KEYNOTE ADDRESS: JUSTICE BREYER AND THE FIRST AMENDMENT

Erwin Chemerinsky

The following is a transcript of the keynote address given by Dean Erwin Chemerinsky at the First Amendment Law Review*'s Volume 21 Symposium on the Jurisprudence of Justice Breyer. The event, held on November 18, 2022, also featured three panels on (1) Justice Breyer and Freedom of Speech, (2) Justice Breyer and the Religion Clauses, and (3) Justice Breyer and Future First Amendment Challenges*.[1]

INTRODUCTION

I have mixed feelings in addressing the jurisprudence of Justice Stephen Breyer. There is so much to praise about his tenure on the Supreme Court. Most of all, I admire his decency. At a time when Supreme Court opinions are increasingly filled with sarcasm, he never resorted to caustic language. This decency was evident in how he treated counsel at oral arguments. He was never the justice who asked the gotcha question. He was never the justice who used oral arguments to embarrass a lawyer. There was always the sense that he was asking you exactly about what was most important to his decision. At times, like all attorneys, I was frustrated by his long, convoluted questions as I watched the clock tick down, and I was conscious of how much time I had left to speak. But his questions always were fair and gave the lawyer a chance to address his greatest concerns.

I also admire his pragmatism—his bringing in real-world consequences to Supreme Court decisions. There are areas of his jurisprudence where I would heap praise, especially when it comes to the Second Amendment. His recent dissenting opinion in *New York Rifle and Pistol Association v. Bruen* hopefully someday will be a blueprint for a future, very different Court.[2] He rightly focused on the tragic consequences of gun violence and explained why a purely historical focus in defining the meaning of the Second Amendment makes no sense.[3] I would praise his abortion decisions, in cases like *Stenberg v. Carhart* and *Whole Woman's Health v. Hellerstedt*.[4] One of his opinions I most admire is his dissent in *Parents Involved in Community Schools v. Seattle*

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[1] First Amendment Law Review, *First Amendment Law Review Vol. 21 Symposium*, YOUTUBE (Jan. 27, 2023), https://www.youtube.com/watch?v=mTc7AwjL71w.
[2] New York Rifle and Pistol Association v. Bruen, 142 S. Ct. 2111 (2022).
[3] *Id.* at 2163–91.
[4] Stenberg v. Carhart, 530 U.S. 914 (2000); Whole Woman's Health v. Hellerstedt, 579 U.S. 582 (2016).

School District No. 1, where he defended the importance of diversity in education.[5]

But one area where I did not admire Justice Breyer's jurisprudence is the First Amendment, the focus of this symposium. I think it is the responsibility of the Supreme Court to provide clarity in the law to guide others who must follow its decisions. It is important for the Court to articulate clear tests, state rules that can be understood and applied, and give guidance to lower courts.

Last year, the Court decided 58 cases with signed opinions after briefing and oral argument. These cases represent a fraction of the decisions decided each year in the United States. It is the Supreme Court's obligation to give guidance to lower federal courts and to state courts. The guidance is also important for elected government officials, including federal and state legislators. Lawyers need clear legal rules in advising their clients.

My problem with much of Justice Breyer's First Amendment jurisprudence is the failure to provide this essential clarity and guidance. I see this both with regard to his religion clause jurisprudence and his freedom of speech opinions. But the problems with his opinions in these two areas are somewhat different.

With regard to the religion clauses, Breyer made seemingly arbitrary distinctions that are hard to figure out. As to his speech jurisprudence, he rejected the levels of scrutiny while embracing a proportionality test or balancing test in which again there is little guidance for others in the legal system.

I. JUSTICE BREYER AND THE RELIGION CLAUSES

Consider the Establishment Clause and then the Free Exercise Clause. With regard to the Establishment Clause, one place where Justice Breyer has drawn arbitrary lines concerns when religious symbols on government property violate the First Amendment. There were two cases about this in the spring of 2005, *McCreary County, Kentucky v. ACLU* and *Van Orden v. Perry*.[6] Both involved Ten Commandments displays.[7] Both were placed by the government on public property.[8] In the former, the

[5] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).
[6] McCreary Cty. v. ACLU, 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).
[7] *McCreary*, 545 U.S. at 851; *Van Orden,* 545 U.S. at 681.
[8] *McCreary*, 545 U.S. at 851; *Van Orden,* 545 U.S. at 682.

Supreme Court found a violation of the Establishment Clause; in the latter, the Supreme Court held that it didn't violate the Constitution.[9] Four justices voted to uphold both displays, and four justices would have invalidated both displays.[10] Only one justice, Stephen Breyer, was in the majority in both cases.[11]

McCreary County v. ACLU involved counties in Kentucky that required that the Ten Commandments be posted in government buildings.[12] The ACLU brought a challenge to this.[13] The county responded and said that it would require posting ten displays about the role of religion in our history, all the same size; one was the Ten Commandments.[14] The Supreme Court, in a 5-4 decision, found that this violated the Establishment Clause.[15] Justice Souter explained that the Ten Commandments are inherently religious.[16] They come from the Bible.[17] They begin with the words: "I am the Lord, thy God." They are regarded as sacred texts by many major religions. The Court concluded that there was no secular purpose in requiring their posting in government buildings.[18]

The other case was *Van Orden v. Perry*. I should disclose here that I was the lawyer for Thomas Van Orden in the Supreme Court and argued the case on the losing side. The case involved a six-foot-high, three-foot-wide Ten Commandments monument directly at the corner between the Texas Supreme Court and the Texas State Capitol.[19] My argument was that for the government to put a profoundly religious symbol at the seat of power violates the Establishment Clause. As I wrote the brief in the case and prepared for oral argument, I was convinced that the case was going to come down to the vote of Justice Sandra Day O'Connor. I didn't expect to get votes from Justices Rehnquist, Scalia, Kennedy, and Thomas; their view on establishment is that no religious symbol will ever violate the Constitution.[20] They believe the government violates the Establishment Clause

[9] *McCreary*, 545 U.S. at 880; *Van Orden,* 545 U.S. at 692.
[10] *McCreary*, 545 U.S. at 849; *Van Orden,* 545 U.S. at 681.
[11] *McCreary*, 545 U.S. at 850–80; *Van Orden,* 545 U.S. at 698–706.
[12] *McCreary*, 545 U.S. at 851.
[13] *Id*. at 852.
[14] *Id*. at 853.
[15] *Id*. at 880.
[16] *Id*. at 868–89.
[17] *Id*.
[18] *Id*. at 869.
[19] *Van Orden*, 545 U.S. at 681.
[20] *Id.* at 692–705.

only when it coerces religious behavior.[21] I also thought I was likely to get the votes of Justices Stevens, Souter, Ginsberg, and Breyer. My focus was on Sandra Day O'Connor.

I got Justice O'Connor's vote, but I lost because Justice Breyer provided the fifth vote to the side protecting the Ten Commandments monument. He concurred in the judgment.[22] I have read his opinion many times, and I am still baffled by it. He says many things that are questionable. He says that no one complained about the monument until Van Orden.[23] Actually, that's not true. There were a number of complaints about the monument over the years. He says that the state of Texas didn't pay for it.[24] Actually, the record does not indicate who paid for the monument. I was asked about it at oral argument and said that there is nothing in the record about who subsidized the monument. Many of these monuments around the country were paid for by Cecil B. DeMille in his promoting his movie, The Ten Commandments.[25] There is every reason to believe that was true for the Texas monument as well.

Justice Breyer stressed that there were over 20 other monuments and symbols on the ground of the Texas state capitol.[26] But there were no other religious monuments, and no other monuments could be seen from that place on the state capitol grounds. This was a particularly important place—at the corner between the Texas Supreme Court and State Capitol.[27] Justice Breyer concluded his opinion by saying that finding the monument unconstitutional would be hostility to religion.[28] But any enforcement of the Establishment Clause can be thought of as hostility to religion; it inherently limits something the government wants to do to advance religion. Why was finding the Ten Commandments in the county buildings in *McCreary County* not hostility to religion?

It is difficult to explain why Breyer voted to strike down the Ten Commandments display in *McCreary County*, but to uphold it in *Van Orden*. The day these two cases came down, a CNN commentator said the difference was that in *McCreary County*, it was inside the building, whereas in *Van Orden*, it was

[21] *Id*. at 693–94.
[22] *Id*. at 698–706.
[23] *Id*. at 702.
[24] *Id*. at 701–02.
[25] *Id*. at 713.
[26] *Id*. at 702.
[27] *Id*. at 681.
[28] *Id*. at 704.

outside the building. That makes no sense as a constitutional principle. Jeffrey Toobin said that the difference was that one was an older monument and the other was more recent. In other words, Justice Breyer was saying: we aren't going to take down old monuments, but don't build new ones. But, again, it is hard to justify why from a constitutional perspective the difference depends on how long the monument was on government property. Nor is it clear how long a monument must be there to be immune from an Establishment Clause challenge.

But Justice Breyer made this distinction explicit just a few years ago in his opinion in *American Legion v. American Humanist Association*.[29] The case concerned a 32-foot cross that sits on a busy intersection on public property in Maryland.[30] The Supreme Court found that it did violate the Establishment Clause, even though a cross is a quintessential Christian symbol.[31] Justice Breyer, in a concurring opinion, stressed that the cross had been there for a long time, having initially been constructed as a tribute to those who died in World War I.[32] But why should the age of a symbol matter under First Amendment analysis? And I'm focusing on the guidance it would give lower courts. What's the principle for judges? Is it one year? Five years? Forty years? How do the lower courts implement this? How would governments know what to do?

With regard to his Free Exercise jurisprudence, there is again inconsistency in his opinions, and I'm not sure what guidance lower courts could take from them. The issue is when and whether the government violates the Free Exercise Clause when it provides financial aid to secular private schools, but not religious ones. In 2017, in *Trinity Lutheran v. Comer*, the Supreme Court considered a Missouri law that provided aid for schools for surfacing playgrounds.[33] The Missouri law provided money to public and secular private schools that qualified, but not religious schools.[34] The Supreme Court, in a 7-2 decision, held that this exclusion violated the Constitution in denying the funds to religious schools.[35]

Chief Justice Roberts in the opinion for the Court said it violated the Free Exercise Clause for the government to give

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[29] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).
[30] *Id*. at 2077.
[31] *Id*. at 2089.
[32] *Id*. at 2091.
[33] Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. 449 (2017).
[34] *Id*. at 455.
[35] *Id*. at 467.

money to secular private schools, but not to religious schools.[36] In footnote 3, the Court said that this was just a case about playgrounds, not about anything else.[37] We know that's not how the law works. Justice Sotomayor wrote a blistering dissent saying this was the first time in American history that the Supreme Court had required that the government provide financial aid to a religious institution.[38]

Justice Breyer did not dissent; rather, he wrote a concurring opinion saying that since this aid is generally available, it should be provided to religious schools as well as to secular ones.[39]

Compare this, though, to *Carson v. Makin*, decided in 2022.[40] There are parts of Maine that are too rural to support local public school systems.[41] In these areas, the state provides funds to parents to send their children to private schools.[42] The restriction is that the funds must be used for secular private schools; the money could not be used for sectarian or religious schools.[43]

The lower courts ruled in favor of Maine, recognizing its interest in providing a free, secular education for all the children in the state.[44] The lower court emphasized that the state has an interest in not taxing some people to support the religions of others.[45]

Here, though, Justice Breyer dissented and wrote one of two dissenting opinions; Justice Sotomayor wrote the other.[46] Justice Breyer's dissent is powerful, stressing the Establishment Clause and emphasizing the divisiveness inherent to the government subsidizing religious schools.[47]

But how can this dissent be reconciled with his opinion in *Trinity Lutheran*? In that case he said that the aid is permissible so long as it is generally given. But that was true for the Maine program as well. Perhaps he is implicitly drawing a line based

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[36] *Id*. at 466.
[37] *Id*. at 496 n.3.
[38] *Id*. at 471–96.
[39] *Id*. at 470–71.
[40] Carson v. Makin, 142 S. Ct. 1987 (2022).
[41] *Id*. at 1993.
[42] *Id*.
[43] *Id.* at 1994.
[44] Carson v. Makin, 979 F.3d 49 (1st Cir. 2010); Carson v. Makin, 401 F. Supp. 3d 207 (D. Me. 2019).
[45] *See Carson*, 979 F.3d 42.
[46] *Id*. at 2002–12, 2012–15.
[47] *Id*. at 2003, 2010.

on aid for a particular purpose, surfacing playgrounds, and aid that is not earmarked for a specific use. It seems hard, though, to explain a constitutional line on that basis.

II. JUSTICE BREYER'S FREE SPEECH JURISPRUDENCE

In discussing Justice Breyer's free speech jurisprudence, my basic criticism is the same: the lack of adequate guidance for lower courts, lawyers, and legislators as to what is allowed under the First Amendment and what is not. In Justice Breyer's free speech jurisprudence, he consistently rejected the application of the levels of scrutiny and has rejected strict scrutiny in particular. Instead, he embraces a proportionality test, or an interest-balancing approach.

He expressed this many times. For example, in 2000, in *Nixon v. Shrink Missouri Political Action Committee*, the Supreme Court considered a Missouri law that limited the amount of money that could be contributed to an election.[48] Justice Breyer, in a concurring opinion, said that the Court should consider this under a proportionality analysis, not the use of the levels of scrutiny.[49] He cited a ruling of the International Court of Human Rights, which uses proportionality analysis in free speech cases.[50] There are other opinions, too, where he cited the foreign practice of proportionality analysis.[51] But Justice Breyer did not give guidance on how to engage in this analysis and how to decide if a regulation of speech should be deemed to violate the First Amendment under proportionality analysis.[52]

One of his most important opinions regarding free speech was a dissent in 2011, in *Sorrell v. IMS Health, Inc.*[53] This case involves a Vermont statute that restricted the sale, disclosure, and use of records that revealed the prescribing practices of individual doctors.[54] The Court held that the law violated the First Amendment.[55] Justice Breyer wrote a lengthy dissent.[56] He analogized the Court's decision to its discredited jurisprudence from the *Lochner* era, where the Court frequently struck down

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[48] Nixon v. Shrink Mo. Gov't Pac, 528 U.S. 377 (2000).
[49] *Id*. at 402.
[50] *See* Bowman v. United Kingdom, 26 Eur. H. R. Rep. 1 (European Ct. of Human Rights 1998).
[51] *See* Libman v. Quebec, 151 D.L.R. (4th) 385 (Canada 1997).
[52] *Nixon*, 528 U.S. 403-05.
[53] Sorrell v. IMS Health, Inc., 564 U.S. 552 (2011).
[54] *Id*. at 557.
[55] *Id*. at 579–80.
[56] *Id*. at 580–603.

progressive social regulations.[57] Justice Kagan later picked up this phrase in 2018 when she called it the "Lochnerizing" of the First Amendment.

In *Sorrell*, Justice Breyer again said the appropriate test is one of proportionality: Is the government regulation proportionate to the problem it is solving?[58] My concern is in how it is to be decided when something is disproportionate and when it violates the Free Speech Clause of the First Amendment.

Another one of his famous opinions in this regard came the following year, in 2012, in *United States v. Alvarez*.[59] This case involved a federal law, the Stolen Valor Act, that made it a federal crime for a person to falsely claim military honors or decorations.[60] Alvarez, at a government meeting in Southern California, falsely claimed to have received the Congressional Medal of Honor.[61] The Supreme Court invalidated the Act in a 6-3 decision, with Justice Kennedy writing the plurality opinion for the Court.[62] But Justice Breyer, joined by Justice Kagan, concurred in the judgment and embraced the idea of interest balancing as an alternative to the levels of scrutiny.[63] In this opinion, he likened his balancing approach to intermediate scrutiny.[64] This is unlike his other opinions, in which he has eschewed the levels of scrutiny.[65] But still, as one reads his opinion in *Alvarez*, one wonders if his approach is anything other than intermediate scrutiny; what's his test?

He explains this a bit more in 2015, in a concurring opinion in *Reed v. Town of Gilbert*.[66] The case involves a town in Arizona which prohibited signs on public property but had almost three dozen exemptions.[67] For example, during election seasons, political signs could be quite large and remain throughout the campaign.[68] But other types of signs were restricted in size and could only be up for a very short time.[69] This case involved signs for directions to worship services, which

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[57] *Id*. at 592–93.
[58] *Id*. at 598.
[59] United States v. Alvarez, 567 U.S. 709 (2012).
[60] *Id*. at 714.
[61] *Id*.
[62] *Id*. at 729–30.
[63] *Id*. at 730, 737–38.
[64] *Id*. 731–32.
[65] *Nixon*, 528 U.S. at 402; *Sorrell*, 564 U.S. at 598; *Alvarez*, 567 U.S. 709 at 730, 737–38; Reed v. Town of Gilbert, 576 U.S. 155, 178–89 (2015).
[66] *Reed*, 576 U.S. 155.
[67] *Id*. at 159.
[68] *Id*. at 160.
[69] *Id*. at 160–61.

had to be very small and could only be displayed for a limited time.[70] Justice Thomas wrote the opinion for the Court and said this is a content-based restriction on speech: whether the sign may be up for a long time, or whether the sign may be large, depended entirely on the content of the message.[71] The Court used strict scrutiny and struck down the law.[72]

Justice Breyer concurred in the judgment and very much disagreed with the majority's reasoning.[73] He defended his interest-balancing approach, and it was the most specific he has ever been in articulating what interest balancing means as opposed to the levels of scrutiny.[74] He said strict scrutiny is just a rule of thumb.[75] I find that perplexing; I'm not sure what it means to say that a well-established test is a rule of thumb.

Justice Breyer says that he would use content-discrimination as a supplement to a more basic analysis, which asks whether the regulation at issue disproportionately harms First Amendment interests in light of the relevant regulatory objectives.[76] Notice again that he speaks in the language of proportionality. He said, "[a]nswering this question requires examining the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so."[77] And I think this is the first time he is giving lower courts guidance as to the analysis.

But the crucial question is whether this is preferable to the strict scrutiny that Justice Thomas was using in the majority opinion and that is far more familiar in constitutional jurisprudence. I am skeptical. The levels of scrutiny are clearly defined, and there is a large body of case law applying them.

Most recently, in 2022, in *City of Austin v. Reagan National Advertising*, Justice Breyer again wrote a concurring opinion

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[70] *Id*.
[71] *Id*. at 171.
[72] *Id*. at 173.
[73] *Id*. at 175–79.
[74] *Id*.
[75] *Id*. at 176, 178–89 (stating "[in] my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as an automatic "strict scrutiny" trigger, leading to almost certain legal condemnation" and "[t]he better approach is to generally treat content discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, but not determinative legal tool, in an appropriate case, to determine the strength of a justification").
[76] *Id*. at 179.
[77] *Id*.

using a proportionality analysis and balancing, rather than applying a level of scrutiny.[78] The case involved an Austin, Texas ordinance restricting digital signs on buildings.[79] The ordinance permitted signs if they related to the businesses in the building but not if they were for other purposes.[80]

The Supreme Court, in an opinion by Justice Sotomayor, reversed the lower court that had found the ordinance content-based and invalidated it.[81] The Court concluded that the Austin law was content-neutral and remanded the case for the application of intermediate scrutiny.[82]

Justice Breyer concurred and questioned the usefulness of the distinction between content-based and content-neutral laws.[83] Instead, he argued, as he had in other cases, that proportionality analysis is appropriate.[84]

One may want to respond to everything I've said and argue that the test that's used doesn't really matter. That whether a court uses strict or intermediate scrutiny, proportionality, or balancing, the Justices will ultimately come to the same conclusion. I don't believe that though. I think the levels of scrutiny serve an important purpose in constitutional analysis. They provide clear tests that courts can use and apply to specific situations. They provide a basis for lawyers to argue. Most important, even if they don't constrain the Supreme Court, they do have an important effect on the lower courts in providing clear, predictable rules for them to follow.

In fact, even on the Supreme Court, the failure to use the levels of scrutiny can have undesirable consequences. Consider *Brown v. Entertainment Merchants Association*, which concerned a California law that made it a crime to sell or rent violent video games to a minor under 18 without parental consent.[85] Many states adopted similar laws. Without exception, every court has struck them down, especially on vagueness grounds.

The Supreme Court, 7-2, invalidated the California law.[86] Justice Scalia wrote the opinion of the Court.[87] He said this

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[78] City of Austin v. Regan Nat'l Advert. of Austin, LLC, 142 S. Ct. 1464 (2022).
[79] *Id*. at 1469–70.
[80] *Id.*
[81] *Id*. at 1475.
[82] *Id*. at 1475–76.
[83] *Id*. at 1477–78.
[84] *Id*. at 1476, 1478–79.
[85] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011).
[86] *Brown*, 564 U.S. at 805.
[87] *Id*. at 786.

is a content-based restriction on speech.[88] Violence is not a category of unprotected speech.[89] Therefore, strict scrutiny applies, and the Court concluded that the law failed this test.[90] Justice Thomas and Justice Breyer were the only dissenters.[91] Justice Breyer emphasized deference to the state.[92] Justice Breyer's opinion doesn't deal with the vagueness problems in defining what is "violent."[93] He never engages with Justice Scalia's analysis on why this law is content-based and why strict scrutiny is appropriate.[94] Simply put, an amorphous interest-balancing approach makes it much easier to uphold laws restricting speech.

The other Justice Breyer opinion, which is more recent in 2021, was *Mahanoy Area School District v. B.L.*[95] This case, which received a great deal of media attention, involved a high school cheerleader.[96] She tried out for the varsity team but was very upset when she was again assigned to the junior varsity.[97] She was furious when she found out that a freshman made the varsity squad ahead of her.[98] She went on a social media platform on a Saturday morning where she ranted profanely and raised her middle fingers.[99] She then posted something else on social media that did not use profanities.[100] The cheerleading coach saw her videos, said it was conduct unbecoming of a cheerleader, and suspended her from the team for the year.[101]

She and her parents sued.[102] They won in the lower courts.[103] They won in the Supreme Court, in an 8-1 decision, with Justice Breyer writing the opinion for the Court.[104] Justice Breyer expressed concerns about a school punishing speech that happened during non-school hours.[105] He said that in general

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[88] *Id*. at 790.
[89] *Id*. at 792–99.
[90] *Id*. at 799–804.
[91] *Id*. at 821–40, 840–57.
[92] *Id*. at 842–46, 855.
[93] *Id*. at 842–46.
[94] *Id*. at 840–41, 847–57.
[95] Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021).
[96] *Id*. at 2043.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *See* B.L. v. Mahanoy Area Sch. Dist., 376 F. Supp. 3d 429 (M.D. Pa. 2019); B.L v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020).
[104] *Mahanoy*, 141 S. Ct. 2038 at 2041.
[105] *Id*. at 2045–46.

parents are responsible for their children's behavior out of school.[106] Justice Breyer stressed the dangers of letting schools monitor students 24 hours a day, 7 days a week.[107] He emphasized the need for schools to teach students about the importance of freedom of speech, and this is undermined by punishing student speech.[108] The Court said that there was no reason to think this speech would disrupt school activities.[109]

But imagine that you're a lower court judge or a law clerk to a lower court judge dealing with a case that involves a school punishing a student for something on the weekend. What test should you apply to cases involving student speech over social media outside of school? In many ways, I think this is a quintessential Breyer opinion. It deals with many important factors but offers little guidance to lower courts.

CONCLUSION

There are many areas of law where Justice Breyer will have a lasting legacy. But I don't think the First Amendment is one of them. As to the religion clauses, Justice Breyer never articulated tests that will be, or can be, followed. Concerning the speech clauses, I don't think balancing with regard to proportionality will be the law in the years to come.

To me, Justice Breyer's most important legacy was that of being a truly decent man on the Supreme Court of the United States. And at this moment in time, that is an important legacy.

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[106] *Id.*
[107] *Id.* at 246.
[108] *Id.*
[109] *Id.* at 246–48.