Justice Breyer's principled pragmatism and Kagan's new living constitutionalism and lite textualism

Rachel Anne Rein *

Abstract: This article is a comparative study of United States Supreme Court Justice Breyer and Kagan's methods of judicial interpretation. By juxtaposing and comparing the justices' jurisprudence, this article aspires to clarify their methods and raise questions for further analysis. This article posits that the core of Breyer's interpretative methods is pragmatism. However, Breyer does account for values and purposes. Thus, he is a "principled pragmatist" for both constitutional and statutory interpretation. On the other hand, Kagan exercises a "new" living constitutionalism in her constitutional interpretation but interprets statutes as a "lite" textualist. Paragraph 1 introduces the article. Then, Paragraph 2 studies what Breyer and Kagan claim to be. Next, Paragraph 3 interrogates Breyer and Kagan's judicial methods in practice. Finally, based on the justices' methods, Paragraph 4 provides theories on what Breyer and Kagan may focus on in *Dobbs v. Jackson Women's Health Organization*, involving one of the United States' most contentious contemporary debates about abortion.

Keywords: Jurisprudence; constitutional law; statutory interpretation; Breyer; Kagan.

Table of contents: 1. Introduction. – 2. What Justices Breyer and Kagan Say They Are. – 2.1. Breyer. – 2.2. Kagan. 3. Breyer and Kagan's Judicial Interpretation in Practice. – 3.1. The Constitution. – 3.2. Statutory Analysis. – 4. Implications for Dobbs. – 5. Conclusion.

1. *Introduction*

Elena Kagan is now the most restrained liberal justice on the Supreme Court, but she began her legal scholarship as a young firebrand. In her Master's thesis at Oxford, Kagan claimed that judges try to "mold and steer" the law to achieve social goals, and she defended the bold practice[1]. Later, at her own judicial confirmation, Kagan dismissed her former statements as the musings of someone who had never set foot in law school[2]. As a justice, Kagan claimed that a judge's empathy must never factor into a decision, which must rest on "law all the way down"[3].

In contrast, Justice Stephen Breyer has tended to be more consistent. As an administrative law professor, he advocated for a pragmatic approach to regulations[4]. His decades-long tenure on the Court has since been marked by an extension of this pragmatic, "living" approach beyond regulations to the Constitution, statutes, and global

---

* Rachel Rein, J.D. (anticipated) Columbia, Class of 2022. She wishes to thank Judge Richard J. Sullivan (U.S. Second Circuit Court of Appeals), for whom she wrote the first draft of this Article as a capstone for his American Jurisprudence seminar. She appreciates his helpful guidance and comments.

1. See Meg Greene, *Elena Kagan: A Biography* at 50 (Greenwood Pub Group 2014).

2. Committee on the Judiciary United State Senate, *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 64* (Jun 28- Jul 1, 2010) at 128, available at https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf (last visited April 10, 2022).

3. Thomas B. Griffith, *Was Bork Right About Judges?*, 34 Harvard Journal of Law & Public Policy 157, 163 (2011)..

4. Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 Yale Law Journal 1719, 1719-20 (2006).

realities[5]. However, it is necessary to understand what the two justices have become today.

This article is a comparative study of Breyer and Kagan's methods of judicial interpretation. By juxtaposing and comparing the justices' judicial philosophies, this article aspires to clarify their methods and raise questions for further analysis. This article posits that the core of Breyer's interpretative methods is pragmatism. However, Breyer does account for values and purposes. Thus, he is a "principled pragmatist" for constitutional and statutory interpretation. On the other hand, Kagan exercises a "new" living constitutionalism in her constitutional interpretation but interprets statutes as a "lite" textualist.

Paragraph 2 analyses what Breyer and Kagan claim to be. Breyer claims to be a living constitutionalist, purposivist, and pragmatist, while Kagan advocates for an approach that sticks closer to constitutional and statutory text. Next, Paragraph 3 interrogates Breyer and Kagan's judicial methods in practice, to verify whether they comply with the approaches they advocate for. Paragraph 3 finds that on balance, both justices consistently follow their own advice. But this part also points out potential inconsistencies between Breyer and Kagan's claims and practice. Overall, Paragraph 3 centers on well-known constitutional and statutory opinions of Breyer and Kagan's, mainly ones that they have said exemplify their interpretative methods. Using these opinions as a sample, instead of choosing a random sample, offers the opportunity to either agree with the justices' assessment of their work or challenge it. These well-known cases, ones often fraught with social impact, are also more likely to differentiate the justices' interpretative methods[6]. Finally, based on the justices' methods, Paragraph 4 provides theories on what Breyer and Kagan may focus on in *Dobbs*

5. See, e.g., *Glossip v. Gross*, 576 U.S. 863, 908-978 (2015) (Breyer dissenting) (applying a pragmatic, living constitutionalist approach to Oklahoma's lethal injection process under *Trop*'s Eighth Amendment evolving standards of decency test); *Milner v. Department of Navy*, 562 U.S. 562 (2011) (Breyer dissenting) (using pragmatism in a statutory Freedom of Information Act case); See also Stephen Breyer, *The Court and the World: American Law and the New Global Realities* at 13 (First Vintage Books 2016) (applying pragmatic considerations to the Court's role in interpreting and applying international law).

6. Stephen Breyer, *The Authority of the Court and the Peril of Politics* at 85-87 (The Scalia Lecture, 2021).

v. Jackson Women's Health Organization[7], involving one of the United States' most contentious contemporary debates about abortion.

2. *What Justices Breyer and Kagan Say They Are*

In oral arguments for *American Hospital Association v. Becerra* in November 2021[8], Justices Breyer and Kagan asked a question simultaneously[9]. Breyer acknowledged the awkward blunder and joked that he and Kagan probably had the same question[10]. Kagan quipped, "I doubt it"[11]. Beyond showcasing Kagan's biting wit, Breyer and Kagan's recent short exchange begs the question: how do the two justices characterize how they interpret texts? Paragraph 2 asks the justices such questions, taking their words at face value from first-person distinguished lectures, as well as articles, interviews, and other texts.

2.1. *Breyer*

At first appearance, Breyer's words suggest he is a living constitutionalist, purposivist, and pragmatist[12]. Breyer has consistently supported a pragmatic, purposive approach to interpreting the Constitution and statutes, which requires considering current circumstances. Breyer first advocates that judges look to unchanging values, primary purposes, and objectives embodied in the Constitution in light of today's circumstances when interpreting vague constitutional provisions[13]. Breyer believes reading these values and original intent

7. See *Dobbs v. Jackson Women's Health Organization* (Supreme Court of the United States, pending).

8. See *American Hospital Association v. Becerra* (Supreme Court of the United States, pending).

9. *Am. Hosp. Ass'n. v. Becerra*, Transcript of Oral Argument at 44 (No. 20-1114).

10. See *id.*

11. See *id.*

12. See Stephen Breyer, *Making Our Democracy Work: A Judge's View* at 1-220 (Vintage Books 2011). See also Breyer, *The Authority of the Court and the Peril of Politics* at 87 (cited in note 6).

13. Stephen Breyer, *A Conversation on the Constitution: Judicial Interpretation with Justice Antonin Scalia and Justice Stephen G. Breyer* (Annenberg Found. Trust Sunnylands), available at https://assets.annenbergclassroom.org/

flexibly best responds to a changing society[14]. For example, Breyer calls one primary purpose and objective "active liberty"[15]. Active liberty describes people's participation in the democratic process[16]. So, Breyer advocates for courts to more heavily account for the Constitution's democratic nature when interpreting the Constitution and statutes[17]. In doing so, Breyer believes that courts will rightfully honor the American people's right to "an active and constant participation in collective power"[18].

For Breyer, when the Court applies the Constitution's text to circumstances today, it protects its enduring democratic purpose[19]. For example, Breyer looks to the value and purpose behind the Fourteenth Amendment to favorably interpret state school affirmative action policies in equal protection cases[20]. Breyer says the amendment

---

annenbergclassroom-conversation-judicial_interpretation.mp4 (last visited December 4, 2021). This approach appears to mirror how living constitutionalism entails evolving, adapting, and changing responses to unchanging values so that such values represent today's world. See David A. Strauss, *The Living Constitution*, (University of Chicago Law School, September 27, 2010), available at https://www.law.uchicago.edu/news/living-constitution (last visited April 11, 2022). For a more robust discussion of living constitutionalism, see generally David A. Strauss, The Living Constitution (Oxford University Press 2010). See also David A. Strauss, *Do We Have a Living Constitution?*, 59 Drake Law Review 973 (2011).

14. Stephen Breyer and Antonin Scalia, *Original Intent and a Living Constitution – A Discussion*, (C-SPAN, March 10, 2010) available at https://www.c-span.org/video/?292678-1/justices-breyer-scalia-constitution-forum (last visited April 11, 2022).

15. Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* at 4-5 (Vintage Books 2006). Breyer frames his discussion of constitutional and statutory interpretation in "the liberty of the ancients" instead of the "liberty of the moderns." "Active liberty of the ancients," coined by political philosopher Benjamin Constant, is a people's right to "an active and constant participation in collective power." This is the right Breyer hopes to honor by flexibly interpreting the Constitution and statutes. See *id.* at 3-5.

16. See *id.* at 4-5.

17. See *id.* at 5.

18. See *id.*

19. See Breyer and Scalia, *Original Intent and a Living Constitution* (cited in note 14).

20. See Antonin Scalia and Stephen Breyer, *A Conversation on the Constitution: Principles of Constitutional Statutory Interpretation (2009)* (University of Arizona James E. Rogers College of Law, January 24, 2019), available at https://www.youtube.com/watch?v=jmv5Tz7w5pk (last visited April 11, 2022).

intended to bring former slaves into full membership in American society[21]. He identifies inclusivity as the amendment's underlying value[22]. Breyer thus differentiates between positive discrimination (such as affirmative action that aims to achieve greater diversity) and invidious discrimination[23]. Affirmative action policies that promote diversity are more likely to be constitutional, according to Breyer, than policies that invidiously discriminate, attempting to exclude racial minorities[24].

Next, Breyer claims to be pragmatic[25]. Breyer argues that judges should first consider the purposes of the legal provision in question to inform judges' "ultimate objectives" [26]. Then, judges should assess the practical consequences of various interpretations[27]. Judges must study whether the implications of a decision further or inhibit constitutional provisions, especially in cases that impact vital social issues[28]. For example, Breyer claims allowing affirmative action in some cases could result in a more racially inclusive school system[29]. According to Breyer, judges should look beyond the law's text, its adopters' original intent, or judicial precedent, when necessary[30]. Judges should also

21. See *id.*

22. See *id.*

23. See Stephen Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (Lyndon Baines Johnson Library and Museum, May 9, 2012), available at https://www.youtube.com/watch?v=lbuNnlve6Lc (last visited April 11, 2022).

24. See Scalia and Breyer, *A Conversation on the Constitution* (cited in note 20).

25. See Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (cited in note 23).

26. Breyer, *The Authority of the Court and the Peril of Politics* at 86-87 (cited in note 6). Considering the purposes of a legal provision is also a purposive approach.

27. See Stephen Breyer, *Legally Speaking: Stephen Breyer* (University of California Television, February 2, 2012), https://www.youtube.com/watch?v=QqJSU-XPezTw; See Breyer, *The Authority of the Court and the Peril of Politics* at 86-87 (cited in note 6). Pragmatism asks judges to predict practical consequences of a potential decision to determine what decision most likely will meet their intended ends. See William James, *Pragmatism: A new name for some old ways of thinking* at 43 (Longmans, Green and Co., 1907).

28. See Breyer, *Legally Speaking* (cited in note 27).

29. See Breyer, *An Evening with Supreme Court Justice Stephen Breyer* (cited in note 23).

30. See Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 Yale Law Journal 1675, 1688-90 (2005-06).

avoid rigid doctrinal formulas and rules, especially in close cases[31]. In such cases, they instead need to balance many factors, make pragmatic judgments, and view matters of degree as dispositive[32]. Breyer says that pragmatism most accurately will determine legal meaning and fully promote democratic values[33]. Breyer emphasizes the importance of compromise to further promote democracy[34]. He suggests deciding cases on narrower bases so that justices can find common ground, avoiding the appearance of a political Court[35].

2.2. Kagan

Compared to Breyer, Kagan adopts a more measured interpretative approach. For statutory interpretation, she sometimes defines herself as a textualist, other times as a "textualist with caveats," who employs common sense and uses language sensibly[36]. She claims to look first at the "whole text" for context[37], and then at the structure of a statute before venturing beyond the text into other sources like legislative history[38]. She says she views legislative history with skepticism and avoids considering it as dispositive[39]. One may define Kagan as a lite textualist.

---

31. See *id.*
32. See *id.*
33. See *id.*
34. See Stephen Breyer, *Scalia Lecture: Justice Stephen G. Breyer, "The Authority of the Court and the Peril of Politics"* (Harvard Law School, April 7, 2021), available at: https://www.youtube.com/watch?v=bHxTQxDVTdU (last visited April 11, 2022).
35. See *id.*
36. See e.g., Elena Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens, Gerrymandering, Writing and More* (Georgia Law School, July 22, 2019), available at: https://www.youtube.com/watch?v=k21ShdZLV-Al (last visited April 11, 2022) (Kagan calls herself a textualist); Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes* (Harvard Law School, November 17, 2015) available at: http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation (last visited April 11, 2022) (Kagan calls herself a textualist with caveats.).
37. See Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens* (cited in note 36).
38. See *id.*
39. See *id.* (She supposes that legislative text may "theoretically" be dispositive in some instances).

Laying out her method of constitutional interpretation, Kagan claims that she answers constitutional questions by looking at the text of the Constitution and at the Constitution's history, structure, and precedents[40]. She claims to consider the "broad sweep of history" instead of the Constitution's original public meaning[41]. Kagan also takes into great consideration consensus on the Court, fostering compromise when she can[42], especially on hot-button social issues, to avoid the Court appearing politicized[43]. She thus sounds like a new living constitutionalist[44]. Unlike originalists, Kagan does not look to original public meaning, but rather to how society has developed over time, applying unchanging values to new circumstances.

Furthermore, Kagan claims to keep her constitutional and statutory interpretative methods separate from her personal views[45]. Further retreating from pragmatism, Kagan notes that in statutory interpretation, doctrine must come before common sense[46]. However, Kagan's focus on consensus-building seems pragmatic, in that she believes

40. Griffith, *supra* note 3, at 163.

41. Elena Kagan, *A Conversation Between Justices Elena Kagan and Rosalie Silberman Abella* (University of Toronto Law School, November 15, 2018), available at: https://www.youtube.com/watch?v=RxfTA3XzA4Q (last visited April 11, 2022).

42. Elena Kagan, *Dean Minow talks with Associate Justice Elena Kagan '86 at HLS*, (Harvard Law School, September 10, 2014), available at: https://www.youtube.com/watch?v=SCLQWtKATpM (last visited April 11, 2022).

43. See Elena Kagan, *Eighth Annual John Paul Stevens Lecture with U.S. Supreme Court Justice Elena Kagan* (Colorado Law School, October 22, 2019), available at: https://www.youtube.com/watch?v=a_JQw_ZO4KI (saying the last thing the Court should appear to be is "polarized"); See Elena Kagan, *2019 Stein Lecture: U.S. Supreme Court Justice Elena Kagan* (University of Minnesota Law School October 24, 2019), available at: https://www.youtube.com/watch?v=E8NnDaxJMMA (Kagan indicates that consensus burgeons public trust and confidence in the institution of the Court).

44. See generally, Carson Holloway, *Elena Kagan's Living Constitution* (Public Discourse – The Journal of The Witherspoon Institute, July 2, 2010), available at: https://www.thepublicdiscourse.com/2010/07/1406/ (last visited April 11, 2022).

45. See Thomas B. Griffith, *Was Bork Right About Judges?*, 34 Harvard Journal of Law & Public Policy 157, 163 (2011). Breyer similarly notes that when principles of law and his personal views conflict, he necessarily chooses law. See Stephen Breyer, *Q&A: Justice Stephen Breyer* (C-SPAN, October 18, 2010), available at https://www.youtube.com/watch?v=wD46zkGd8k0 (last visited April 11, 2022). As an example, he describes how despite his personal animosity towards mandatory minimums, he is bound as a judge to uphold them.

46. See Kagan, *Eighth Annual John Paul Stevens Lecture* (cited in note 43).

that lack of consensus could potentially undermine public confidence in the Court.

She indicates that she works to build consensus by framing issues in ways in which the justices may hopefully find common ground. Her compromise-focused strategy suggests the possibility that Kagan may choose in some cases to frame the law narrowly or broadly, because of her will to favor a practical outcome – one that advances or clarifies the law in a way that inspires public support or at least avoids sowing public distrust. Thus, while Kagan claims that any form of constitutional theory must impose constraints on judicial discretion[47] stressing that one must start with the text with both the Constitution and statutes, her focus on consensus-building brings her, ever so slightly, closer to Breyer's pragmatism.

3. *Breyer and Kagan's Judicial Interpretation in Practice*

This section uses constitutional and statutory case studies to assess whether Breyer and Kagan actually adhere to their asserted methods of judicial interpretation, finding that both justices' practices are largely consistent with their preferred interpretative methods.

3.1. *The Constitution*

For constitutional analysis, one may argue that Breyer is a principled pragmatist, while Kagan exercises new living constitutionalism. Kagan's approach focuses heavily on unchanging values in a changing society, though not at the expense of doctrine or the occasional pragmatic consideration. Breyer, on the other hand, focuses primarily on practical results, occasionally considering constitutional values. In this way, both justices consistently apply their asserted interpretative methods[48].

47. See Elena Kagan, *A Conversation with U.S. Supreme Court Justice Elena Kagan*, (Harvard Law School, September 16, 2016), available at: https://www.youtube.com/watch?v=zxITcqE0orM (last visited (April 11, 2022)

48. See Part 1.1. and 1.2.

Breyer's interpretation of the Full Faith and Credit Clause (FFC) showcases his pragmatism. Breyer's majority opinion in *Franchise Tax Board v. Hyatt*[49] held that Nevada's Supreme Court violated the FFC when it upheld a judgment against a California agency that awarded damages higher than Nevada permitted in suits against the Nevada government[50]. Breyer's majority opinion does not appeal to precedent or text[51]. Instead, it reflects a compromise amid the FFC's "indeterminate [text]" and "uncertain [original meaning][.]"[52]. As one scholar noted, Breyer's pragmatic reasoning "finds vindication" in the Constitution's balance of state and federal power and in the "practical likelihood that [his majority] decision will reduce interstate friction without occasioning undue uncertainty or excessive litigation"[53]. In doing so, Breyer is adopting a pragmatic interpretation.

Breyer also claims, however, to exercise living constitutionalism in some cases. For example, Breyer cites *Roper v. Simmons*[54], in which he joined the majority opinion striking down the death penalty for minors, as a chief example of his living constitutionalism[55]. Breyer does not note the specific value that *Roper* exemplifies[56]. However, as *Roper* relies on *Trop v. Dulles*'s[57] evolving standards of decency test, one value Breyer could be referring to is human dignity or decency. Moreover, it is unclear how *Roper*'s decision honors people's participation in the political process. It is therefore difficult to find Breyer's active liberty, a core value that Breyer claims to attempt to uphold, in the *Roper* decision. If Breyer means that *Roper* is responsive to the death penalty debates in general, showing that the Court is not ignoring current social debates, then the outcome in *Roper* should not matter. By taking the case on the merits, the Court shows its willingness to revisit legal issues in today's light.

---

49. See *Franchise Tax Board v. Hyatt* (*Hyatt II*), 136 S. Ct. 1277 (2016).
50. *Article IV – Full Faith and Credit – Sovereign Immunity – Franchise Tax Board v. Hyatt*, 130 Harvard Law Review 317, 317-18 (2016).
51. See *id.*
52. See *id.*
53. See *id.*
54. *Roper v. Simmons*, 543 U.S. 551 (2005).
55. See Breyer, *A Conversation on the Constitution* (cited in note 13).
56. See *id.*
57. *Trop v. Dulles*, 356 U.S. 86 (1958).

Supposing that Breyer meant that *Roper* is responsive to the public's alleged anti-death penalty sentiment, one may conclude that he is advocating for a Court that is political instead of independent, even though Breyer generally condemned political decisions[58]. As the public is far from single-minded when it comes to the death penalty, it seems almost as if Breyer goes against active liberty by giving short shrift to public sentiment in his death penalty dissents.

For instance, one may argue that in Breyer's death penalty decisions he fails to adequately account for the fact that a majority of U.S. citizens support the death penalty and many citizens democratically voted for politicians that enacted state capital punishment laws[59]. In fact, in Breyer's dissent in *Glossip v. Gross*[60], he actively downplays nationwide support for the death penalty, arguing that the death penalty is unusual and disfavored[61]. Breyer's opinions on death penalty also focus on the practical effects that the death penalty imposes on capital defendants in U.S. prisons, including long delays on death row[62]. By focusing on the death penalty's effects on the criminal justice system, Breyer sounds like pragmatist Judge Richard Posner. Posner considered the implications of his decisions for the public good[63]; Breyer similarly enlarges his discussion of the death penalty into one about the United States prison system.

---

58. See *Dobbs v. Jackson Women's Health Org.*, Transcript of Oral Argument at 10 (No. 19-1392).

59. According to a 2021 Pew Research study, 60% of U.S. adults support the death penalty for people convicted of murder, and almost one-third of Americans *strongly* support it. See *Most Americans Favor the Death Penalty Despite Concerns About Its Administration*, (Pew Research Center June 2, 2021), available at https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ (last visited April 11, 2022) See also *Dunn v. Price*, 139 S. Ct. 1312 (2019) (Breyer dissenting from grant of application to vacate stay); *Evans v. Mississippi*, 461 U.S. 939 (2018) (Breyer dissenting from the denial of certiori); *Sireci v. Florida*, 580 U. S. __ (2016) (Breyer dissenting).

60. *Glossip v. Gross*, 576 U.S. 863 (2015) (Breyer dissenting).

61. See *id.* at 918-19, 938-942 (describing a decline in executions as well as the growing number of states that have abolished the death penalty).

62. See *id.* at 923-27 (describing lengthy delays on death row and egregious solitary confinement conditions that capital defendants often face, causing hallucinations, paranoia, and even self-mutilation).

63. Richard A. Posner, *What Am I? A Potted Plant?*, The New Republic (September 28, 1987).

This matters because Breyer seems to undermine a core value he reads in the Constitution, active liberty, by favoring a pragmatic discussion. If Breyer is willing to undermine a core constitutional value, one that supports the very purpose of our democracy, in favor of pragmatism, he could be better classified as a pragmatist, rather than a living constitutionalist. So, Breyer does not appear to fully practice the living constitutionalism he refers to when discussing his interpretative methods, at least not in death penalty cases.

Unlike Breyer, Kagan has chosen doctrine over common sense in ethically difficult cases. Doing so shows how she reconciles constitutional values with other means of interpretation, embodying a new living constitutionalism. In *Brown v. Entertainment Merchants Association*[64], a First Amendment case on the right of children to access violent video games, in which Kagan joined the majority[65], she indicates that First Amendment doctrine pulled one way, toward striking down a California law that imposed restrictions on violent video games[66]. "All of common sense[,]" on the other hand, pulled the opposite way: to restrict dangerous video games from vulnerable, impressionable children[67]. Kagan ultimately joined the majority opinion, striking down the California law[68]. In this case, Kagan does exactly what she claims to do: focus primarily on the doctrine. Kagan exemplifies a new living constitutionalist analysis by choosing not to put constitutional values over doctrine when the two diverge.

This case also exemplifies how Breyer seems likely to choose the "common sense" approach: to keep violent media out of kids' hands. He did indeed dissent, holding the California law constitutional[69]. Breyer's dissent does not depart from classic First Amendment analysis: he justifies then applies strict scrutiny[70]. But his dissent rings pragmatic in two ways. First, Breyer suggests a "flexible" application of strict scrutiny, instead of a "mechanical" one[71]. Breyer does not

64. *Brown. v. Ent. Merchs. Ass'n*, 564 U.S. 786 (2011).
65. See Kagan, *Eighth Annual John Paul Stevens Lecture* (cited in note 43)
66. See *id.*
67. See *id.*
68. See *id*.
69. See *Brown. v. Ent. Merchs. Ass'n,* 564 U.S. 786, 840 (2011) (Breyer dissenting).
70. See *id.* at 841-56.
71. See *id*. at 847.

describe what "mechanical" strict scrutiny analysis looks like. But Breyer's flexible approach would balance the proportion by which the statute harms speech compared to the benefits the statute aims to provide[72]. By balancing harms and benefits, Breyer employs choice-based analysis. His focus on the public good marks pragmatism[73]. Second, Breyer focuses on the practical effects of violent video games, introducing outside-the-record social science studies into his dissent to show how the games may harm children[74]. By emphasizing social science and statistics, even ignoring the limitations of the record to do so, Breyer exemplifies pragmatism's focus on policy and choices even above law.

Therefore, Breyer's focus on the practical consequences of constitutional decisions overshadows his focus on principles. In contrast, Kagan's commitment to unchanging values, but not at the expense of doctrine or other considerations, makes her a new living constitutionalist.

3.2. *Statutory Analysis*

For statutes, Kagan uses lite textualism, in contrast to Breyer's purposive approach[75]. Kagan infrequently allows legislative history to inform her analysis, moving her away from pure textualism. Breyer, on the other hand, often starts with legislative history, considering statutes in the context of their congressional purposes. So here, both justices similarly practice what they preach.

---

72. See *id.*

73. See Richard A. Posner, *Pragmatic Adjudication*, 18 Cardozo Law Review at 15-16 (1996).

74. *Brown*, 564 U.S. at 801.

75. An in-depth study of Breyer and Kagan's approaches to administrative regulations, in addition to statutes and the Constitution, was outside the scope of this article, though Breyer's take on regulations appears pragmatic. See Stephen Breyer, *Regulation and Its Reform* at 191 (Harvard University Press, 1982) (indicating that an understanding of the specific issue warranting the regulation would aid in choosing the right regulation). While Kagan has not written prolifically on the subject like Breyer, for a taste of her approach toward regulations, See Elena Kagan, *Presidential Administration*, 114 Harvard Law Review 2245, 2376-77 (2000-01) (discussing how courts could develop post-*Chevron* doctrine promoting presidential power over agency action).

Yates v. United States[76] offers a clear example of Kagan's lite textualism[77]. Kagan's dissent admonishes the majority, including Breyer, for not taking the text seriously enough[78]. Her dissent focuses on the ordinary meaning of "any tangible object"[79]. Kagan argues that "any tangible object" includes undersized fish that a fisherman destroyed to avoid a fine[80]. Kagan first notes that the ordinary dictionary definition of tangible object includes discrete, physical objects like fish[81]. Kagan then uses several textualist canons, including studying context, to confirm her interpretation. She looks to the words immediately surrounding "tangible object" in § 18 U.S.C. 1519, the evidence tampering statute at issue, noting the expansive plain meaning of "any"[82]. She shows how the words "record, document, or tangible object" in U.S.C. § 1512, the federal witness tampering law, cover physical evidence in all forms[83]. Here, Kagan does not think any single canon of textualism reigns supreme[84]. Instead, she asks what is the common denominator in evidence tampering is[85]. Is the common denominator things that store information[86]? No, it is things that provide information to prosecutors and investigators[87]. If Kagan's analysis stopped here, she would be a pure textualist.

However, Kagan then demonstrated her willingness to consider legislative history sparingly by looking at the legislative history of § 1519[88]. She shows that Congress enacted § 1519 "to apply broadly to

76. *Yates v. United States*, 574 U.S. 528 (2015) (Kagan dissenting).

77. See *id.* at 552-53.

78. Kagan also made the same claim in a lecture conversation with a law student audience. Elena Kagan, *A Conversation with US Supreme Court Justice Elena Kagan*, (George Washington University Law School, March 23, 2017), available at https://www.youtube.com/watch?v=8jdBa6MPhmY (last visited April 11, 2022).

79. *Yates*, 574 U.S. 528 (Kagan dissenting).

80. See *id.*

81. See *id.* at 553-54.

82. See *id.* at 555.

83. See *id.* at 556-67.

84. Kagan, *Supreme Court Justice Elena Kagan discusses John Paul Stevens* (cited in note 36).

85. See *id.*

86. See *id.*

87. See *id.*

88. *Yates*, 574 U.S. at 557-58 (Kagan dissenting).

any acts to destroy or fabricate physical evidence"[89]. Here she even employs purposivist reasoning by noting that the section was intended to close a loophole that allowed criminals to destroy evidence themselves so long as they did not induce another person to do so[90]. But her analysis of legislative history and mention of congressional purposes only serve to support her textual analysis. She reads the statute's clear purpose only to make sure her textual interpretation does not conflict with it. So, Kagan uses a lite textualist analysis, primarily focusing on the text but allowing legislative history to confirm the text's ordinary meaning.

Similarly, Kagan's majority opinion in *Milner v. Department of Navy*[91] takes a textualist tack[92]. In *Milner*, Kagan's majority held that the Navy must not withhold information about storing explosives under the Freedom of Information Act (FOIA)[93]. There, Kagan similarly thought the text should control the outcome[94]. Kagan notes that in *Milner*, the text of FOIA was "perfectly clear"[95]. Yet, lower courts had "made up" "very elaborate doctrine" irrelevant to the text and had applied it throughout the country for decades beforehand[96].

Kagan's majority opinion does analyze legislative history. She addresses Congress's removal of an exemption for "international employment rules" in FOIA's text before FOIA's enaction[97]. By analyzing evidence of legislative history, Kagan demonstrates to not discount it entirely. This is what separates her from pure textualists like Justice Thomas or Scalia. However, Kagan does not consider muddled or sparse legislative history, especially when the text is clear[98]. Thus, Kagan ultimately ignores the ambiguous, "scant" legislative history in *Milner* in favor of FOIA's clear statutory language[99]. Here, Kagan is

89. See *id.* at 558.
90. See *id.* at 557-58.
91. *Milner*, 562 U.S. at 562.
92. See *id.*
93. See *id.* at 564-65.
94. See *id.*
95. See *id.*
96. See *id.*
97. See id. at 572.
98. See *id* at 572.
99. See *id.*

doing exactly what she maintains she does. She employs textualism, but a forgiving variety.

Contrast Kagan's lite textualist approach in the *Milner* majority opinion with Breyer's lone purposive dissent in *Milner*. Where Kagan avoids legislative history and sticks to FOIA's text, Breyer sticks almost solely to FOIA's legislative history. Here, Breyer showcases the purposivist methods he described in his books, lectures, and interviews by structuring his dissent around Congress's purpose in enacting FOIA[100]. Breyer does what he declares he does.

Following D.C. Circuit precedent, Breyer concludes that a FOIA exception would apply in the case at bar, excusing the Navy from releasing its explosives information[101]. To determine Congress's purpose in enacting the FOIA exception, Breyer starts with both the Senate and House Reports[102]. He shows that the House Report describes the exemption as applying to operating rules, guidelines, and procedures for various government agents[103]. The Navy's information falls in a sufficiently similar category, Breyer concludes. Further delving into legislative intent, Breyer notes that Congress did not alter the FOIA exception at issue when it amended FOIA[104]. Congress knew about the D.C. Circuit interpretation of the exception at that time[105]. This, Breyer reasons, is evidence that Congress thought the D.C. Circuit's opinion was in line with the congressional purpose for the FOIA exception. Finally, Breyer's approach employs common sense: for the past thirty years, courts have followed the D.C. interpretation – why stop now[106]? So, though Breyer and Kagan's substantive methods differ starkly, they are similarly consistent in applying the methods they each advocate for in judicial interpretation.

100. See *id.* (Breyer, J., dissenting).
101. See *id.* at 585.
102. See *id.* at 587-88.
103. See *id.* at 588.
104. See *id.* at 586.
105. See *id.*
106. See *id.* at 585.

4. *Implications for Dobbs*

Given the two justices' interpretative methods, one could ask how they are likely to vote in *Dobbs.* The October 2021–2022 term case asks the justices to decide whether a law in Mississippi that bans nearly all abortions after fifteen weeks' gestational age is unconstitutional[107]. *Dobbs* thus addresses one of this nation's most contentious social debates since gay marriage: abortion[108]. It comes after a long line of abortion decisions in the Supreme Court and lowers circuit courts, including *Planned Parenthood of Southeastern Pennsylvania v. Casey* and *Roe v. Wade*[109]. Whatever the outcome, *Dobbs* is likely to have wide-ranging implications for women's bodily autonomy, the protection of fetal life, religion, and the right to privacy.

First, given the sharp divide between the justices on the right to abortion, evident in their oral argument in Dobbs, the Court is unlikely to come to a unanimous decision. Instead, a majority of six justices will likely overturn *Roe* and *Casey* or hold on a narrow ground, offering an undue burden standard instead of a viability line. Breyer, Kagan, and Justice Sotomayor will likely dissent. Breyer (or Sotomayor) seems more likely to pen the dissent than Kagan, given Kagan's strong focus on consensus-building, though Kagan would almost certainly join. Breyer's principled pragmatism would probably lead him to focus in dissent on the negative practical consequences of the Court overruling *Roe v. Wade*[110] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*[111]. On the other hand, Kagan's new living constitutionalism would seem to lead her to center on the constitutional liberty interest at stake.

The dissent would likely mirror Breyer's focus on *stare decisis* in oral argument. In oral argument, Breyer cautioned that if the Court ignored *stare decisis* to overrule *Roe* or *Casey*, the Court would undermine its

---

107. *Glossip v. Gross*, Transcript of Oral Argument at 4-5 (cited at note 60).

108. See Obergefell v. Hodges, 576 U.S. ___ (2015).

109. See *Timeline of Important Reproductive Freedom Cases Decided Cases By the Supreme Court* (A.C.L.U.), available at https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court (last visited April 11, 2022).

110. *Roe v. Wade*, 410 U.S. 113 (1973).

111. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833 (1992).

legitimacy. He wrote that, "to overrule under fire in the absence of the most compelling reason, to reexamine a watershed decision, would subvert the court's legitimacy beyond any serious question"[112]. He further stressed the importance of showing that the Court overturns cases based on principle, not political or social pressure[113]. Otherwise, the Court could subject itself to public condemnation[114]. Breyer showcases his living constitutionalist focus on principles by noting the importance of only overturning cases based on principle. Likewise, Breyer focuses on his main constitutional value and purpose, active liberty, and its promotion, by aiming to protect the Court's legitimacy. Finally, by warning of public condemnation, Breyer reveals his pragmatic concerns about the practical consequences of overturning *Roe* on American democracy and judiciary.

On the other hand, Kagan's new living constitutionalism would seem to lead her to request that the dissent include a discussion of the constitutional values implicated in *Dobbs*. For example, a Kagan-inspired dissent passage may reaffirm the liberty interest, privacy right, or autonomy value implicated in *Roe* and *Casey*[115]. But what about living constitutionalism's focus on a changing world? Kagan's constitutional method thus suggests she may think about whether the Court should account for new research showing the harmful impacts of abortion bans on poor women's physical health, economic well-being, and education[116]. These impacts could show the necessity of protecting women's liberty and privacy, which are unchanging constitutional values[117]. During oral argument, other justices took the lead asking about the values at stake – whether the value was liberty or the right to privacy[118]. Instead, Kagan spent most of her time in oral argument on *stare decisis*, as Breyer did[119]. Why? Initially, it could mean that

112. *Glossip v. Gross*, Transcript of Oral Argument at 10 (cited at note 60).

113. See *id.*

114. See *id.*

115. See generally *id.* at 6, 72 (a discussion on how best to characterize the right and value at interest).

116. See *id.* at 31, 48, 52.

117. See *id.*

118. Justices Thomas and Alito extensively focused on constitutional values. See *id.* at 6, 49-50, 71-74, 85-86.

119. See Sarah Isgur, *How SCOTUS Will Rule on Dobbs, in 3 Scenarios* (Politico, December 2, 2021), available at: https://www.politico.com/news/

Kagan views the values discussion as encompassed within *stare decisis*. By honoring precedent, the Court maintains its legitimacy, honoring federalist and democratic values. Next, maybe Kagan does not think much has changed – that access to abortion impacts women's liberty and privacy in the same ways as it used to. Or perhaps the societal "change" is the fifty years of cases since *Roe* supporting its precedent. There would need to be an excellent reason to disregard fifty years of precedent to violate women's liberty and privacy here. Finally, Kagan's *stare decisis* focus could be due to her alleged *new* living constitutionalism, a method that does not place constitutional values above all other considerations. Kagan may think that in Dobbs, abiding by *stare decisis* is more important than the case's constitutional values.

So, Breyer's principled pragmatism leads him towards practical consequences and the democratic value of active liberty. Kagan's new living constitutionalism would seem to lead her to a values-based discussion, but instead, it leads her to support *stare decisis*. However, stare decisis is consistent with new living constitutionalism.

5. *Conclusion*

This article leaves open at least a few questions about Breyer and Kagan's judicial interpretation for further study. For example, the article leaves open how often did Breyer or Kagan stick to their favored means of interpretation. This article's selected opinions provide insights into Breyer and Kagan's analysis in action. But the article largely relies on opinions Breyer and Kagan have discussed, and even justices are not immune from confirmation bias. The decisions chosen here are also relatively well-known, perhaps selected at the expense of lesser-known opinions that may have gone against the grain.

However, even an empirical analysis would not be perfect. In such an analysis, would one factor in opinions only? One may also ask whether an analysis would include concurrences and dissents, too. Even further, one may wonder whether opinions that Breyer and Kagan joined but did not write should be included Finally, would one

---

magazine/2021/12/02/abortion-supreme-court-dobbs-ruling-scenarios-523692 (last visited April 11, 2022).

weigh decisions equally, perhaps limiting the analysis to merits decisions? Despite the shortcomings of this article's qualitative case study assessment, the above questions illuminate that an empirical study may not provide definitive answers.

This article maintains that we should start instead with the most challenging cases that test justices' interpretative methods. These complicated cases invite more analysis than their more straightforward counterparts with limited social impact. And they often inspire markedly diverse reasoning and conclusions from Breyer versus Kagan. It may still be "law all the way down," but the law sure looks different to each justice.