statute "sweeps too widely and too indiscriminately across the liberty guaranteed in the Fifth Amendment," Goldberg concluded that "here, as elsewhere, precision must be the touchstone of legislation so affecting basic freedoms."<sup>62</sup>

What these cases have in common, in addition to their measured tone, is accompanying dissenting opinions from all or some of the members of the Warren Court's four member conservative bloc. In *Gibson*, *Escobedo*, and *Mendoza-Martinez*, Justices Harlan, Clark, Stewart, and White all joined in dissent; in *Aptheker*, Clark and Harlan dissented in full and White in part; in *Cox*, White and Harlan dissented in part. Speaking for the Court, Goldberg seems to have brought to the task his approach honed through years of successful mediations, a willingness to stake out his position in a non-inflammatory manner by identifying common ground with the minority at the same moment that he established the majority's basis for its opposite result. His tendency was always to look to the specific context of the case before him, what he

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55. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

56. *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964).

57. *Escobedo*, 378 U.S. at 490.

58. *Id.* at 487 n.6.

59. *Id.* at 490.

60. *Aptheker*, 378 U.S. at 505.

61. *Id.* at 509 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160). In the earlier case, Goldberg wrote for the majority to strike down statutes making the evasion of military service in time of war by absence from the country punishable by loss of citizenship. *Kennedy*, 372 U.S. at 165-66.

62. *Aptheker*, 378 U.S. at 514.

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called “the recognition that the Fourth Amendment’s commands, like all constitutional requirements, are practical and not abstract.”<sup>63</sup> As a result, his majority opinions provide few memorable or sweeping pronouncements of the constitutional values he elsewhere celebrated in his separate opinions and in a stream of law review articles and essays in more popular forums. Writing majority opinions on a deeply divided Court, Goldberg preferred to rest on the particular rather than the general, perhaps in the hope of persuading some of the usual dissenters to join or at least of leaving open channels of future engagement.

## 2. In Concurrence

It is in his concurring opinions that Goldberg’s expansive reading of constitutional protection for individual rights becomes clear. In his first term, Goldberg did not hesitate to move beyond the holding in one of the Warren Court’s landmark decisions, *New York Times v. Sullivan*,<sup>64</sup> announcing the restrictive actual malice standard for libel claims by government officials concerning their official conduct.<sup>65</sup> Concurring in the result but not endorsing Brennan’s majority opinion, Goldberg, joined only by Douglas, asserted his “belief that the Constitution affords greater protection than that provided by the Court’s standard to citizen and press in exercising the right of public criticism.”<sup>66</sup> That protection, again formulated in unqualified terms, was “an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses.”<sup>67</sup> Goldberg departed from the majority in another opinion of that term for the opposite reason, his sense that the Court had gone too far in aid of a principle that he too endorsed, endangering the very rights it aimed to protect. In *Sch. Dist. of Abington Twp. v. Schempp*,<sup>68</sup> the Court, with only a single dissent, struck down statutes requiring the reading of Bible verses and the Lord’s Prayer in public schools as a violation of the neutrality principle of the Establishment Clause. After joining the majority opinion Goldberg concurred as well, prompted by what he termed “the singular sensitivity and concern” surrounding the issue, to “add a few words in further

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63. *United States v. Ventresca*, 380 U.S. 102, 108 (1965). In additional language applicable beyond its specific context, Goldberg observed that search warrants “must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion.” *Id.*

64. *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

65. *Id.* at 279-80.

66. *Id.* at 298 (Goldberg, J., concurring in the result).

67. *Id.*

68. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

explication.”<sup>69</sup> Those words expressed his anxiety that uniform application of neutrality could in practice produce “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.”<sup>70</sup> A court determined to enforce neutrality at any cost might well, he argued, end by limiting the First Amendment rights of the “vast portion of our people” whose belief in God informs “many of our legal, political and personal values.”<sup>71</sup> The irony he identified resided in the delicacy of the judicial task, and he concluded with a practical caution for the well-intentioned majority: that “the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.”<sup>72</sup>

Even when a constitutional issue was not squarely before the Court for resolution, Goldberg felt compelled to state his concerns about its impact on individual rights forcefully and at some length. This was the situation in *Bell v. State of Maryland*,<sup>73</sup> which concerned a criminal trespass conviction of restaurant sit-in demonstrators. The six Justice majority, in an opinion written by Justice Brennan, remanded the case to the Maryland Court of Appeals for review in light of recent changes to state law. Goldberg signed onto the majority but added a lengthy concurrence, joined in part by Warren and Douglas, to counter Justice Black’s dissent addressing the merits and insisting that the Fourteenth Amendment did not bar the trespass conviction. Although Goldberg’s thirty-two page rejoinder argued in detail that the history of the Fourteenth Amendment made clear its framers’ intent to protect access rights to public accommodations, he added a second, broader basis for his position: that “the logic of *Brown v. Board of Education*, based as it was on the fundamental principle of constitutional interpretation proclaimed by Chief Justice Marshall, requires that petitioners’ claims be sustained.”<sup>74</sup> Thus, *Brown* and *Marbury v. Madison* combined to both reinforce and render superfluous the historical argument. The right at issue, asserted in identical language in the opening and concluding sections of the opinion, was simply “the right of all Americans to be treated as equal members of the community with respect to public accommodations.”<sup>75</sup> In the following term, when the Court in *Heart of Atlanta v. United States* upheld Congress’ Commerce Clause authority to enact the Civil Rights Act of 1964, Goldberg invoked his *Bell* opinion in

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69. *Id.* at 305.

70. *Id.* at 306.

71. *Id.*

72. *Id.* at 308.

73. *Bell v. Maryland*, 378 U.S. 226 (1964).

74. *Id.* at 316.

75. *Id.* at 286, 317.

his brief concurrence finding additional—and more comprehensive—authority under Section 5 of the Fourteenth Amendment. “The primary purpose” of the Act, he wrote, “as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics,”<sup>76</sup> language that, like his defined right in *Bell*, both sweeps broadly and favors the abstract over the particular.

The best known of Goldberg’s expansive concurrences and the opinion he considered his most important came in the landmark case of *Griswold v. Connecticut*<sup>77</sup> as his tenure on the Court was drawing to a close.<sup>78</sup> Goldberg joined Douglas’ opinion striking down Connecticut’s birth control statute as a violation of the unenumerated right of marital privacy before going on, as Robert McCloskey has observed, to “more unabashedly endorse[] the Court’s ability” to find such rights in the Constitution.<sup>79</sup> The focus of the concurrence was the Ninth Amendment,<sup>80</sup> as Goldberg made clear in his introductory statement that “I add these words to emphasize the relevance of that Amendment to the Court’s holding.”<sup>81</sup> Douglas had also invoked the amendment as part of his penumbra argument but, as Goldberg noted in a message to Douglas, lacked majority support to develop it further, a task that Goldberg willingly assumed.<sup>82</sup> Drawing on the language of Madison, whom Goldberg described as “almost entirely” the amendment’s author,<sup>83</sup> and Story, he concluded “that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.”<sup>84</sup> In fact, he argued,

[t]o hold that a right so basic and fundamental and so deep rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first

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76. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring).

77. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

78. *Stripping Away the Fictions: Interview with Mr. Justice Goldberg*, 6 NOVA L.J. 553, 570 (1982). He had no second thoughts about his Ninth Amendment approach, stating that “I feel strongly I was right in my concurring opinion.” *Id.*

79. ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 166 (2nd ed., rev. Sanford Levinson, 1994).

80. “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

81. *Griswold*, 381 U.S. at 487 (Goldberg, J., concurring).

82. DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 250 (1994). According to Garrow, “[I]n a cover note to Douglas, Goldberg simply said that ‘I have added some of my views about the 9th Amendment, which, as I recall the Conference discussion, you are not free to do as reflecting the views of all in the majority.’” *Id.*

83. *Griswold v. Connecticut*, 381 U.S. 479, 488 (1965).

84. *Id.* at 490.

eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever.<sup>85</sup>

Goldberg was careful to limit the nature of his reliance on the Amendment. He did not, he explained, believe that it “constitutes an independent source of rights protected from infringement by either the States or the Federal Government.”<sup>86</sup> Instead, it “simply shows the intent of the Constitution’s authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.”<sup>87</sup> And he had little difficulty in finding that the right of marital privacy was one of those fundamental rights under its protection. While Douglas labored to attach the privacy right to emanations from the specific guarantees in the Bill of Rights, Goldberg was comfortable relying on the amorphous authority of the neglected Ninth Amendment and potentially leading the way to recognition of other previously unidentified rights. As a practical matter, Goldberg’s approach was acceptable to Warren, who had been reluctant to join Douglas’ opinion. Since Goldberg’s concurrence stated that he was also joining Douglas, its effect was indirectly to join Warren as well, giving Douglas the necessary fifth vote for a majority opinion.<sup>88</sup> Goldberg’s concurrence thus did double duty, formulating an independent approach to recognition of a privacy right while also sparing the Court the discomfort of a plurality opinion in a controversial constitutional case.

### 3. In Dissent

Goldberg was less adventurous in his dissents on the merits from Court opinions. The most striking of these occurred in *Swain v. Alabama*,<sup>89</sup> what Lucas Powe calls “one of the most surprising decisions by the Warren Court,” where the majority rejected a black defendant’s claim of systematic discrimination by the state through its use of peremptory challenges to dismiss potential black jurors.<sup>90</sup> In dissent Goldberg criticized the Court for departing from both its earlier jury exclusion standards “and the view, repeatedly expressed by this Court, that distinctions between citizens solely because of their race, religion, or

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85. *Id.* at 491.

86. *Id.* at 492.

87. *Id.*

88. GARROW, *supra* note 82, at 252. Brennan joined both the Douglas and the Goldberg opinions. *Id.* at 249, 252.

89. *Swain v. Alabama*, 380 U.S. 202 (1965).

90. POWE, *supra* note 7, at 290. As Powe notes, “most surprisingly,” not even Brennan sided with the defendant. *Id.*

ancestry, are odious to the Fourteenth Amendment.”<sup>91</sup> The dissent, like his majority and concurring opinions, was restrained throughout in its rhetoric, relying heavily on a detailed review of the record and concluding that its resolution of the issue “achieves a pragmatic accommodation of the constitutional right and the operation of the preemptory challenge system without doing violence to either.”<sup>92</sup> Here, Goldberg was looking backward, not forward, in his preferred standard. Rather than proposing a new approach to the problem of discrimination in jury selection, he asked only that the Court remain true to its own earlier case law.

It was in his dissents from denials of certiorari that Goldberg showed the same willingness to exceed the bounds of present law that appears in his concurrences. The most striking of these dissents from denial of certiorari came early in his second term in *Rudolph v. Alabama*,<sup>93</sup> where Goldberg, joined by Douglas and Brennan, went beyond the issues raised by the petition to challenge the imposition of the death penalty for a rape conviction under the Eighth and Fourteenth Amendments.<sup>94</sup> Goldberg’s dissent, which he later described as “the first decision where a Justice expressed doubts about the death penalty,”<sup>95</sup> consisted of three concisely formulated questions that he believed the Court should have agreed to hear, each supported only by footnotes to relevant sources. The first question asked, “[i]n light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate ‘evolving standards of decency that mark the progress of [our] maturing society,’ or ‘standards of decency more or less universally accepted?’”<sup>96</sup> The supporting footnotes invoked, first, a United Nations survey that placed the United States among only five countries—and Alabama among only seventeen states—still engaging in the practice.<sup>97</sup> Goldberg also quoted at length from *Weems v. United States*,<sup>98</sup> a 1910 case asserting that the constitutionality of punishments should be evaluated by contemporary standards because “[t]ime works changes, brings into existence new conditions and purposes.”<sup>99</sup> The remaining

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91. *Swain*, 380 U.S. at 246. Goldberg’s dissent was joined by Warren and Douglas. *Id.* at 228.

92. *Id.*

93. *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting).

94. *Id.* at 889. The petition was denied on October 21, 1963, and rehearing was denied on November 12, 1963. *Id.*

95. *Stripping Away the Fictions*, *supra* note 78, at 558.

96. *Rudolph*, 375 U.S. at 889-90 (footnotes omitted).

97. *Id.* at 890 n.1.

98. *Weems v. United States*, 217 U.S. 349 (1910).

99. *Id.* at 373.

questions asked “Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against ‘punishments which by their excessive severity are greatly disproportionate to the offenses charged?’” and whether “permissible aims of punishment (e.g., deterrence, isolation, rehabilitation)” could “be achieved as effectively by punishing rape less severely than by death.”<sup>100</sup> The sources cited for these propositions included *Weems* and the United Nations Report on Capital Punishment.<sup>101</sup> What is most striking to a contemporary reader is Goldberg’s use of foreign law as a measure for gauging the constitutionality of American practices, an issue that has become highly divisive among the Justices in recent years. He explicitly rejects both originalism and American exclusivity as constraints on the Court’s assessment of “‘evolving standards of decency more or less universally accepted.’”<sup>102</sup> Two years before leaving the Court for the United Nations, Goldberg was already comfortable viewing American law from an international perspective.

In another dissent from denial of certiorari, Goldberg, writing only for himself, again identified a question that he thought raised significant constitutional concerns. The indigent *pro se* defendant in *Spencer v. California*<sup>103</sup> had first made and then, after examination by state appointed psychiatrists, withdrawn an insanity plea. Under California law, those psychiatrists could nonetheless testify concerning incriminating statements made to them by the defendant in the course of their examinations. The defendant’s certiorari petition argued that this outcome discriminated between affluent and indigent defendants by depriving the latter of the privilege against self-incrimination that would protect the former from testimony by their privately retained psychiatrists. Quoting *Griffin v. Illinois*<sup>104</sup> for the proposition that “all people charged with crime must, so far as the law is concerned, ‘stand on an equality before the bar of justice in every American court,’”<sup>105</sup> Goldberg found a “substantial and important question” under both equal protection and due process doctrine that he considered worthy of certiorari.<sup>106</sup> And when the Court dismissed for want of a substantial federal question a *pro se* traffic violation case challenging a Massachusetts statute that put a litigant to the choice of pleading guilty and paying a small fine or going to trial and risking a more severe

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100. *Rudolph v. Alabama*, 375 U.S. 889, 891 (1963) (Goldberg, J., dissenting).

101. *Id.* at 891 nn. 4, 6 & 7.

102. *Id.* at 890.

103. *Spencer v. California*, 377 U.S. 1007 (1964).

104. *Griffin v. Illinois*, 351 U.S. 12 (1956).

105. *Id.* at 17.

106. *Spencer*, 377 U.S. at 1009.

sanction, Goldberg, joined by Douglas, dissented because, as he concluded, “I am not convinced that the generally sound advice to ‘pay the two dollars’ necessarily reflects a constitutionally permissible requirement.”<sup>107</sup> Both cases illustrate the same openness to identifying constitutional intrusions in matters great and small meriting the Court’s attention.

Goldberg’s dissent in *Rudolph* was actually the second step in an unusual procedural strategy to place the issue of capital punishment on the Court’s docket. He described that strategy in a law review piece published almost a quarter century later:

In the summer of 1963, during my tenure on the Supreme Court, in reviewing the list of cases to be discussed when the Court reconvened for the 1963 Term in October, I found there were six capital cases seeking review by certiorari. In studying these cases, I came to the conclusion that they presented the Court with an opportunity to address explicitly for the first time the constitutionality of capital punishment. I thereupon prepared a conference memorandum on this subject which I circulated to the members of the Court for their consideration.<sup>108</sup>

In the memorandum itself, Goldberg announced that “I propose to raise the following issue: Whether, and under what circumstances, the imposition of the death penalty is proscribed by the Eighth and Fourteenth Amendments to the United States Constitution.”<sup>109</sup> His motive, he told his colleagues, was “to afford an opportunity for consideration of the matter prior to our discussion.”<sup>110</sup> The memorandum reviewed the history of the cruel and unusual punishment provision and the Court’s relevant jurisprudence before making the argument that capital punishment is unconstitutional under “‘evolving standards of decency’” and that the Court should now condemn it “as barbaric and inhuman.”<sup>111</sup> Goldberg’s approach was unapologetically aggressive. He looked at the question, he said, “in light of the worldwide trend toward abolition”<sup>112</sup> and insisted that “[i]n certain matters—especially those relating to fair procedures in criminal trials—this Court traditionally has guided rather than followed public opinion in the

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107. *Marder v. Massachusetts*, 377 U.S. 407 (1964).

108. Arthur J. Goldberg, *Death and the Supreme Court*, 15 HAST. CONST. L.Q. 1 (1987).

109. Goldberg published the memorandum more than twenty years after its original circulation. Arthur J. Goldberg, *Memorandum to the Conference Re: Capital Punishment, October Term, 1963*, 27 S. TEX. L. REV. 493 (1986).

110. *Id.*

111. *Id.* at 499.

112. *Id.*

process of articulating and establishing progressively civilized standards of decency.”<sup>113</sup> After arguing that capital punishment created the risk of “mistakenly and irremedially executing an ‘innocent’ man” and had not been shown to have a “uniquely *deterrent* effect upon potential criminals,”<sup>114</sup> Goldberg ended on a surprisingly understated note. “The foregoing,” he concluded, “expresses my substantial doubts concerning the constitutionality of the death penalty.”<sup>115</sup>

Neither his arguments nor his conciliatory conclusion impressed the conference. Predictably, he won the support of only two colleagues, Douglas and Brennan, while the Court denied certiorari in all six capital cases.<sup>116</sup> Looking back on the episode, Goldberg took comfort in the collateral effect of his effort, “alert[ing] the Bar to challenge the constitutionality of capital sentencing laws.”<sup>117</sup> Although he also took comfort in—and some credit for—the Court’s 1977 decision in *Coker v. Georgia*<sup>118</sup> “adopt[ing] my dissenting opinion in *Rudolph v. Alabama*” and holding capital punishment for rape unconstitutional,<sup>119</sup> he acknowledged that the prospects for a broader ruling were not encouraging in light of the Court’s reaffirmation of the death penalty in *Gregg v. Georgia*,<sup>120</sup> which he considered “a deplorable step backward.”<sup>121</sup> Turning his attention to the potential role of Congress, the state legislatures, and governors in abolishing the death penalty, he insisted in surprisingly strong rhetoric that “[t]hey cannot escape the reality that the executions of such persons will be nothing more than governmental mass murder”<sup>122</sup> and held out a hope, admittedly slim, for future change.

The *Rudolph* episode reveals Goldberg as a determined internal Court activist. Although Justices have long recognized the agenda-setting power of certiorari decisions and the use of published dissents from denial of certiorari to signal counsel, Goldberg was willing to go a step further. After only a single term on the Court, he took the initiative in an attempt to place the issue of capital punishment front and center long before any process of percolation in the lower courts indicated that the time was ripe for the Supreme Court to take on the controversial topic. The maneuver may well have been ill-advised, since a fourth vote

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113. *Id.* at 500.

114. *Id.* at 501-02.

115. *Id.* at 506.

116. Goldberg, *Death and the Supreme Court*, *supra* note 108, at 2.

117. *Id.*

118. *Coker v. Georgia*, 433 U.S. 584 (1977).

119. Goldberg, *Death and the Supreme Court*, *supra* note 108, at 3-4.

120. *Gregg v. Georgia*, 428 U.S. 153 (1976).

121. Goldberg, *Death and the Supreme Court*, *supra* note 108, at 3.

122. *Id.* at 6.

to grant certiorari would probably have produced another Court precedent in support of capital punishment. Yet for Goldberg the effort reflected a deep and abiding commitment to the issue. After leaving the Court, he published a series of law review articles expanding on his position, beginning with a 1970 *Harvard Law Review* piece *Declaring the Death Penalty Unconstitutional*, co-written with his former law clerk Alan Dershowitz, by then a member of the Harvard law faculty.<sup>123</sup> In that piece, the two authors repeated Goldberg's earlier arguments on the merits but went on to critique the institutional concerns that might restrain the Court from acting and to elaborate on the roles that might be played by the executive and legislative branches in finding capital punishment unconstitutional.<sup>124</sup> That broader and more sophisticated framework reflected Goldberg's continuing focus on the issue, just as his subsequent individual articles incorporated the *Coker* and *Gregg* decisions<sup>125</sup> and what he considered to be the irregular procedures by which the Court vacated a circuit court's stay of execution.<sup>126</sup> Goldberg's bitter 1982 observation about the telephone communications used to poll the Justices—"The telephone still has the edge over Federal Express"<sup>127</sup>—makes clear his persistent commitment to the issue of procedural protections in death penalty cases long after leaving the Court.

*D. Off the Bench: Later Writings*

In the years following his resignation, Goldberg remained engaged in the debate on a range of issues, like the death penalty, of continuing concern to him. He published frequently on legal topics; a comprehensive bibliography of his writings lists twenty-six law review articles,<sup>128</sup> and he wrote as well for more general publications like *The New Republic*.<sup>129</sup> There is a marked consistency, sometimes rising to the level of sheer repetition, in many of these pieces, an example of what Daniel Patrick Moynihan describes as "Goldberg's willingness to state

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123. Arthur J. Goldberg and Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970). Later pieces included Arthur J. Goldberg, *The Supreme Court Reaches Out and Touches Someone - Fatally*, 10 HAST. CONST. L.Q. 7 (1982); Arthur J. Goldberg, *The Death Penalty for Rape*, 5 HAST. CONST. L.Q. 1 (1978); Arthur J. Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973).

124. Goldberg and Dershowitz, *supra* note 123, at 1798-1818.

125. See, e.g., Goldberg, *The Death Penalty for Rape*, *supra* note 123, at 9-12.

126. See Goldberg, *The Supreme Court Reaches Out*, *supra* note 123, at 8-10.

127. *Id.* at 7.

128. Watts, *supra* note 8, at 307.

129. See, e.g., Arthur J. Goldberg, *One Supreme Court*, THE NEW REPUBLIC, Feb. 10, 1973, at 14.

arguments over and again.”<sup>130</sup> In a 1969 article entitled *Can We Afford Liberty?*, Goldberg defended the Warren Court’s privacy decisions against growing calls for more intrusive police techniques, arguing that protection of privacy “is the principal distinction between a free society and the sullen tyranny of Big Brother.”<sup>131</sup> He repeated that message in a 1982 article of the same title<sup>132</sup> and once more in 1990, the year of his death, under the slightly modified title *Can We Afford the Bill of Rights?*<sup>133</sup> The two later pieces contained specific suggestions for dealing with increases in crime while continuing to argue that “liberty is worth this small price”<sup>134</sup> of constraint on some police operations. Other pieces defended the Warren Court’s First Amendment decisions and celebrated its protection of individual rights in the face of such new challenges as judicial gag orders, the jailing of reporters for refusal to name their sources, and the Watergate scandal.<sup>135</sup> An underlying theme in these pieces is Goldberg’s unwavering defense of the Warren Court’s innovations as a valid implementation of what he called the Constitution’s “innate capacity for growth.”<sup>136</sup> Taking issue with Reagan Administration Attorney General Meese’s criticism of the Supreme Court for abandoning the framers’ original intent, Goldberg countered with what he characterized as Chief Justice Marshall’s “evolutionary concept of the nature of our Constitution,” one he found “pervasive throughout our legal history.”<sup>137</sup> Although Goldberg rejected the term “activist” as used by Meese to criticize liberal judges—he pointed out that “[t]he most ‘activist’ Supreme Court in our history was that of the

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130. Daniel Patrick Moynihan, *Introduction to ARTHUR J. GOLDBERG, THE DEFENSES OF FREEDOM: THE PUBLIC PAPERS OF ARTHUR J. GOLDBERG* viii (Daniel Patrick Moynihan ed., Harper & Row Publishers, Inc. 1966).

131. Arthur J. Goldberg, *Can We Afford Liberty?*, 117 U. PA. L. REV. 665, 669 (1969).

132. Arthur J. Goldberg, *Can We Afford Liberty?*, 1982 ARIZ. ST. L.J. 39, 42 (1982).

133. Arthur J. Goldberg, *Can We Afford the Bill of Rights?*, 129 MIL. L. REV. 1 (1990).

134. *Id.* at 5.

135. *See, e.g.*, Arthur J. Goldberg, *The Free Exercise of Religion*, 20 AKRON L. REV. 1 (1986); The Honorable Arthur J. Goldberg, *The First Amendment and Its Protections*, 8 HAST. CONST. L.Q. 5 (1980); The Honorable Arthur J. Goldberg, *Our Constitutional Faith*, 13 LOY. L.A. L. REV. 885 (1979); Arthur J. Goldberg, *Mr. Justice Brennan and the First Amendment*, 4 RUTGERS-CAM. L.J. 8 (1972).

136. Arthur J. Goldberg, *The Constitution: The Safeguard of Our Freedoms*, 2 U. HAW. L. REV. 539, 541 (1980-81).

137. Arthur J. Goldberg, *Attorney General Meese vs. Chief Justice John Marshall and Justice Hugo L. Black*, 38 ALA. L. REV. 237, 238 (1987). At his confirmation hearing, Goldberg was candid about his evolutionary view of the Constitution when he was questioned by Senator Ervin about the unaltered meaning of the Constitution: “One of the very perceptive aspects of the great men who wrote this Constitution is that they drafted the Constitution in terms where, years later, decades later, centuries later, it can still be applied to modern times. So they drafted it in broad terms so that new conditions could be taken into account.” 6 HEARINGS, *supra* note 31, at 26.

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‘nine old men of the Thirties’<sup>138</sup>—he remained at heart committed to the Warren Court’s implementation of the Bill of Rights as the inevitable reading of its clear language. Quoting the text, he concluded that “[s]urely it would appear that judicial activism in these areas is mandated.”<sup>139</sup>

Goldberg’s most sustained defense of the Warren Court’s jurisprudence came in a series of lectures he delivered at his alma mater, Northwestern University School of Law, in 1971, two years after Warren had retired. In the preface to the published lectures, Goldberg stated his laudatory thesis, “that great progress was made toward the realization of equal justice during the years in which Earl Warren served as Chief Justice of the United States.”<sup>140</sup> That progress was a movement toward what he called a “‘new realism’” in confronting the inequities of the prevailing legal system.<sup>141</sup>

[I]t appeared that the Warren Court was manifesting a growing and possibly more general impatience with legalisms, with dry and sterile dogma, and with virtually unfounded assumptions which served to insulate the law and the Constitution it serves from the hard world it is intended to affect.<sup>142</sup>

Such realism carried with it an imperative for activism, an aspect of “[t]he Court[s] . . . most important role in expressing the essential morality inherent in the Constitution.”<sup>143</sup> Goldberg found the Court’s activism authorized by the framers of the Fourteenth Amendment, who intended a dynamic interpretation that would “encompass[] our greater awareness of the meaning of equality”<sup>144</sup> as society changed. He thus found the Court’s activist role “perfectly consistent” with the Constitution’s democratic principles, “particularly [where] the rights of minorities or fundamental individual liberties or the health of the democratic process itself are at issue.”<sup>145</sup>

That confidence in the rightness of the Warren Court’s expansive jurisprudence and in the leadership of Earl Warren himself remained constant. For Goldberg, activism was a badge of honor rather than a judicial usurpation, at least when it was undertaken in the service of

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138. Goldberg, *supra* note 137, at 245.

139. *Id.* at 246.

140. GOLDBERG, *supra* note 8, at vii.

141. *Id.* at 25.

142. *Id.* Goldberg later described the realism of the Warren Court as its willingness to “[b]rush aside legal fictions” and complained about the Burger Court’s “reemergent use of legal fictions.” *Stripping Away the Fictions*, *supra* note 78, at 563, 565.

143. GOLDBERG, *supra* note 8, at 93.

144. *Id.* at 39.

145. *Id.* at 52.

constitutionally mandated values. According to his wife, he thought that the Supreme Court was, and should be, “the least technical court in the whole country . . . because it was concerned with such grave constitutional matters,” and he discouraged his clerks from “straining after technicalities.”<sup>146</sup> As the Warren Court gave way first to the Burger Court and then, in 1986, to the Rehnquist Court, Goldberg remained an unapologetic champion of Warren Court jurisprudence.<sup>147</sup> Asked in a 1982 interview for his views on judicial restraint, he offered an aggressive rejoinder that reversed the perspective. When dealing with the Bill of Rights, he countered, “[t]here’s no excuse for not being an activist in protecting those constitutional rights”<sup>148</sup> and offered a less tainted alternative. “But I actually distrust judicial activism,” he surprisingly noted. “I prefer judicial courage to vindicate rights.”<sup>149</sup>

#### E. *The Departure Revisited*

The final chapter in Goldberg’s brief judicial career came abruptly, at the close of the 1964 Term, when President Lyndon Johnson persuaded him to resign from the Court to fill the vacancy created by the death of Adlai Stevenson, the United States Ambassador to the United Nations. There is general agreement that at least one of Johnson’s motivations was his desire to create a vacancy for Abe Fortas, his advisor and close friend,<sup>150</sup> but there are several discrepant versions of Goldberg’s motivation for allowing himself to be removed from a post that he had long desired, one that his former law clerk Peter Edelman described as “the fulfillment of his life’s dream.”<sup>151</sup> Asked bluntly in a 1983 oral history interview why he left the Court, Goldberg attempted to

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146. D. GOLDBERG, *supra* note 24, at 170.

147. See, e.g., Arthur J. Goldberg, *Escobedo and Miranda Revisited*, 18 AKRON L. REV. 177, 181-82 (1984), rejecting an opinion by then Associate Justice Rehnquist as overturning *Escobedo* with “an approach . . . completely inconsistent with our belief in the rule of law and in the safeguards of our cherished Bill of Rights.” One year into the Rehnquist Court, Goldberg expressly defended judicial activism to protect the Bill of Rights. Goldberg, *Attorney General Meese*, *supra* note 137, at 246.

148. *Stripping Away the Fictions*, *supra* note 78, at 562.

149. *Id.* at 562-63.

150. According to Stebenne, “If Goldberg resigned from the Court to accept the UN post, Johnson at one stroke would have solved his potential problems with liberals and also created an opening on the Court for his long-time adviser Abe Fortas.” STEBENNE, *supra* note 7, at 346-47. Another scholar concludes that “we have consensus on some aspects of Goldberg’s departure,” first of them that “Johnson wanted Goldberg off the Court so that he could offer Goldberg’s seat to his good friend Abe Fortas.” Emily Field Van Tassel, *Justice Arthur J. Goldberg*, in *THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED*, *supra* note 42, at 96.

151. Symposium, *Arthur J. Goldberg’s Legacies to American Labor Relations*, 32 J. MARSHALL L. REV. 667, 678 (1999).

debunk the widespread view that Johnson had successfully engineered the resignation against Goldberg's will, replying that "it was not because President Johnson twisted my arm."<sup>152</sup> Instead, he offered two reasons for his departure: his "egotistical feeling" that he could keep Johnson from getting the country "enmeshed in Vietnam," and the sense, as a first generation American, "that I owed the country a great deal."<sup>153</sup> Goldberg's biographer has suggested that Goldberg also believed that Johnson, now in his debt, would repay it by eventually reappointing him to the Court, perhaps to replace Chief Justice Warren upon his retirement.<sup>154</sup> When asked directly whether there was "consideration given to reappointing you to the Court," Goldberg's response was equally direct: "No, never. I would never make such a deal."<sup>155</sup> The account of the resignation that seems to have most rankled with Goldberg was Johnson's explanation, in his memoirs, that Goldberg was eager to leave the Court because he was bored and thus open to another public position.<sup>156</sup> According to Dorothy Goldberg, her husband was sufficiently "outraged" to telephone Johnson, with Dorothy on an extension, because "'I want her to hear me tell you what I think.' Then he said, 'And one other thing. I want that painting of hers she sent to you. It's mine and you don't deserve it.'"<sup>157</sup>

Although the precise details of Johnson's campaign to replace Goldberg with Fortas may never be entirely clear, there is little doubt

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152. *Oral History Interview*, *supra* note 36, at 1.

153. *Id.* at 1. In an interview with Fortas biographer Laura Kalman in December 1983, Goldberg offered a more candid and succinct reason: "'I left because of vanity,' he explained. 'I thought I could influence the President to get out of Vietnam.'" LAURA KALMAN, *ABE FORTAS: A BIOGRAPHY* 241 (1990). Peter Edelman largely echoes this explanation: "But he also had two characteristics that in this circumstance were fatal flaws. One was his ego, which was not small, and the other was his immigrant patriotism." *Arthur Goldberg's Legacies*, *supra* note 151, at 678. Edelman concludes that Goldberg "realized that he had been had, if I can put it in words of one syllable. . . . It gradually dawned on him that Johnson was not about making peace and that he was being used." *Id.* at 678-79.

154. STEBENNE, *supra* note 7, at 348. Stebenne also notes that others "spread rumors that Goldberg had agreed to accept the UN post only in return for Johnson's financial advice, supposedly given in the past and from which Goldberg had allegedly profited. Such stories lacked any foundation in fact, but they persisted nonetheless." *Id.* Apparently other rumors claimed a specific agreement that Goldberg would replace Warren, "which was patently untrue." *Id.*

155. *Oral History*, *supra* note 36, at 19.

156. According to Johnson, he was told by John Kenneth Galbraith that Goldberg "would step down from his position to take a job that would be more challenging to him." LYNDON BAINES JOHNSON, *THE VANTAGE POINT: PERSPECTIVES OF THE PRESIDENCY 1963-69*, at 544 (1971). For an analysis of the episode based on the existing—and conflicting—versions, see BRUCE MURPHY, *FORTAS: THE RISE AND RUIN OF A SUPREME COURT JUSTICE 163-72* (1988). Murphy believes that Johnson tempted Goldberg with the possibility of being "the first Jewish vice president of the United States." *Id.* at 170.

157. D. GOLDBERG, *supra* note 24, at 223.

that Goldberg came to regret his decision to leave the Court for the United Nations. In his oral history interview, he reported his dismay on hearing rumors that Johnson was excluding him from meetings with cabinet members on Vietnam: “I have to reveal my obvious strong feelings that I was asked to participate in a venture to try to extricate our country as a principal adviser and found I was not the principal adviser.”<sup>158</sup> He and Johnson “ended on a very bad note,”<sup>159</sup> and their relationship deteriorated further after his resignation. According to Goldberg, Johnson approached him in 1968 about a recess appointment to the Court as Chief Justice to replace Earl Warren. Goldberg agreed, but only a day later that plan had soured:

Then he called me the next day and said his staff had looked it up and they found a speech of his against recess appointments. So I said, “Then forget about it. If you feel your statement is more important than getting a chief justice that would reflect liberal values.” . . . After Nixon was elected—Nixon’s staff told me this—he went to Nixon and asked Nixon to appoint me. The chances of that were ridiculous.<sup>160</sup>

From a blend of egotism, patriotism, and duty, Goldberg surrendered the job that only three years earlier he had, in his wife’s words, “wanted, wanted, *wanted*.”<sup>161</sup> And he was never again to find a position remotely comparable to what he described, in his subdued letter accepting the United Nations post, as “the richest and most satisfying period of my career.”<sup>162</sup> During his disastrous 1970 campaign for governor of New York, he told a voter who wished that Goldberg were still on the Court, “So do I, sometimes.”<sup>163</sup> Following his defeat, Goldberg returned to private practice with a Washington law firm, while also playing the role of what Kenneth Starr, his eulogist before the Supreme Court, described as “a highly active ‘elder statesman.’”<sup>164</sup> Goldberg also continued to

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158. *Oral History*, *supra* note 36, at 18.

159. *Id.*

160. *Id.* at 19. For a more detailed account of this episode, see STEBENNE, *supra* note 7, at 373.

161. D. GOLDBERG, *supra* note 24, at 134.

162. *Autobiographical Notes*, THE DEFENSES OF FREEDOM, *supra* note 130, at xv. Rather than expressing great pleasure or anticipation in accepting the position, he said only that “I have accepted, as one simply must.” *Id.*

163. ROBERT SHOGAN, A QUESTION OF JUDGMENT: THE FORTAS CASE AND THE STRUGGLE FOR THE SUPREME COURT 108 (1972). For an account of his campaign, including his weaknesses as a campaigner, see STEBENNE, *supra* note 7, at 375-78. For a harsher assessment of Goldberg as candidate, see LASKY, *supra* note 13, at 164-65.

164. *Proceedings*, note 17, at xxxi. Starr cited Goldberg’s service as President Carter’s Ambassador to the Belgrade Conference on Human Rights and his chairmanship of a “committee to right the wrongs done to Japanese citizens of the United States during World War II.” *Id.*

publish his commentaries on Supreme Court issues until his death in 1990.

### III. STEPHEN BREYER

#### A. *The Path to the Bench*

Stephen G. Breyer was born in 1938, one generation—precisely thirty years and seven days—after Arthur Goldberg, and their early lives illustrate the changed nature of the American Jewish experience. Unlike Goldberg’s impoverished Chicago childhood, Stephen Breyer’s early years were spent in a solidly middle class family in San Francisco, where his father—the first in his family to attend college<sup>165</sup>—was an attorney for the San Francisco Board of Education and his mother volunteered for the Democratic Party and the League of Women Voters.<sup>166</sup> Breyer attended public schools, including the “academically prestigious” Lowell High School, and was voted the most likely to succeed in his graduating class.<sup>167</sup> Like Goldberg, he worked during his school years, but in his case the job he recalled fondly was at a summer camp in the Sierra Mountains,<sup>168</sup> and, unlike Goldberg, he had little reason to worry about his future prospects. In an interview with Jeffrey Toobin, Breyer has described the sense of great opportunity that pervaded his early years in high school and beyond:

In San Francisco in the nineteen-fifties, it was a wide-open time,” he told me. “It’s true that there were lots of people, mostly black people, who were still excluded from opportunities, but for the rest of us there was a sense of possibility that we’ve never seen before or since. You had a great mixing of classes. I was a hasher at Camp Mather, in the Sierras, which was run by the city and county of San Francisco. Anyone could go. You had a mix of the families of firemen, policemen, and doctors and lawyers. They all felt an

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165. Stephen Breyer, *Boston College Law School Commencement Remarks*, [http://supremecourtus.gov/publicingo/speeches/sp\\_05-23-03.html](http://supremecourtus.gov/publicingo/speeches/sp_05-23-03.html). Breyer’s father attended Stanford University. *Id.*

166. Stephen G. Breyer—Biography, [http://www.oyez.org/justices/stephen\\_g\\_breyer](http://www.oyez.org/justices/stephen_g_breyer).

167. *Id.* Breyer’s high school academic record was also impressive; he received only one B grade. *Id.*

168. In the biographical information Breyer submitted to the Senate Judiciary Committee for his Supreme Court nomination, he also listed work as a ditch digger for a utility company in the summer of 1958, along with his job as a waiter in the summer of 1955. *Stephen G. Breyer*, 19 HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1994 172 (Roy M. Mersky, J. Myron Jacobstein, & Bonnie L. Koneski-White, eds., 1996).

obligation to be part of the community and to contribute to the community.<sup>169</sup>

Breyer went on to Stanford University, majoring in philosophy, graduating in 1959 with great distinction (the equivalent of highest honors), and winning a Marshall Scholarship to Oxford's Magdalen College, where he received a B.A. in philosophy, politics, and economics with first class honors in 1961. He then attended Harvard Law School, graduating *magna cum laude* in 1964 and serving as articles editor of the *Harvard Law Review*.

While Goldberg completed law school in the inauspicious year of 1929 and was forced to begin his career with an uncongenial job, Breyer's anticipation of limitless opportunities proved accurate. From Harvard he moved on to his Supreme Court clerkship with Goldberg for the Court's 1964 Term. Following his clerkship, Breyer worked for two years in the Antitrust Division of the Department of Justice before joining the Harvard Law School faculty, where he remained until 1980, with several interludes for government work: briefly in 1973 as a member of Archibald Cox's Watergate prosecution team and then as special counsel and subsequently chief counsel to the Senate Judiciary Committee.<sup>170</sup> In 1980 President Carter appointed Breyer to the U.S. Court of Appeals for the First Circuit, where he served as Chief Judge from 1990 until his 1994 appointment by President Clinton to the Supreme Court, only a year after another Jewish Justice, Ruth Bader Ginsburg, had taken her seat.<sup>171</sup> A generation after Goldberg's appointment to replace Felix Frankfurter, "no one," as Ginsburg herself has observed, "regarded Ginsburg and Breyer as filling a Jewish seat."<sup>172</sup> With the exception of two stints as a summer associate during law school, one in San Francisco and the other in Paris, Breyer had no experience in private practice, working exclusively in academia and government and earning a reputation as a leading scholar of regulatory law.<sup>173</sup> Breyer's private life also reflects the broader world open to a gifted young man of his background and generation. In 1967 he married Joanna Hare, a clinical psychologist and the daughter of John Hare, an English viscount and briefly head of the Conservative Party.<sup>174</sup>

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169. Jeffrey Toobin, *Breyer's Big Idea*, THE NEW YORKER, Oct. 31, 2005, at 36.

170. 19 HEARINGS, *supra* note 168, at 172-73.

171. *Id.* at 173.

172. Ruth Bader Ginsburg, *From Benjamin to Brandeis to Breyer: Is There a Jewish Seat?*, 41 BRAND. L.J. 229, 235 (2002).

173. 19 HEARINGS, *supra* note 168, at 172.

174. *Id.* at 171; Biographies of Current Justices of the Supreme Court, <http://www.supremecourt.gov/about/biographies.aspx> (last visited July 27, 2010). For a brief account of Hare's career, see Mark Garnett, *Hare, John Hugh*, in 25 OXFORD

*B. The Clerkship*

Goldberg's and Breyer's lives intersected in the 1964 Term when Breyer began his clerkship for what turned out to be Goldberg's third and final year on the Court. Breyer is the only one of Goldberg's six clerks to write an essay about his experience, contributing a brief in memoriam piece to the *Journal of Supreme Court History*.<sup>175</sup> Breyer asked a question that his readers would have liked to have answered: "What was it like clerking for this active, practical, humane man during one of the three years he served as an Associate Justice of the United States Supreme Court?"<sup>176</sup> Breyer's response, little more than two pages of text, however, provided scant detail, instead largely offering appreciative generalities. Goldberg is described as the possessor of "a strong and imaginative legal mind" and "a strong social conscience," a Justice with "a highly practical view of the Constitution" whose attitude toward government "was respectful but not necessarily reverential."<sup>177</sup> And the Justice apparently found his position a congenial one. He was, Breyer notes, "happy on the Court; indeed he was in his element."<sup>178</sup>

Breyer does briefly suggest the growth of a more personal relationship between Justice and clerk. He describes "[w]orking for this energetic, highly principled man (who would not let a lawyer buy him coffee)" as "great fun."<sup>179</sup> That fun included invitations to Saturday lunches with wide ranging conversations and to the ecumenical Passover seder at the Goldberg home. The clerkship was the start of a lifelong friendship in which the Justice "followed our lives and those of our families with interest" and "called us with help and advice."<sup>180</sup> Breyer's relationship with Goldberg does not seem to have been as close and sustained as that of at least one of his other clerks. In his comments at a symposium devoted to Goldberg, Peter Edelman, one of his clerks for the 1962 Term, gave a more intimate account of his own ties to the Justice:

Justice Goldberg took an enormous interest in anybody who came into his orbit. Everybody became part of the extended family. You went to Passover Seder, it didn't matter whether you were Jewish or not, you came to Passover Seder at his house.

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DICTIONARY OF NATIONAL BIOGRAPHY 255-56 (H. C. G. Matthew & Brian Harrison, eds., 2004).

175. See Breyer, *Clerking for Justice Goldberg*, *supra* note 5.

176. *Id.* at 4.

177. *Id.* at 4, 5.

178. *Id.*

179. *Id.* at 6.

180. *Id.*

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Justice Goldberg served as the flower person, I think that would be the correct way to describe it, at my wedding. . . . Justice Goldberg was kind of the all purpose attendant, sort of the best man. We didn't have a large group of attendants, so when the time came for Marian to hand her flowers to somebody, Justice Goldberg was standing there so he played that role as well.<sup>181</sup>

There is another notable point of divergence between Edelman's and Breyer's recollections of their clerkships. For Edelman, Goldberg became a mentor as well as a friend, with "an enormous influence on me philosophically in terms of the values and views that I have about the law."<sup>182</sup> Goldberg also volunteered guidance that shaped Edelman's early career. As Edelman recalls, "Justice Goldberg asked me one day what I was going to do when the clerkship was over? . . . [H]e said, 'Go into the government.' He said, 'There won't be many Administrations like this one in your lifetime.'"<sup>183</sup> Though a bit skeptical, Edelman followed that advice: "But all right, if that's what he said I should do, I would do it. Everything else that's happened to me stemmed from that and I'm very grateful."<sup>184</sup>

In introductory remarks at his confirmation hearing, Breyer, like Edelman, recalled that Goldberg "became a wonderful lifelong friend."<sup>185</sup> He acknowledged learning one important lesson from Goldberg, "that judges can become isolated from the people whose lives their decisions affect" and should remain engaged in their communities.<sup>186</sup> But in his subsequent responses, Breyer was at some pains to make clear the limits of his ties to Goldberg, whom he never described as either a mentor or a powerful jurisprudential influence. The focus of the questioning was Breyer's role as the law clerk who drafted Goldberg's *Griswold* concurrence, an opinion that had serious critics among some members of the Judiciary Committee.<sup>187</sup> Asked point blank by Senator Howell Heflin about his role in preparing the concurrence, Breyer disclaimed any independent role in its formulation of an unenumerated right to marital privacy:

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181. *Arthur Goldberg's Legacies*, *supra* note 151, at 676-77.

182. *Id.* at 676.

183. *Id.*

184. *Id.*

185. 19 HEARINGS, *supra* note 168, at 168.

186. *Id.*

187. David Garrow had written that Breyer was the clerk who drafted the concurrence. GARROW, *supra* note 82, at 250.

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If you had worked for Justice Goldberg as I did, you would be fully aware that Justice Goldberg's drafts are Justice Goldberg's drafts. It was Justice Goldberg who absolutely had the thought, that his clerks implemented, and both my coclerk Stephen Goldstein and I did—there were two at that time—and we worked on that draft. I might have worked on it a little more than he. But it is Justice Goldberg's draft.<sup>188</sup>

Pressed by Senator Patrick Leahy to clarify his views on the source of unenumerated rights, Breyer noted that “I do not think it is in the Ninth amendment, but it is true that Justice Goldberg wrote an opinion about the Ninth amendment.”<sup>189</sup> When Leahy returned to the issue, Breyer acknowledged that “[t]he Ninth amendment, to Justice Goldberg, and I think to [sic] many others, makes clear the fact that certain rights are listed does not mean that there are not others,” but focused instead on the meaning of “liberty” in the Fourteenth Amendment as the potential source of such rights.<sup>190</sup> And he linked Goldberg with two considerably more conservative Justices as appropriate guides: “You look to what Frankfurter and Harlan and Goldberg and others talked about as the traditions of our people.”<sup>191</sup> Without directly criticizing or disowning Goldberg, Breyer managed to suggest that his clerkship and his work on *Griswold* did not automatically mark him as a Warren Court liberal.

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188. 19 HEARINGS, *supra* note 168, at 348-49. Peter Edelman, another Goldberg clerk, made a similar point when asked about the role of Goldberg's clerks in drafting opinions, writing that “Justice Goldberg put his imprint on opinions from start to finish. He articulated the theory he wanted developed, dictated the basic framework of opinions, and went over every draft line by line, inserting language at each stage.” Quoted in TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 168 (2006) (Breyer apparently has followed Goldberg's approach. Martha Matthews, a Breyer clerk on the United States Court of Appeals for the First Circuit in the 1988 Term, testified at his confirmation hearing that “he checks everything we write so carefully.” 19 HEARINGS, *supra* note 168, at 741.). In her memoir, Dorothy Goldberg echoes both Breyer and Edelman on the question of influence:

In considering the influence of clerks on their Justice, Art thought that every Justice made up his own mind. He has said to able clerks, “If you are capable, you may very well have an opportunity to be an influence, but I would like to caution you about remembering that you can be an influence only so long as that Justice chooses to be so influenced.

D. GOLDBERG, *supra* note 24, at 166. According to Dorothy, who could “sometimes hear the tones, if not the substance” of Goldberg's discussions with his clerks held at his home on Thursday evenings, he “invited them to air their differences with his position, but they learned early that he could not be unduly influenced in decision-making. His vote was his alone and law clerks learned how he voted at conference after his vote was cast.” *Id.* at 168.

189. 19 HEARINGS, *supra* note 168, at 314.

190. *Id.* at 503.

191. *Id.* at 504.

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In recent years, securely situated on the Court, Breyer has continued to deflect questions about Goldberg. During a 2003 interview at the John F. Kennedy Library, Breyer was asked a series of such questions: “How did he influence you? What did you learn from him, and who influenced him?”<sup>192</sup> His first response was to challenge the questions (“Now, I’m not sure we’re influenced.”) and his second to reaffirm his personal affection for Goldberg (“I loved Arthur Goldberg. I thought he was a great man. I was his clerk. He kept up with his clerks in the years.”).<sup>193</sup> But Breyer then turned to the judicial, though not jurisprudential, lesson he learned from Goldberg, how to respond to a failure to persuade your colleagues:

And I think, my goodness, stop complaining. You have a lot more to decide and a lot more cases in which to write opinions that may start as a dissent and may end up as a majority. You start feeling sorry for yourself because you lost that case? Go somewhere else. There’s a lot to do. And I say, who would have told me that? Arthur Goldberg.<sup>194</sup>

Breyer made the same point more elegantly in an interview two years later with Jeffrey Toobin:

“Your opinions are not your children,” Breyer told me. “What they are is your best effort in one case. The next one will come along, and you’ll do your best. You’ll learn from the past. [Justice] Goldberg taught me never to look backward. People ask all the time whether I was sorry that I was in the minority in *Bush v. Gore*. I say, ‘Of course I was sorry!’ I’m always sorry when I don’t have a majority. But, if I started moping about it, I can hear Goldberg saying, ‘What are you talking about, feeling sorry for yourself? There’s no basis for feeling sorry for yourself. Get down and do it. Keep going. Maybe they didn’t agree yesterday. Maybe they’ll agree tomorrow.’”<sup>195</sup>

Neither mentor nor jurisprudential model, Goldberg seems to have become for Breyer a source of practical wisdom about dealing with the unending conflicts and resolutions that define the work of a collegial court.

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192. *A Conversation with Justice Stephen Breyer*, September 21, 2003, John F. Kennedy Library, at 38.

193. *Id.* at 39.

194. *Id.*

195. Toobin, *supra* note 167, at 43.

### C. *Reading the Constitution*

In his fifteen years on the bench, Breyer has shaped a judicial role that is active rather than activist in the Goldberg manner. He is an engaged questioner at oral argument, a visible presence off the bench in legal, academic, and media settings,<sup>196</sup> and the only Justice regularly to attend the president's annual State of the Union address.<sup>197</sup> As an author he has taken a route seldom followed by sitting Justices by describing in print his approach to constitutional interpretation. In *Active Liberty*, the book version of his Tanner Lectures delivered at Harvard Law School, Breyer offers a practical guide to resolving constitutional issues in a manner that will "help[] a community of individuals find practical solutions to important social problems."<sup>198</sup>

Where Goldberg used his published lectures, *Equal Justice*, to defend and celebrate the Warren Court's decisions, *Active Liberty* is at once more ambitious and more modest in its scope. Breyer announces his "theme" in broad terms as nothing less than "democracy and the Constitution" and his intention as "illustrat[ing] how this constitutional theme can affect a judge's interpretation of a constitutional text."<sup>199</sup> But in the very next sentence Breyer disclaims any grand design. "To illustrate a theme," he tells us, "is not to present a general theory of constitutional interpretation."<sup>200</sup> Instead, "[t]he matter is primarily one of approach, perspective, and emphasis."<sup>201</sup> The next sentence pivots once again, noting that "approach, perspective, and emphasis, even if they are not theories, play a great role in law."<sup>202</sup> Breyer's carefully modulated

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196. The Supreme Court's website lists eighteen speeches by Breyer in the period from May 2000 to September 2009, a tie with Justice Ginsburg for the greatest number of such appearances. Speeches, available at <http://www.supremecourt.gov/publicinfo/speeches/speeches.aspx>. The venues for Breyer's speeches include both the predictable law school commencements and bar association meetings and more rarefied occasions: the James Madison Lecture at the New York University Law School, the Harvard University Tanner Lectures on Human Values, The American Academy in Berlin, and the Marshall Scholars Alumni Dinner Reception at the British Embassy in Washington. *Id.* In a less conventional venture, Breyer was audible, though not visible, on *Wait, Wait . . . Don't Tell Me!*, National Public Radio's news quiz. <http://www.npr.org/templates/rundowns/rundown.php?prgId+35&prgDate=03-24-2007&vview=storyview>.

197. According to Paul Gewirtz, Breyer's presence reflects "not only his sense that members of the Court should participate in this symbolic event" but also his "characteristic optimism" toward the notion of the branches of government as ultimately "one Union with a set of common purposes." Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1695-96 (2006).

198. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005).

199. *Id.* at 6-7.

200. *Id.* at 7.

201. *Id.*

202. *Id.*

message is, characteristically, a practical one. Far from proposing a unified theory, he is identifying a unifying attitude expressed by the Constitution and its framers toward the centrality of “the citizen’s ‘active liberty,’ i.e., the scope of the right to participate in government.”<sup>203</sup> That attitude, legitimated by the text and history of the Constitution, should guide judges in their interpretative work. “Since law is connected to life,” he argues, “judges, in applying a text in light of its purpose, should look to *consequences*” for the community and favor the outcomes that serve the value of active liberty.<sup>204</sup> The challenge for judges is to avoid the opposing constraints of personal views or conventional principles, relying instead on the constitutional tradition:

The tradition answers with an *attitude*, an attitude that hesitates to rely upon any single theory or grand view of law, of interpretation, or of the Constitution. It champions the need to search for purposes; it calls for restraint, asking judges to “speak . . . humbly as the voice of the law.” And it finds in the democratic nature of our system more than simply a justification for judicial restraint.<sup>205</sup>

The tradition, however, is not static. It permits and encourages the expansion of the community to include formerly excluded groups. Since “the original document sowed the democratic seed,”<sup>206</sup> judges were working within that tradition when they reinterpreted the Constitution to extend rights to African Americans and women. Breyer sees the goal of the Constitution as “furthering active liberty, as creating a form of government in which all citizens share the government’s authority, participating in the creation of public policy.”<sup>207</sup> That principle—or “attitude”—shapes a body of opinions that has at times defied easy predictions about Breyer’s jurisprudence.

The form of *Active Liberty* mirrors its thesis. Its thematic section occupies thirty-four pages. Most of the remainder of the book, some seventy-six pages, contains what Breyer calls “Applications,” explications of how his approach resolves constitutional questions in an assortment of areas, including speech, federalism, privacy, affirmative action, statutory interpretation, and administrative law. (There is also a final eighteen page section, entitled “A Serious Objection,” that responds to textualist and originalist critiques of his position.) The book’s distribution of pages, like its thesis, reflects what academic reviewers

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203. BREYER, *supra* note 198, at 10.

204. *Id.* at 18.

205. *Id.* at 19.

206. *Id.* at 33.

207. *Id.*

have variously termed Breyer's "democratic pragmatism"<sup>208</sup> and his "pragmatic passion,"<sup>209</sup> his practical approach to the task of constitutional interpretation. Not surprisingly, that pragmatism emerges as well in his own opinions.

*D. The Opinions: The Problem Solver*

Just as Breyer in *Active Liberty* identifies the defining attitude of the constitutional tradition, so a reader of his Supreme Court opinions can identify Breyer's attitude toward his judicial task. He is not an activist in the Goldberg mold, approaching each case with an eye to integrating it into an already developed jurisprudential framework. Breyer is more inclined to treat each case individually, evaluating its specific facts from a more generalized perspective by asking whether the outcome reached by the court below achieves a proper fit with the perceived harm. As what Ken Kersch calls "a committed empiricist,"<sup>210</sup> Breyer takes note of the real world implications of a decision. And he brings to his judicial role an insistence on appropriate deference to the legislative branch that is more than ceremonial. Although his views are firm—he does not hesitate to call those he disagrees with "wrong"—they are also carefully nuanced, a quality reflected in the precision of his allegiance to selected sections of his colleagues' opinions.

One of the persistent themes running through Breyer's opinions is his call for what he terms "proportionality," most often in reference to the fit between the harm detected and the remedy proposed. The term appears in a number of his separate First Amendment opinions, both concurring and dissenting, where he performs his preferred balancing test. Thus, in a concurring opinion written early in his tenure, Breyer detected First Amendment interests on both sides of a case pitting the Federal Communications Commission against Turner Broadcasting over a federal requirement benefiting local broadcasters.<sup>211</sup> "The key question," Breyer found, "becomes one of proper fit," including the search for less restrictive measures and for "a reasonable balance between potentially speech restricting and speech enhancing

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208. Cass R. Sunstein, *Justice Breyer's Democratic Pragmatism*, 115 YALE L.J. 1719 (2006).

209. Gewirtz, *supra* note 197. Gewirtz has contrasted Justice Scalia with Justice Breyer: "One is a witty provocateur, the other is a cheerful problem solver." *Id.* at 1696. I have used "problem solver" in the heading for the following subsection.

210. Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759, 760 (2006).

211. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

consequences.”<sup>212</sup> In a later dissent, he argued that a judge should be asked “not to apply First Amendment rules mechanically, but to decide whether, in light of the benefits and potential alternatives, the statute works speech-related harm (here to adult speech) out of proportion to the benefits that the statute seeks to provide (here, child protection).”<sup>213</sup> The proportionality motif recurs both in other First Amendment cases and in cases dealing with such diverse constitutional issues as affirmative action, citizenship determination, and Second Amendment rights.<sup>214</sup> Perhaps most memorably, this motif appears in his *Bush v. Gore* dissent, where Breyer insisted that “[b]y halting the manual recount, and thus ensuring that the uncounted legal votes will not be counted under any standard, this Court crafts a remedy out of proportion to the asserted harm.”<sup>215</sup>

Breyer’s rejection of inflexible First Amendment rules in favor of proportionality approaches is integral to his view that, as he recently said, “[l]aw is not an exercise in mathematical logic”<sup>216</sup> detached from the real world context of the legal issue. Thus, considering the application of the 1965 Voting Rights Act’s ban on poll taxes to the Virginia Republican Party’s imposition of a registration fee for participation in its nomination process, he departed from the majority’s rationale to rely instead on the history of deliberate exclusion of African American voters from the political process. Breyer opened his concurring opinion by underscoring that history: “One historical fact makes it particularly difficult for me to accept the statutory and constitutional arguments of the appellees. In 1965, to have read this Act as excluding all political party activity would have opened a loophole in

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212. *Id.* at 227 (Breyer, J., concurring in part). Breyer has cited his “proper fit” test in other cases. *See, e.g.*, *United States v. American Library Assoc.*, 539 U.S. 194, 217 (2003) (Breyer, J., concurring in judgment); *Bartnicki v. Vopper*, 533 U.S. 514, 536 (2001) (Breyer, J., concurring).

213. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting).

214. *See, e.g.*, *District of Columbia v. Heller*, 128 S.Ct. 2783, 2848 (2008) (Breyer, J., dissenting) (noting that the burden imposed on gun owners by the statute “seems proportionately no greater than restrictions in existence at the time the Second Amendment was adopted”); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 837 (2007) (Breyer, J., dissenting) (judge should “determine whether the use of race-conscious criteria is proportionate to the important ends it serves”); *Randall v. Sorrell*, 548 U.S. 230, 262 (2006) (Breyer, J., dissenting) (finding that campaign finance restrictions “burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance”); *United States v. United Foods Inc.*, 533 U.S. 405, 429 (2001) (Breyer, J., dissenting) (finding program features “necessary and proportionate”); *Miller v. Albright*, 523 U.S. 420, 485 (1998) (Breyer, J., dissenting) (referring to the “legal requirement of tailoring or proportionality”).

215. *Bush v. Gore*, 531 U.S. 98, 147 (2000) (Breyer, J., dissenting).

216. *Parents Involved in Cmty. Sch.*, 551 U.S. at 831 (Breyer, J., dissenting).

the statute the size of a mountain. And everybody knew it.”<sup>217</sup> Public knowledge of the obvious becomes in this view an acceptable and persuasive interpretive tool. Breyer has also relied on predictable outcomes as a valid measure of constitutional values. In a copyright case, he dissented from the Court’s acceptance of a newly extended term because its “practical effect is not to promote, but to inhibit, the progress of ‘Science.’”<sup>218</sup> And, in a First Amendment dissent that found Breyer in the surprising company of Chief Justice Rehnquist, he was willing to uphold the Child Online Protection Act on the ground that, unlike the majority, he could find no less restrictive approach to the protection of children from pornographic materials.<sup>219</sup> “In the real world,” he argued, “where the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable packages,” what he termed a “middle way” was a better approach to “tempering the prosecutorial instinct in borderline cases.”<sup>220</sup>

As a proponent of real world analysis, Breyer frequently invokes empirical data to support his position. He may cite to specific data provided by the parties, as he did in asserting that “29 million children are potentially exposed to audio and video bleed from adult programming,”<sup>221</sup> or praise a party, as he did the government in another case, for offering such data rather than relying “upon ‘mere speculation.’”<sup>222</sup> Or he may provide his own data, as he did to refute the majority’s assumption in *Clinton v. Jones* that civil suits against sitting presidents would be rare occurrences.<sup>223</sup> Most dramatically, in *United States v. Lopez*, he supported his position that Congress could have found that “gun-related violence in and around schools is a commercial, as well as a human, problem”<sup>224</sup> with copious cites to secondary materials and underscored the point by attaching a thirteen page appendix of both “Congressional” and “Other Federal Government” sources.<sup>225</sup> As Linda

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217. *Morse v. Republican Party of Virginia*, 517 U.S. 186, 235 (1996) (Breyer, J., concurring in the judgment).

218. *Eldred v. Ashcroft*, 537 U.S. 186, 243 (2003) (Breyer, J., dissenting).

219. *Ashcroft v. ACLU*, 542 U.S. 656, 676 (2004) (Breyer, J., dissenting).

220. *Id.* at 691.

221. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 839 (2000) (Breyer, J., dissenting).

222. *United States v. United Foods Inc.*, 533 U.S. 405, 430 (2001) (Breyer, J., dissenting). Breyer also attached as an appendix a copy of a mushroom advertisement at issue in the case. *Id.* at appendix to Breyer, J., dissenting.

223. *Clinton v. Jones*, 520 U.S. 681, 722 (1997) (Breyer, J., concurring in the judgment).

224. *United States v. Lopez*, 514 U.S. 549, 620 (1995) (Breyer, J., dissenting).

225. *See id.* at 631-36.

Greenhouse recently observed, “[h]e believes in evidence and in expertise and in the power of both facts and experts to persuade.”<sup>226</sup>

Breyer’s reliance on empirical data leads directly to its corollary, deference to legislative decision making in areas where questions based on such data are at issue. “In practice,” he believes, “the legislature is better equipped to make such empirical judgments.”<sup>227</sup> That deference is, however, carefully confined. When, as in a campaign finance case, the issue implicates the effectiveness of the democratic process, he finds “no alternative to the exercise of independent judicial judgment.”<sup>228</sup> In drawing the line that separates judicial from legislative scope, he advocates giving Congress “a degree of leeway,” a measure that he finds “[t]he traditional words ‘rational basis’ capture.”<sup>229</sup> But even in the campaign finance area, Breyer remains concerned that judicial encroachment on legislative authority will result in usurpation of Congress’ role when the outcome hinges on factual assessments. In one such case, *Nixon v. Shrink Missouri Government PAC*, dealing with the constitutionality of specific legislative caps on political contributions, he accused the dissent of “mak[ing] the Court absolute arbiter of a difficult question best left, in the main, to the political branches.”<sup>230</sup>

As his language indicates, Breyer’s deference is not confined to the legislative branch. In his separate opinion concurring only in the judgment in *Clinton v. Jones*, he was alone among the Justices in finding a constitutional principle capable of restricting the authority of lower court judges to compel a president to respond to a civil lawsuit. That principle, although not absolute, would assign a president the burden of demonstrating “a conflict between judicial proceeding and public duties.”<sup>231</sup> If the burden was met, Breyer’s principle would “forbid[] a federal judge in such a case to interfere with the President’s discharge of his public duties.”<sup>232</sup> That deference was grounded in empirical as well as constitutional concerns, as Breyer cited a range of sources in support of his position—commentaries by Joseph Story and Thomas Jefferson, case law, and government statistics suggesting that the potential volume

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226. Linda Greenhouse, *The Breyer Project: “Why Couldn’t You Work This Thing Out?”* 4 CHARLESTON L. REV. 37, 37 (2009).

227. *Randall v. Sorrell*, 548 U.S. 230, 248 (2006).

228. *Id.* at 249.

229. *Lopez*, 514 U.S. at 616-17. See also *Ashcroft v. ACLU*, 542 U.S. 656, 690 (2004) (Breyer, J., dissenting) (criticizing the majority for a finding in the First Amendment area that “if universally appropriate . . . denies to Congress, in practice, the legislative leeway that the Court’s language seems to promise”).

230. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 399 (2000) (Breyer, J., concurring).

231. *Clinton v. Jones*, 520 U.S. 681, 710 (1997) (Breyer, J., concurring in the judgment).

232. *Id.*

of suits against sitting presidents was in fact much greater than assumed by the majority.<sup>233</sup> “[P]redicting the future is difficult,” Breyer concluded, “and I am skeptical.”<sup>234</sup> With the factual context less than certain, he preferred to leave the door open for deference to the president based on a sufficient showing.

That skeptical turn of mind is reflected not only in Breyer’s willingness to defer to the other branches of government but also in his attitude toward the capacities of his own branch. “[J]udges,” as he recently reminded us, “cannot change the world.”<sup>235</sup> He is consequently comfortable with the limits of his role, recognizing, for example, that “Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance.”<sup>236</sup> In that spirit, he has repeatedly cited Justice Brandeis’ celebrated proposition that the Supreme Court should avoid deciding unnecessary constitutional issues<sup>237</sup> and, in a nod to the current Chief Justice, has quoted as well his characteristically framed observation that “if it is not necessary to decide more, it is necessary not to decide more.”<sup>238</sup> Breyer ended one of his most heartfelt opinions, his *Bush v. Gore* dissent, with a lament that by intervening in the election dispute the Court had set aside such restraining principles and failed to recognize the wisdom of another Brandeis observation, that “[t]he most important thing we do is not doing.”<sup>239</sup> Although both Justices concerned themselves in their pre-Court careers with the problem of government regulation of industry and share what Brandeis biographer Melvin Urofsky identifies as the twin ruling principles of idealism and pragmatism, it is on a narrower issue that Breyer himself has focused, acknowledging Brandeis as an influence on his own view that “[t]he job of the Court is to keep legislatures on the constitutional rails, deferring to legislators’ judgments whenever fundamental individual liberties are not seriously threatened.”<sup>240</sup>

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233. *See id.* at 12-20.

234. *Clinton*, 520 U.S. at 723.

235. *United States v. Morrison*, 529 U.S. 598, 660 (2000) (Breyer, J., dissenting).

236. *Id.*

237. *See, e.g., Morse v. Frederick*, 551 U.S. 393, 428-29 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part); *Ashcroft v. ACLU*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring in part and concurring in the judgment); *Richardson v. United States*, 526 U.S. 813, 820 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998).

238. *PDK Labs, Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment), *quoted in Morse*, 551 U.S. at 431. For a discussion of Roberts’ use of deliberate repetition as a stylistic device in his opinions, *see Ray, The Style of a Skeptic, supra* note 3, at 1006-08.

239. *Bush v. Gore*, 531 U.S. 98, 558 (2000) (Breyer, J., dissenting).

240. Stephen G. Breyer, *Justice Brandeis as Legal Seer*, 42 *BRANDEIS L.J.* 711, 718 (2004).

That blend of idealism and pragmatism emerges clearly in Breyer's jurisprudence, where he invokes what he has called "the genius of the Framers' pragmatic vision"<sup>241</sup>—the focus of *Active Liberty*—as a versatile interpretational guide to the resolution of a variety of constitutional issues. He has been, for example, critical of the majority's decision applying strict scrutiny to strike down a statutory requirement that mushroom producers contribute to the cost of industry advertisements aimed at expanding the market for their product. Such a tough standard would, he argued, "seriously hinder[] the operation of that democratic self-government that the Constitution seeks to create and to protect"<sup>242</sup> by interfering with legislative regulatory programs. Again dissenting in the Court's recent Second Amendment case, *District of Columbia v. Heller*, he insisted that its decision striking down the District's gun control ordinance "will have unfortunate consequences" by encouraging widespread legal challenges to such measures and restricting "the ability of more knowledgeable, democratically elected officials to deal with gun-related problems."<sup>243</sup> The challenge in each case is identifying a solution that both resolves the particular issue and at the same time serves the framers' democratic values by deferring to elected officials.

Breyer's approach to meeting that challenge informs his attitude toward a pair of Establishment Clause cases. In *Zelman v. Simmons-Harris*,<sup>244</sup> Breyer dissented from the Court's acceptance of Cleveland's school voucher program in which the vast majority of the vouchers were used to send pupils to religious schools. Although he joined the Souter dissent and declared himself in substantial agreement with the Stevens dissent, he nonetheless added his own opinion to make clear a distinct concern, the risk of "religiously based social conflict" posed by the program.<sup>245</sup> Three times in the opinion he linked that risk directly to the drafters' intention underlying the Establishment Clause. He began by noting "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict,"<sup>246</sup> invoked the "Establishment Clause concern for social concord,"<sup>247</sup> and concluded that his separate dissent was necessary "[b]ecause I believe the Establishment Clause was written in part to avoid this kind of conflict."<sup>248</sup> The same point recurred

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241. *Clinton v. City of New York*, 524 U.S. 417, 472 (1998) (Breyer, J., dissenting).

242. *United States v. United Foods Inc.*, 533 U.S. 405, 425 (2001) (Breyer, J., dissenting).

243. *District of Columbia v. Heller*, 128 S.Ct. 2793, 2868 (2008).

244. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

245. *Id.* at 717 (Breyer, J., dissenting).

246. *Id.*

247. *Id.* at 728.

248. *Id.* at 729.

in *Van Orden v. Perry*,<sup>249</sup> where Breyer's opinion concurring in the judgment provided the fifth vote to uphold the constitutionality of a Ten Commandments monument on the grounds of the Texas state capitol.<sup>250</sup> The removal of the monument would be "not only inconsistent with our national traditions . . . , but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid."<sup>251</sup> Breyer's outcome, which allied him with the Court's conservative bloc, was driven not by its support of religion in the public square but rather by his own sense of what the framers' vision required.

The various strands in Breyer's jurisprudence come together in an elaborate dissent from the Court's recent decision, *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>252</sup> rejecting the use by the Seattle and Louisville school systems of race-conscious methods to preserve desegregated schools. The opinion is an impassioned compendium of its author's approach to constitutional interpretation, unusual in both its length, some sixty-five pages, and its intensity.<sup>253</sup> Breyer acknowledged and defended its uncharacteristic form, conceding that "I have written at exceptional length. But that length is necessary."<sup>254</sup> In other respects, his opinion revisited familiar themes. He criticized the plurality's "overly theoretical approach to case law," insisting that "[l]aw is not an exercise in mathematical logic."<sup>255</sup> He argued in favor of a "contextual approach" to the validity of the programs in which the judge would "determine whether the use of race-conscious criteria is proportionate to the important ends it serves."<sup>256</sup> He insisted that the proper approach to the Fourteenth Amendment "understands the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion."<sup>257</sup> And he found that the compelling interest justifying the use of race "includes an effort to help create citizens better prepared to know, to understand, and to work with people of all races and backgrounds, thereby furthering the kind of democratic government our Constitution foresees."<sup>258</sup> Finally, he

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

250. *Id.* at 698 (Breyer, J., concurring in the judgment).

251. *Id.* at 699.

252. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

253. The opinion also includes two appendices, the first containing charts showing patterns of racial diversity in schools attended by average black students and the second listing four pages of sources relied on in the text of the dissent. *Id.* at 869-76.

254. *Id.* at 863.

255. *Id.* at 831.

256. *Id.* at 837.

257. *Id.* at 829.

258. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 843 (2007) (Breyer, J., dissenting).

returned to his central theme in *Active Liberty*, that “[t]he Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time.”<sup>259</sup> It is an opinion that synthesizes the strands of idealism and pragmatism in Breyer’s jurisprudence, relying on the framers’ vision as one that both embodies and transcends history.

The dissent also, on a smaller scale, reflects its author’s stylistic tendency toward candid, though not uncivil, discourse. In the introductory section of *Parents Involved*, Breyer charged the plurality with “pay[ing] inadequate attention” to the holdings, rationales, language, and context of precedent.<sup>260</sup> As a result, he said bluntly, “it reverses course and reaches the wrong conclusion.”<sup>261</sup> That candor recurs in a number of other cases where he does not hesitate to call those on the other side of an issue simply wrong. Sometimes the accusation is addressed generally to a claim<sup>262</sup> or to the unnamed author of a dissent<sup>263</sup> or a majority opinion.<sup>264</sup> On a few occasions, the erring Justice is named. Thus, writing for the Court in *Stenberg v. Carhart*,<sup>265</sup> Breyer used an emphatic three word sentence—“He is wrong.”—to challenge Justice Thomas’ reading of precedent,<sup>266</sup> and in an earlier opinion “Justice Scalia is also wrong” in his account of a federal statute.<sup>267</sup> In one particularly vivid instance, *Bush v. Gore*, the accusation is doubled: “The Court was wrong to take this case. It was wrong to grant a stay.”<sup>268</sup> At other times, though, Breyer is not so deeply wedded to his own position that he cannot see the force of an opposing viewpoint. In his dissent from the Court’s decision finding the line item veto unconstitutional, he followed his own argument based on earlier delegation cases with a concession that “[o]n the other hand, I must recognize that there are important differences between the delegation before us and other broad, constitutionally acceptable delegations to Executive Branch agencies—

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259. *Id.* at 858.

260. *Id.* at 803.

261. *Id.*

262. *United States v. Playboy Entm’t Group*, 529 U.S. 804, 839 (“This claim is flat-out wrong.”).

263. *Nixon v. Shrink Missouri Gov’t PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) (“If the dissent believes that the Court diminishes the importance of the First Amendment interests before us, it is wrong.”).

264. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2847 (2008) (Breyer, J., dissenting) (“The majority’s conclusion is wrong for two independent reasons.”).

265. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

266. *Id.* at 931.

267. *Miller v. Albright*, 523 U.S. 420, 489 (1998) (Breyer, J., dissenting).

268. *Bush v. Gore*, 531 U.S. 98, 144 (2000).

differences that argue against my conclusion.”<sup>269</sup> Dissenting in a First Amendment case he noted the “strong constitutional arguments favoring” the views of past and present Justices who rejected any speech restrictive legislation before pointing out that “the Court itself does not adopt those views.”<sup>270</sup>

Commenting on the Court’s internal dynamics in a recent interview, Breyer observed that the differences between Justices, even those occurring in difficult and disputed cases, “are within the range of reason.”<sup>271</sup> And he invoked a favorite guiding principle—what he termed “Tomorrow is another day”—to explain the virtues of a system that regularly produces a range of disparate positions.<sup>272</sup> Thus, Justices who are firm allies in one case may well find themselves on opposite sides in the next. Breyer finds the fact that there is no inevitable “linkage” between cases a salutary thing, one that “produces good human relations.”<sup>273</sup> For him, shifting alliances among the Justices underscore the need for tolerance as part of the job, accompanied by an apparently unquenchable optimism that the right argument may turn a dissenter into a partner in reaching the right result. That optimism is a clear echo of the Goldberg advice Breyer invoked in an earlier interview—the assumption that “[maybe] they’ll agree tomorrow”<sup>274</sup>—and an unarticulated bond between Goldberg and Breyer as Justices who remain, amid the Court’s shifting alliances, ever hopeful of ultimately persuading their colleagues.

In the same spirit, Breyer believes that disparate views are a healthy and productive part of the Court’s work. When Justice Scalia, writing for a plurality in a partisan gerrymandering case, argued that the presence of four dissenting opinions with three different standards “goes a long way to establishing that there is no constitutionally discernible standard” and thus that the claim should be held nonjusticiable,<sup>275</sup> Breyer responded with a simple and skeptical question: “Does it?”<sup>276</sup> Ever hopeful of finding common ground, he countered that the dissenters

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269. *Clinton v. City of New York*, 524 U.S. 417, 489 (1998) (Breyer, J., dissenting). In a recent interview, Breyer expressed his tendency to see the merits of opposing arguments: “I have to admit that in cases in which I have dissented, in my heart, though I tended to think how right I am, in my heart I had to admit there is much to be said for the other side, wrong though it may be.” Brookings Institution Interview with Justice Stephen Breyer, October 17, 2005, <http://www.brookings.edu/comm/20051017Breyer> at 35.

270. *Ashcroft v. ACLU*, 542 U.S. 656, 690 (2004) (Breyer, J., dissenting).

271. C-Span interview with Justice Breyer (2009), [http://supremecourt.c-span.org/Video/JusticeOwnWords/SC\\_Jus\\_Breyer.aspx](http://supremecourt.c-span.org/Video/JusticeOwnWords/SC_Jus_Breyer.aspx).

272. *Id.*

273. *Id.*

274. *See supra* text accompanying notes 188-89.

275. *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004).

276. *Id.* at 368.

might believe that their diverse proposals “will stimulate further discussion” that could in turn “lead to change in the law,” especially when one member of the Court, Justice Kennedy, withheld his vote from the plurality and “remains in search of appropriate standards.”<sup>277</sup> For Breyer, disagreement among the dissenters was a harbinger of future progress rather than a signal for judicial surrender.

Despite his willingness to appreciate the divergent viewpoints of his colleagues, Breyer does not hesitate to offer his own position by way of a concurrence or dissent, and he has been a steady, if not dramatically prolific, author of separate opinions. In his fifteen years on the high bench, he has averaged five concurrences per term, precisely the Court’s average for those terms.<sup>278</sup> His output of dissents is somewhat higher, an average of nine per term, compared with the Court’s average of seven. Although he has never led the Court in dissents, that outcome is largely due to Justice Stevens’ substantially greater productivity over that period.<sup>279</sup> Breyer has tied Stevens only once, in the 2007 term, when each Justice wrote thirteen dissents, and has been second to Stevens in three terms.<sup>280</sup>

More interesting than this quantitative measure of his separate opinions is the way in which Breyer at times fine-tunes his concurrences and an occasional dissent to mark with precision where he agrees and disagrees with a fellow Justice. In *Turner Broadcasting*, for example, he accepted the majority’s First Amendment conclusions but included a proviso, asserting that “I join the opinion of the Court except insofar as Part II-A-1 relies on an anticompetitive rationale.”<sup>281</sup> In another First

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277. *Id.* Kennedy observed “[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future.” *Id.* at 311 (Kennedy, J., concurring in the judgment).

278. All statistics are based on the HARVARD LAW REVIEW’s annual statistical summary of the previous Court term, published in the November issue. *See* 123 HARV. L. REV. 382 (2009); 122 HARV. L. REV. 516 (2008); 121 HARV. L. REV. 436 (2007); 120 HARV. L. REV. 372 (2006); 119 HARV. L. REV. 420 (2005); 118 HARV. L. REV. 497 (2004); 117 HARV. L. REV. 480 (2003); 116 HARV. L. REV. 453 (2002); 115 HARV. L. REV. 539 (2001); 114 HARV. L. REV. 390 (2000); 113 HARV. L. REV. 400 (1999); 112 HARV. L. REV. 366 (1998); 111 HARV. L. REV. 431 (1997); 110 HARV. L. REV. 367 (1996); 109 HARV. L. REV. 340 (1995).

279. Stevens published twenty-one dissents in the 1995 Term and nineteen in the 1994 and 1998 Terms. For the 1995 Term, *see* 110 HARV. L. REV. 367 (1996); for the 1994 Term, *see* 109 HARV. L. REV. 340 (1995); for the 1988 Term, *see* 103 HARV. L. REV. 394 (1989).

280. Those terms are 1996, 2000, and 2006. For the 2006 Term, *see* 121 HARV. L. REV. 436 (2007); for the 2000 Term, *see* 115 HARV. L. REV. 539 (2001); for the 1996 Term, *see* 111 HARV. L. REV. 431 (1997).

281. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 225 (1997). Breyer expanded on his qualified support: “My conclusion rests, however, not upon the principal opinion’s analysis of the statute’s efforts ‘to promot[e] fair competition,’ . . . but rather upon its discussion of the statute’s other objectives.” *Id.* For another example, *see* BE & K

Amendment case, he opened his partial concurrence with the qualified endorsement that “I agree with the Court’s conclusion and join its opinion to the extent that they are consistent with the following three observations,” which he then proceeded to specify.<sup>282</sup> Breyer may on occasion express his reservations by carving out a particular part of an opinion that he cannot join, as he did in *Boerne v. Flores*, noting that “while I agree with some of the views expressed in the first paragraph of Part I of Justice O’Connor’s dissent, I do not necessarily agree with all of them. I therefore join Justice O’Connor’s dissent, with the exception of the first paragraph of Part I.”<sup>283</sup> In two particularly controversial cases, Breyer was careful to make clear that by joining another Justice’s separate opinion he was not allying himself with that Justice’s potentially broader acceptance of the Court’s position. Thus, in *Washington v. Glucksberg*,<sup>284</sup> where the Court declined to find a due process right to assisted suicide, Breyer concurred in that judgment while setting forth his own “formulation” of a “right to die with dignity” that might apply in cases of severe suffering.<sup>285</sup> As a result, he added an unusual limit to his joinder of the O’Connor concurrence, noting that “I join her separate opinion, except insofar as it joins the majority.”<sup>286</sup> In *Gratz v. Bollinger*,<sup>287</sup> the Court’s much watched decision on affirmative action in higher education, Breyer appended an even more complicated qualification to his simultaneous joinder of both an O’Connor concurrence and a Ginsburg dissent. Again, he noted that “I join Justice O’Connor’s opinion except insofar as it joins that of the Court.”<sup>288</sup> To that, he added a surgically precise account of his second joinder: “I join Part I of Justice Ginsburg’s dissenting opinion, but I do not dissent from the Court’s reversal of the District Court’s decision. I agree with Justice Ginsburg that, in implementing the Constitution’s equality instruction,

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*Construction v. NLRB*, where Breyer objected to the majority’s treatment of labor law “as if it were antitrust law,” although he joined its result: “I do not know why the Court reopens these matters in its opinion today. . . . But I note that it has done so only to leave them open. It does not, in the end, decide them. On that understanding, but only to the extent that I describe at the outset, . . . I join the Court’s opinion.” 536 U.S. 516, 544 (2002) (Breyer, J., concurring in part and in the judgment).

282. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 127 (2001) (Breyer, J., concurring in part). See also *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring). Breyer ended his concurrence with a call for a reconsideration of the Court’s peremptory challenge jurisprudence, noting that “[w]ith that qualification, I join the Court’s opinion.” *Miller-El*, 545 U.S. at 273.

283. *Boerne v. Flores*, 521 U.S. 507, 566 (1997) (Breyer, J., dissenting).

284. *Washington v. Glucksberg*, 521 U.S. 702 (1997) (Breyer, J., concurring in the judgment).

285. *Glucksberg*, 521 U.S. at 790.

286. *Id.* at 789.

287. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Breyer, J., concurring in the judgment).

288. *Id.* at 281.

government decisionmakers may properly distinguish between policies of inclusion and exclusion.<sup>289</sup>

Breyer's preference for nuanced decisionmaking differs strongly from Goldberg's blunter approach. As the fifth vote for the Warren Court's liberal bloc, Goldberg tended to support his colleagues' positions wholeheartedly and refrained from adding his own qualifications. Quite the reverse—when he wrote separately it was likely to be because he was willing and even eager to go beyond the limits of a majority opinion. It is noteworthy too that several of Breyer's carefully defined concurrences map the contours of his agreement with O'Connor, the Court's somewhat unpredictable swing Justice. Breyer, too, has demonstrated the capacity to surprise, as he did in *Van Orden*, when he joined the Court's conservatives to uphold the constitutionality of one Ten Commandments display while joining its liberals to strike down the constitutionality of another.<sup>290</sup> The difference between those two cases for Breyer lay in their facts: the difference between a series of courthouse displays that had sparked immediate, powerful controversy and a monument that had occupied an inconspicuous position on statehouse grounds for forty years without attracting any attention or complaint. For Breyer the empiricist, facts can modulate broad principles, whereas for Goldberg facts tended to illustrate rather than to qualify those principles. It is, of course, difficult to compare the work of a Justice who authored only seventy-eight opinions in his three terms on the Court with that of a Justice now in his sixteenth term with a body of over 300 opinions in print.<sup>291</sup> Nonetheless, Breyer, though clearly also a strong ally of his Court's liberal members, seems less ideological and more focused on factual context in his approach, inclined to view each case on its own terms rather than as a necessary component of a unified jurisprudential theory.

Breyer's emphasis on solving the particular problem raised by each case is reflected in some of his characteristic stylistic devices. Like the academic he once was, he is fond of using the query not just to formulate an issue for his audience but to underscore a troublesome or crucial aspect of a case. The device appears in its basic form in *Heller*, where he acknowledged statistics showing that the District of Columbia's crime rate rose after it imposed its ban on handguns and then rejected the

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289. *Id.*

290. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005). Breyer, together with Justices Stevens, O'Connor, and Ginsburg, joined Justice Souter's opinion for the Court. In *Ashcroft v. ACLU*, Breyer again voted with the conservatives, this time in dissent, to uphold a statute restricting online adult speech as necessary for the protection of children. 542 U.S. 656, 676 (2004). Breyer's dissent was joined by Rehnquist and O'Connor. Justice Scalia filed a separate dissent. *Id.*

291. In his first fifteen terms on the Court, Breyer authored 341 cases. *See supra* note 278.

argument, based on those statistics, that a handgun ban was therefore not reasonably related to the District's crime problems.<sup>292</sup> "But," Breyer pointed out, "as students of elementary logic know, *after it* does not mean *because of it*. What would the District's crime rate have looked like without the ban? Higher? Lower? The same? Experts differ; and we, as judges, cannot say."<sup>293</sup> The questions highlight the indeterminacy of the rejected argument. Breyer may ask and respond to his own questions, as he did in puzzling over the Court's decision to return the Child Online Protection Act case to the district court for unspecified further proceedings: "What proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated? . . . I do not understand what that new evidence might consist of."<sup>294</sup> He may raise a series of questions, as he did in *Parents Involved*, where he was at pains to point out the difficulty of distinguishing *de jure* from *de facto* segregation by asking about the Seattle's school system: "Was it *de facto*? *De jure*? A mixture? Opinions differed. Or is it that a prior federal court had not adjudicated the matter? Does that make a difference? Is Seattle free on remand to say that its schools were *de jure* segregated . . . ?"<sup>295</sup> He may use a question purely for rhetorical impact, as when he concluded a section of his *Bush v. Gore* dissent by giving a single sentence a paragraph of its own to reinforce his skepticism about the majority's view of the election process: "I repeat, where is the 'impermissible' distortion?"<sup>296</sup> In his unusually playful dissent from the Court's decision upholding a copyright extension, he ironically invoked a parade of literary figures in debunking the supposed financial benefits available to authors:

What potential Shakespeare, Wharton, or Hemingway would be moved by such a sum? What monetarily motivated Melville would not realize that he could do better for his grandchildren by putting a few dollars into an interest-bearing bank account? . . . How will extension help today's Noah Webster create new works 50 years after his death? Or is that hypothetical Webster supposed to support

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292. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2859-60 (2008) (Breyer, J., dissenting).

293. *Id.* at 2859.

294. *Ashcroft v. ACLU*, 542 U.S. 656, 689 (2004) (Breyer, J., dissenting). Later in the opinion, Breyer asks "If this statute does not pass the Court's 'less restrictive alternative test' test, what does?" *Id.* at 690.

295. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 820 (2007) (Breyer, J., dissenting).

296. *Bush v. Gore*, 531 U.S. 98, 152 (2000) (Breyer, J., dissenting). *See also* *Clinton v. City of New York*, where he ended a paragraph with another question: "Where the burden of overcoming legislative inertia lies is within the power of Congress to determine by rule. Where is the encroachment?" 524 U.S. 417, 483 (1998).

himself with the extension's present discounted value, *i.e.*, a few pennies? Or (to change the metaphor) is the argument that Dumas  *fils* would have written more books had Dumas *père's* Three Musketeers earned more royalties?<sup>297</sup>

Breyer's questions contain their own answers and draw the reader, like a spellbound student, to the desired conclusion.

Breyer also at times employs another academic device to reinforce his opinions, the appendix. The materials added vary considerably. In *Eldred*, the copyright extension case, he produced two attachments, explaining in a page and a half the bases for points made in his dissent.<sup>298</sup> Appendix A sets out the statistical analysis supporting his view that the extension would provide minimal financial benefit to copyright holders;<sup>299</sup> Appendix B briefly presents "circumstances [that] support the conclusion in the text that the extension fails to create uniformity where it would appear to be most important."<sup>300</sup> Breyer added more elaborate appendices of seven pages to his dissent in the Seattle and Louisville school desegregation cases.<sup>301</sup> Appendix A, captioned "Resegregation Trends," contains charts and graphs, cited to their sources, for resegregation trends in schools nationwide;<sup>302</sup> Appendix B provides detailed references to sources supporting the text of the dissent.<sup>303</sup> Other appendices have visual as well as textual impact. Dissenting from a decision that a federal statute requiring mushroom producers to pay for industry advertisements violated the First Amendment, Breyer attached a two page ad produced by the Mushroom Council, captioned *Let Your Love Mushroom*, containing illustrated recipes and general instructions for a romantic mushroom dinner.<sup>304</sup> And in *Van Orden*, where his dissent relied in part on the surroundings of the challenged Ten Commandments monument, he appended both a map of the state capitol grounds and a photograph with an arrow pointing to the monument itself.<sup>305</sup> Like his use of repeated questions to drive home a point, Breyer's appendices draw on statistics and visual images to reach the reader from a different direction. An academic for many years, Breyer

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297. *Eldred v. Ashcroft*, 537 U.S. 186, 255 (2003) (Breyer, J., dissenting).

298. *Id.* at 267-69.

299. *Id.* at 267-68.

300. *Id.* at 269.

301. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 869-726 (2007) (Breyer, J., dissenting).

302. *Id.* at 869-72.

303. *Id.* at 873-76.

304. *United States v. United Foods Inc.*, 533 U.S. 405 (2001) (appendix to Breyer, J., dissenting).

305. *Van Orden v. Perry*, 545 U.S. 677, 705 (2005) (appendix to Breyer, J., dissenting).

adapts the techniques of scholarship and classroom teaching to the medium of the judicial opinion.

*E. Breyer and Goldberg: Common Ground*

Although it is usually said that Breyer, like Goldberg a generation earlier, is a member of his Court's liberal bloc, there are surprisingly few occasions on which Breyer has affirmed that jurisprudential linkage directly. Goldberg's name seldom appears in Breyer's opinions. It can be found a handful of times as an obligatory parenthetical in a cite to a separate Goldberg opinion in a labor law case.<sup>306</sup> More conspicuously, in two cases raising peremptory challenge issues, Breyer quoted appreciatively the same passage from Goldberg's dissent in *Swain v. Alabama*: "Were it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former."<sup>307</sup> Drawing on Goldberg's passage, Breyer made a similar point: that for him "a jury system without peremptories is no longer unthinkable."<sup>308</sup> Since he was in accord with the Court's result, this was not the case in which to take that stand, but he clearly indicated that he was prepared, in the future, to make the same choice that Goldberg had earlier defined. It is worth noting that *Swain* was decided during Breyer's clerkship, giving the connection between the two Justices particular resonance.

One other Goldberg opinion, this time a concurrence, seems to have had a similar resonance for Breyer. As noted above, in *School District of Abington Township v. Schempp*<sup>309</sup> Goldberg joined in the Court's decision striking down as an Establishment Clause violation the required reading of Bible verses or the Lord's Prayer in a public school classroom.<sup>310</sup> He also, however, concurred to make a subtler point, that

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306. See, e.g., *BE & K Construction v. NLRB*, 536 U.S. 516, 543 (2002) (citing *United Mine Workers v. Pennington*, 381 U.S. 657, 667 (1965)) (Goldberg, J., concurring and dissenting); *Eastern Enter. v. Appel*, 524 U.S. 498, 563 (1998) (Breyer, J., dissenting) (quoting *Pennington*, 381 U.S. at 698) (Goldberg, J., concurring); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 242, 248 (1996) ((quoting *Pennington*, 381 U.S. at 698) (Goldberg, J., concurring)). *Pennington* was decided during Breyer's clerkship year.

307. *Swain v. Alabama*, 380 U.S. 202, 244 (1965) (Goldberg, J., dissenting), quoted in *Rice v. Collins*, 546 U.S. 333, 344 (2006) (Breyer, J., concurring) and *Miller-El v. Dretke*, 545 U.S. 231, 273 (2005) (Breyer, J., concurring).

308. *Miller-El*, 545 U.S. at 272. In *Miller-El*, Breyer also asserted that "I believe it necessary to reconsider *Batson's* test and the peremptory challenge system as a whole," concluding that "[w]ith that qualification, I join the Court's opinion." *Miller-El*, 545 U.S. at 273.

309. *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

310. *Id.* at 204.

the application of the principles of religious freedom protected by the Constitution is a delicate task. “There is for me,” Goldberg wrote, “no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.”<sup>311</sup> That passage appears in the first sentence of Breyer’s *Van Orden* concurrence, where he found a Ten Commandments monument on public land constitutionally valid.<sup>312</sup> Goldberg’s perspective serves as the organizing principle of the opinion, which invoked his name no fewer than six times as it argued that the monument did not violate the purposes of the Religion Clauses because it signaled no government attempt to promote religion and created no divisiveness. Two of those references were parenthetical citations dictated by the conventions of legal form.<sup>313</sup> There are, however, four occasions in the opinion when Breyer deliberately mentioned Goldberg by name, most prominently quoting him again in the opinion’s rhetorical conclusion to insist that “where the Establishment Clause is at issue, we must ‘distinguish between real threat and mere shadow.’ . . . Here we have only the shadow.”<sup>314</sup>

Ironically, although Goldberg’s approach pervades Breyer’s opinion and Goldberg’s language appears at its start and its conclusion, Goldberg shares the spotlight with his colleague, Justice Harlan, the only Justice to join the *Schempp* concurrence.<sup>315</sup> Every time Breyer refers to Goldberg in the text, he includes Harlan as well, repeatedly attributing the argument of the *Schempp* concurrence to “Justices Goldberg and Harlan.”<sup>316</sup> The linking of Goldberg with the considerably more conservative Harlan, widely respected for his adherence to legal principle and craftsmanship, underscores the content of the quoted passages from *Schempp*, a liberal Justice’s unexpectedly nuanced application of the Establishment Clause. In an opinion that might otherwise have been viewed as a deliberate homage to the man for whom he clerked, Breyer contrives at once to honor Goldberg and to underplay the direct connection between them. At the same time, Goldberg’s modification of the majority opinion in *Schempp* anticipates and illuminates Breyer’s own capacity to surprise liberal expectations, as he does in *Van Orden*, through his own distinction between threat and shadow. By quoting

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311. *Id.* at 306 (Goldberg, J., concurring).

312. *Van Orden*, 545 U.S. at 698. Breyer also cites to the *Schempp* concurrence in his *Zelman* dissent. *Zelman v. Simmons-Harris*, 536 U.S. 639, 719 (2002).

313. *Van Orden*, 545 U.S. at 700, 702.

314. *Id.* at 704.

315. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., dissenting).

316. *Id.* at 698. (stating “Justice Goldberg, joined by Justice Harlan,” and “as Justices Goldberg and Harlan noted”). *See also id.* at 699 (stating “as Justices Goldberg and Harlan pointed out”); *id.* at 704; (stating “Justices Goldberg and Harlan concluded”).

Goldberg and simultaneously pairing him with Harlan, Breyer provides the most revealing jurisprudential link between Justice and clerk to be found in his opinions.

An additional area in which Goldberg and Breyer have similar responses to a controversial issue is the reliance on international law, although here Breyer makes no rhetorical gesture suggesting that he was influenced by Goldberg. In his dissent from denial of certiorari in *Rudolph v. Alabama*, discussed earlier, Goldberg cited the United Nations Report on Capital Punishment as evidence of “the trend both in this country and throughout the world against punishing rape by death” and noted the place of the United States among only five nations still permitting the practice.<sup>317</sup> Breyer has on a number of occasions also invoked international law to support his positions. He has observed that “it can be helpful to look to international norms and legal experience in understanding American law”<sup>318</sup> and has suited his action to his words. Thus, he has identified similar use of balancing tests in free speech cases by the European Commission of Human Rights and a Canadian court<sup>319</sup> and has cited England approvingly as “a common-law jurisdiction that has eliminated peremptory challenges.”<sup>320</sup> He has found foreign law helpful even on such a quintessentially American issue as federalism, opening a dissent with the observation that “the United States is not the only nation that seeks to reconcile the practical need for a central authority with the democratic virtues of more local control” and citing Switzerland, Germany, and the European Union as examples of countries preferring “a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution.”<sup>321</sup> Although he concedes that “there may be relevant political and structural differences between their systems and our own,” he insists that “their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem.”<sup>322</sup> The use of foreign law by the Court has become a fiercely disputed issue, with Justices Scalia and Thomas in particular denouncing the practice and insisting that the

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317. *Rudolph v. Alabama*, 375 U.S. 889, 889 n.1 (1963) (Goldberg, J., dissenting).

318. *Eldred v. Ashcroft*, 537 U.S. 186, 257 (2003) (Breyer, J., dissenting).

319. *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 403 (2000). In a recent decision, *Ysura v. Pocatello Education Association*, Breyer combined two of his familiar themes when he proposed a First Amendment test asking “whether the statute imposes a burden upon speech that is disproportionate in light of other interests the government seeks to achieve” and noted that “[c]onstitutional courts in other nations also have used similar approaches when facing somewhat similar problems.” 129 S.Ct. 1093, 1103 (2009) (Breyer, J., concurring in part and dissenting in part).

320. *Miller-El*, 545 U.S. at 272.

321. *Printz v. United States*, 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

322. *Id.* at 978.

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Supreme Court “should not impose foreign moods, fads, or fashions on Americans.”<sup>323</sup> In a 2003 speech before the American Society of International Law, Breyer countered by citing his four colleagues—Justices O’Connor, Ginsburg, Stevens, and Souter—who are in accord with his views on the relevance of foreign law and offering a characteristically pragmatic rationale, “our perception of need and of usefulness [that] arises out of our daily experience.”<sup>324</sup> Although Breyer did not mention Goldberg as one of his allies on this issue, they nonetheless stand together in their support for the use of international law as a legitimate interpretational tool.

#### IV. CONCLUSION

Arthur Goldberg and Stephen Breyer shared the experience of the 1964 Term of the Warren Court as Justice and clerk, but they shared considerably more than that precise moment in Supreme Court history. They had in common as well both their heritage as American Jews and their reputations as members of their Courts’ liberal blocs. Those obvious points of intersection coexist, however, with significant points of divergence. Although both Goldberg and Breyer have written opinions strongly supportive of minority rights, First Amendment freedoms, and protections for criminal defendants, their jurisprudential approaches are fundamentally different. Where Goldberg brought a broadly ideological vision with him to the bench and candidly pursued an agenda of equal justice and individual liberties grounded in Warren Court precedents like *Brown*, Breyer’s sense of his job is considerably more nuanced. Although on the Rehnquist Court he was most frequently allied with Justices Stevens, Souter, and Ginsburg, Breyer has never been entirely predictable in either his votes or his rationales. A committed empiricist, he is inclined to take each case on its own merits and its own facts rather than as part of a larger agenda. His preference, explicated in *Active Liberty*, is to test each constitutional decision against the framers’ broad principles to see which outcome best advances the values of participatory democracy and reduced conflict. Most often that process reaches the result that his liberal colleagues endorse—and that Goldberg would have

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323. *Foster v. Florida*, 537 U.S. 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari), *quoted in* *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). Thomas’ observation was in specific rebuttal to Breyer’s citation of decisions from courts of the United Kingdom and Canada and the European Court of Human Rights as relevant to the question of whether the delay of a prisoner’s execution for a period of twenty-seven years constituted cruel and unusual punishment. 537 U.S. at 990 (Breyer, J., dissenting).

324. Stephen Breyer, *The Supreme Court and the New International Law* (Apr. 4, 2003) transcript, *available at* [http://supremecourtus.gov/publicinfo/speeches/sp\\_04-04-03.html](http://supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html).

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supported. But Breyer retains the capacity to surprise and, in cases like *Van Orden*, to play the role of swing Justice rather than liberal stalwart and certain fifth vote.

Despite their jurisprudential differences, Breyer does resemble Goldberg in his judicial temperament. Like Goldberg, he prefers to make his points without resorting to the kind of hostile rhetoric that entrenches divisions between Justices; as Cass Sunstein has observed, Breyer “writes in a way that is unfailingly civil and generous to those who disagree with him.”<sup>325</sup> If his opinions provide few eminently quotable passages, they also, by their tone and their reliance on the particulars of a case, tend to leave the door open to future realignments. The lesson that Breyer admits to learning from Goldberg is that of patient persistence: Accept a defeat philosophically and look ahead to the next opportunity for victory. Breyer’s opinions are crafted to make that possible by asking questions rather than launching attacks, finding common ground even with those who vote against him, and preferring supportive appendices to dismissive critiques. It is no coincidence that the Goldberg opinion that figures most prominently in Breyer’s canon is *Schempp*, where a staunch liberal joined the majority’s broad Establishment Clause position but went on to offer in concurrence his own modulated version, one that acknowledged the risk that untempered neutrality could generate hostility to the nation’s pervasive religious values. What Goldberg and Breyer share, then, is what Breyer would call an attitude, a judicial perspective that remains, even at the moment of decision, capable of appreciating the other side’s position while retaining the hope that, one day, its own will prevail.

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325. Sunstein, *supra* note 208, at 1728.