PANEL THREE: JUSTICE BREYER AND FUTURE FIRST AMENDMENT CHALLENGES

MODERATOR

Mary-Rose Papandrea

Samuel Ashe Distinguished Professor of Constitutional Law at the University of North Carolina School of Law

PANELISTS

Erwin Chemerinsky

Dean and Jesse H. Choper Distinguished Professor of Law at Berkeley Law School

Robert Post

Sterling Professor of Law at Yale Law School

Geoffrey Stone

Edward H. Levi Distinguished Service Professor at the University of Chicago

The following is a transcript of the third panel of the First Amendment Law Review*'s Volume 21 Symposium on The Jurisprudence of Justice Breyer, discussing the Justice's influence on the future of the First Amendment. The event, held on November 18, 2022, also featured a keynote address by Dean Erwin Chemerinsky and first and second panels on Justice Breyer's views on freedom of expression and the religion clauses, respectively. This transcript has been edited lightly for clarity.*

TRANSCRIPT

Mary-Rose Papandrea: Thank you so much to everyone who has made this day magical so far. But this last panel is going to be the most magical one of all. This is the first, to my knowledge, the first and only time that we have brought to the stage three of the most eminent First Amendment scholars in the country. They are all three dear. We also invited Guy Charles from Harvard Law School, and unfortunately, he was unable to join us, so we'll miss him today. But I think the reason we have this panel and we are making history here is that no one would dare put these three together. I am just so thrilled that they are here. I'm going to do some brief introductions, and then the format for this actually to be more of a motivated conversation rather than presentations. At the same time, we welcome your questions, and I expect many.

I don't want to spend too much time introducing Dean Erwin Chemerinsky, except for those who were not watching this morning. He is Dean of Berkeley Law School, and he has

written over 200 law review articles. To my right, Geoffrey Stone, who has been my mentor for many, many years. He is the Edward H. Levi Distinguished Service professor at the University of Chicago. He served as a law clerk to Justice William Brennan, Jr., he has served as Dean of the law school, and Provost of the University of Chicago. He's the author of many books, including "National Security, Leaks and Freedom of the Press," "Democracy and Equality: The Enduring Constitutional Vision of the Warren Court," "Free Speech Century," he has an upcoming book coming out on abortion, and he has many, many other accomplishments. One thing I'll mention, I don't think it's listed, he was the chair of the committee that authored the Chicago Principles. Indeed, they were originally named the "Stone Principles." So I am now going to refer to them as the Stone Principles from now on. So thank you so much for coming today. The other panelist we have today is Bob Post, who is the Sterling Professor of Law at Yale Law School. He served as the school's 16th Dean from 2009-2017, and before Yale, he taught at Berkeley. He specializes in Constitutional law, with an emphasis on the First Amendment. He is also a legal historian who is currently writing Volume X of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States, which will cover the period 1921-30 when William Howard Taft was Chief Justice. He's also written many books, including "Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State." Also, something not in his bio is that Justice Breyer cited him many times in his opinions. We are beyond fortunate to have these gentlemen with us today.

Before we start, I want to just offer a few remarks about why we are having this symposium. The arc of history is long, and for those like me who went to law school a few decades ago, times change. So, we don't know that Justice Breyer's approach—it's a very distinctive approach to First Amendment questions and resonates with countries around the world, but it might indeed one day become the dominant approach here in the United States. It's worthwhile for that reason alone to consider - what is that approach, and whether it has value, what are the strengths, and what are the weaknesses?

More recently, though, I became obsessed with *Mahanoy*, with Justice Breyer because of his decision in the *Mahanoy* case, which we've already heard mentioned a few times today, particularly in Dean Chemerinsky's opening remarks on the

student speech case. A student posting a Snapchat, "fuck everything." Justice Breyer wrote the majority for the court. He didn't write a lot of First Amendment majority opinions. It was eight to one, and I think we're going to talk today about what is going on in that opinion. Is it proportionality? I'm not even sure it is. I'm curious, it's the same court that announced we use text, history, and tradition to resolve First Amendment cases. That is not what they did in the *Mahanoy* case. I have also been intrigued with his majority opinion in the *Walker v. Texas* case, which is a specialty license plate case. Again, he had a majority in that case, 5-4. That also doesn't track a text, history, tradition approach. So one of our questions for today's panelists is, "What's up with that?" Where is the court going now?

We have that Second Amendment opinion where the court, just as [Justice] Thomas said, that we use text, history, and tradition to resolve First Amendment cases, like Clay Calvert pointed out earlier today, that's sometimes true but mostly incorrect. It seems to me the court is on the precipice of perhaps great change in this area. Maybe not. Using Justice Breyer as a lens, let's explore - what is the future of the First Amendment? I'm going to ask you, Geoff, to talk a little about the lessons we've learned—you've written a few essays about this—about the First Amendment in its first 100 years of jurisprudence by the Court. So, you might get us started by summarizing what these lessons are, and what are some thoughts as to how Justice Breyer's approach to the First Amendment is consistent or inconsistent with these lessons.

Geoffrey Stone: Thank you, I am honored and delighted to be here because it's very sobering to realize I'm the oldest person in the room. It's also great to be at an event where so many of the participants I deeply admire. I won't mention who they are though, because if I fail to mention someone, I could get sued for defamation. As Mary-Rose mentioned, I've written a piece on the Court and its first century of interpretation on the First Amendment. The first thing to understand about it is that the Court did not start with any of the current doctrines. It didn't know squat about how to interpret the First Amendment. By deciding a large number of cases over a long period of time, they came to an agreement on a range of different principles on doctrines, creating jurisprudence on the First Amendment. The first one is simply learning the lessons of experience. Over time, the justices were able to realize that prior decisions were wrong.

They hadn't understood the subtlety of free speech in context. That hadn't understood the need for context about the abuse of power by the majority and didn't develop a distrust of government regulation of free speech. That was not there from the beginning, and also understanding the importance of people having the opportunity to speak and not have government over-regulate that. These things, they may seem obvious to us today, but were not really embedded in the Court's jurisprudence for at least the first 50 or 75 years. But, they have learned that now quite well, and that shapes their view. People have criticized their opinions, they've learned from it, and they modify their jurisprudence.

The second lesson is that they rejected several possible approaches. One of them is absolutism. That Congress shall make no laws abridging the freedom of the press could not possibly mean what it says. First of all, it shouldn't be limited to Congress. Second of all, no one knows what abridge means. And it's not freedom of speech, it's freedom of the press. So, even though you might look at that and say, "Okay, that's clear," they figured that out as a court. Also, they learned to reject ad hoc balancing across the board, because it would be so unpredictable that it would create enormous problems in reducing a structure of free speech protective of the values of the First Amendment. They also rejected the idea of having the unitary standard that could be one standard for all free speech cases. Realistically, that's not going to work because there's different problems that are raised by different cases.

The third thing they learned is you need as clear as possible rules. Ambiguity in jurisprudence in First Amendment cases creates all sorts of opportunities for abuse, both by state legislatures, Congress, and juries, and so on. There is a need for people to have an understanding of whether they do or do not have the right to engage in speech because of the potential chilling effect. If you know there is a risk of going to jail for giving a speech, marching in a parade or whatever, a lot of people would say, "Ah, never mind." It is very important to having a robust system of freedom of expression to essentially have a clear understanding of what the rules are.

Getting to the rules, one of the basic ones over the course of time was the distinction between content-based and content-neutral restrictions. That was not self-evident in the beginning. In the beginning, the courts were engaged more or less in ad hoc balancing. They recognized over time that laws that regulate

content are potentially more dangerous under the First Amendment than laws that are content-neutral. Content based laws are those that say "ok, you can't have political-based signs on your front lawn" or "you can only have political signs on your front lawn" or "you can only have political billboards" or "you cannot have political billboards." Those are content-based, and it's easy to see those are more problematic. But if the law said, "no one can have a billboard" or "no one can have signs in their front lawn," that's less problematic because the risk of the government engaging in some form of discrimination from types of speech is less when it's neutral than when it's about content. Then, beyond that, they learned that there is an important distinction between content-based and viewpoint-based distinctions. There's a difference between "no one can have political signs on their front lawn" and "no one can have signs on their front lawn for Republicans." It is dramatically different, those categories of the First Amendment. Over time they came to understand and develop that distinction. So there's a relevant distinction between content-based and viewpoint-based.

And the last thing that I'll mention is the concept of low value speech. The Court, again, came to recognize that there's certain categories of speech that mainly for historical reasons, but also because they don't seem to serve the purposes of the First Amendment in the same way that other types of speech do, are not entitled to the same degree of protection. That's illustrated by things like defamation, threats, and commercial advertising. And the Court recognized that partly for historic reasons, partly for value reasons, that they could be regulated differently than other forms of content- and viewpoint-based restrictions. The Court also recognized recently that they don't want to be in the position of recognizing new categories of low value speech because that gives them power over something they shouldn't be troubling with. So they have defined this as those categories as having long been regulated by standards much less than the normal standards for free speech.

Those are some of the principles that I think the Court has settled upon, or is settling upon, over the course of the past century. The other [rule] I'll just mention is about government speech, one is about incidental effects of speech, others that govern employee speech, and the others about public forum, all of which shift the standard because of the category of speech. It is clear that this has not produced a perfectly clear [standard], except maybe for viewpoint-based distinctions and

discrimination. All of those standards have ambiguities about them, but they enable lower courts and lawyers to understand what different standards apply in any given situation. And lower courts over time have tended to come to an understanding of how they should apply. And the Supreme Court has offered a great deal more confusion than the lower court because the only ones they take are the ones where there is real confusion. So what you see is a lot more ambiguity in the court's jurisprudence than I think one does in the lower courts, who understand for the most part what the current doctrine should be.

Breyer's approach, I'll say briefly to underscore what we've heard a lot of earlier, is in important ways he [took issue] with what I think the Court rightly recognized in having these fairly defined categories. The idea of having a proportionality approach makes everything up for grabs and makes it unclear what rights people have and don't have, what restrictions the government can and can't make. And that degree of uncertainty and ambiguity again reenforces the chilling effect and reinforces the ability to regulate based on, in principle, motivations which the state is careful to hide. I think that his embrace of that approach, which might have seemed perfectly sensible a few years ago, is not only inconsistent with the current jurisprudence, which is not perfect, but which opens to door to that exact uncertainty and ambiguity that would wreak havoc in people's understanding and lower courts' understanding what the First Amendment means in any given situation. So, that was long enough.

Papandrea: No, thank you so much. I asked you to summarize a hundred years, so you did a great job. Bob, I'm going to turn to you now. I'd love for you to describe a little bit more just as far as approaches you see on First Amendment questions, and particularly what you consider the greatest benefits of this approach? And what are its possible weaknesses? Feel free to mention any cases along the way if you wish.

Robert Post: Thank you. It's a great pleasure to be here, it's an honor to be on this panel. I think I was brought on here to be the dissenter. In my view, the First Amendment doctrine is a bloody mess that is going to get worse and worse and worse. So, I'm starting from a different place, not one of celebration of what the Court has discovered, but some dissatisfaction with the Court, what the court is doing.

I am going to start with my initial reservation about the previous panel and the idea of a piece of it. I think, to understand Breyer, he comes from working with the Senate, he comes from being in the Congress, and his idea of being constructive is negotiating and getting to a center. And his whole life he imagines himself as dealing with people who disagree, coming together, and reaching an agreement. This is his whole idea. And when he was on the Court, he imagined, he challenged every other justice no matter how much he disagreed with them, and he understood himself to be almost like a best friend to even the justices you can imagine he wouldn't have agreed with. He did that to cut down the harshness and to reach whatever agreements he could. In retrospect, we call that biding for time. If you're dealt a losing hand, you play for time. Sometimes you win. Sometimes you lose. In my view, it's a little harsh to call it appeasement. In the sense of—you're just giving it away, giving it away, giving it away, as opposed to, you might have a winning hand if you could reach the other side of the river and get back to a point, right? It all depends on those contingencies beyond just controlling what he was doing and his point of view. His idea of what it meant to be a justice was different than what it means in the Court, and that's both his strength and his weakness.

It's the opposite of a justice like Sotomayor or Scalia, both of whom imagine a voice that reaches out beyond the Court, to the general public, and mobilizes the general public. To arouse the general public to demand jurisprudence, that's never been Breyer's strength. He keeps trying to reach out to the general public in his books, and you can read the reviews. But a mobilizing figure is not always just talking inside, dealing elite to elite, trying to get a consensus among those who have the power at the given level to do it. I think he would like to be like Sotomayor, to have a better voice. Every once in a while, he gets there, but for the most part, that's not his genre, he doesn't consider that to be his issue. So, that's point one.

Point two: he is someone who is a pragmatist. So, he says, "We have law, and we have law to accomplish purposes we want to achieve." That's the point of law. Sometimes, you can achieve those purposes by having a rule, and sometimes you cannot achieve those purposes by having a rule because you start cutting in all kinds of different ways. So the idea of content discrimination came after this *Reed* case that you've heard about. *Reed* said any rule that turned on the content of speech would be content discrimination subject to strict scrutiny. Many things

follow from that. One thing that follows from that is a very important difference that Geoff just talked about. Content discrimination causes everything to be escalated up to strict scrutiny. But another thing is we make all kinds of distinctions based on content for all kinds of very good reasons. This become like a cleaver, and the lower courts, they were not given guidance. They had a very different standard, then it was decided. You know, it cited to 15 cases that act as though it had never been decided that just made no sense as rules. Rules sometimes make sense, and very often, in areas like the First Amendment, they do not make sense. And why is that? They apply to speech, and speech isn't just one thing. Speech is many, many, many different things, and what may make sense in regard to political speech does not make sense in comparison to commercial speech, does not make sense with respect to doctors and their patients, does not make sense in a courtroom, does not make sense with respect to speech in school. It's very hard to make a rule that is going to make sense in all those different contexts, even though they're all speech.

He was very aware of that, Breyer. He did not like the standard of clear rules, except where it was something that could vary across the board. And speech is so various and applies to so many different domains, and it is very rare to find a rule that would make sense across those broad genres of speech. He was more likely to say, "What do we want to achieve as a Court? And let's fashion our inventions by what we want to achieve. Do we want to protect democracy or do we want to hurt democracy?" One question you might think about as you learn the law is whether clarity comes from a rule or if clarity comes from clarity and about what your purposes are. These are two different forms of clarity. A lot of people look at the IRS code of rules and think, "What the hell does it mean?" The fact that you have a lot of rules doesn't mean clarity or transparency, it often means confusion. Whereas if you know what you want to achieve and then you think about what you're doing relative to the question, it can create more unity and more cohesion and more integrity in your decision-making. That was his approach to the problem.

My criticism of him in terms of his approach to First Amendment doctrine is that, for my taste, he had too much of a reliance on what we call trans-substantive tests. These are the tiers of scrutiny that Erwin was talking about earlier which have been incorporated into the First Amendment from the Equal Protection doctrine. Under the Equal Protection doctrine, tiers

of scrutiny makes sense because its measuring equality to see whether people who are similarly situated are being treated equally. That's not the point of the First Amendment. The point of the First Amendment is quite different—there's debate about what it is—is to promote participation in the formation of public opinion. So if that's the point, the issue isn't tiers of scrutiny, it's how does state intervention or state action affect that goal? We can derive a lot of things from that goal. The tiers of scrutiny don't ask anything at all about that goal. They ask irrelevant questions, like narrowly tailored or compelling purpose or necessary or less restrictive alternatives, which are all so easily manipulated. I mean, you can always come up with a less restrictive alternative, but the issue is do you want to? It should depend on the rule's effectuating purpose. These rules open up tons of discretion. When you start debating over the levels of scrutiny, you are missing the point.

We will take a simple case here, *Alvarez*. It's a case where we have something called the Stolen Valor Act. It made it a crime to falsely claim that you had received a medal from the US military. In this case, a Congressional Medal of Honor. Someone is running for the public works commission, and he says, "I've received a Medal of Honor," and he didn't, so he gets prosecuted. The debate in court is between those who say he should get intermediate scrutiny and those who say he should get strict scrutiny. Tell me more about what the First Amendment value at stake is here? What is the value, and why do we care whether it is being regulated? You could ask two simple questions about *Alvarez*. The first question is this: What is being regulated? And the second question is, why do we regulate it? So why do we regulate false claims about the medal, and the answer is very clear. We want to maintain the reputation of the medal. We don't want to tarnish the reputation. Well, we know from basic First Amendment theory that we don't want the government intervening to form public opinion. We don't want the government to tell us how to think about something. Well, what is it to say the purpose is to prevent tarnishing the reputation? We don't want you to think badly about this, that's the point of this statute. You don't have to say anything about the tiers of scrutiny. Just look at what's being regulated.

Second question—to what does this apply? The justices in the case agreed that the problem with this case is that it applies to everything. It applies to someone sitting at home saying, "You know son, I was in WWII," and someone could be prosecuted

for that. Why do we worry about giving too great discretion to prosecutors? Because, if everything is subject to prosecution, they could prosecute selectively and for the wrong reasons, like I'm doing it because I don't like you. We know that that's a bad thing, you shouldn't be prosecuted because they don't like you.

That's two questions about the statute. No justice talked about that. Instead, they talked about irrelevant things like tiers of scrutiny, which didn't get to the heart of the problem. When you start to formulate First Amendment doctrine in these oblique and abstract ways, you start to miss the point of First Amendment protections. Whereas if we get back to basic First Amendment theory, which is what we care about, you can solve most of these cases pretty simply. The reason that First Amendment cases like *Sorrell* have gone off the rails is because no one is asking why we need the First Amendment in the first place. Instead we get platitudes like "the remedy is more speech," "the marketplace of ideas."

The supreme parody of this can be seen in a case called *NIFLA*, a case which is about California requiring the posting availability of reproductive rights services. The question came up in the case, is there special First Amendment rules for professional speech? Of course we treat professional speech differently. When your doctor says to you, "You've got cancer," and it turns out it was a mistake and you sue your doctor, the doctor doesn't get to say it was an experiment. Of course we are going to treat this differently. You'd have to be a moron not to treat it differently. And then you have Thomas, who says the reason we don't want to have a special category for professional speech is that we want the marketplace of ideas to deal with professional speech. I sure hope this doctor doesn't function according to the marketplace of ideas that he celebrates. That would be crazy. I'm not talking about speaking in public. We aren't talking about Dr. Oz running for Senate. We are talking about professional speech: doctors practicing medicine through speech, which they do. Or if that's too abstract, then to lawyers, where if I'm giving an opinion letter to my client and I'm making it up, I'm liable and I cannot say "marketplace of ideas." And I hope Justice Thomas's lawyers don't say that to him. And we get right off the shelf these lines about the First Amendment that have nothing to do with the situation. When we see cases constructed with that level of professional ineptitude and indifference to the actual speech acts which are at stake, of course the doctrine is going to go to hell. And that's what's happening.

Papandrea: I see Erwin grabbing the mic.

Erwin Chemerinsky: I just want to say how wonderful it is and how humbling it is to be on this panel. There is no one in the legal education I admire more for their brilliance, or for their kindness, than Robert Post and Geoff Stone. And I'd be remiss if I didn't thank Bill Marshall, and I just wanted to say to the students in attendance that you are so incredibly fortunate to have Bill as your professor.

It is interesting, as I listen to Geoff and then Robert, I think some of it, what Geoff was doing was mostly descriptive, and I agree completely with his description, and what Robert was doing was more normative, and I agree with a lot but not all of it. Let me just run several things that I disagree with. First, if the general rules aren't [deciding], then you have particularized rules for particular areas. My criticism of Justice Breyer is he neither was willing to describe general rules nor particularized rules. I think you made a very good point that speech applies in many different contexts, and it's hard to get overall rules. But then you go to *Mahanoy Area School District*, and if you don't want to give a general set of rules that apply to schools, then, at least with regard to schools, give guidance as to, "how are we going to regulate social media?" The problem with the *Mahanoy* case is it doesn't give any guidance to school administrators, let alone, lower courts dealing with the issue.

Second, I do think I'm more of a fan of the levels of scrutiny than you are because I think they ultimately ask the right questions. If it's something we care deeply about, then we only want the government to intervene if it has a compelling interest. Then, if we are willing to trust the government, then I think the question is right in terms of a legitimate interest. I think we can modify that in particular instances, but I think there is a logic behind the levels of scrutiny that is desirable. Again, when you think of it that way, the Supreme Court is going to decide so many cases, the overwhelming majority of which are decided by lower courts who need some guidance to support [their decisions].

Third, I very much agree with you in terms of looking at the purpose of the First Amendment. The difficulty is there are so many different purposes of the First Amendment, I don't know if it's going to help a great deal, [with] courts deciding where to go, especially when it's the lower courts saying, "look

at all these purposes of the First Amendment." And, I think in a sense you are being unfair in the criticism of Justice Kennedy's opinion in *Alvarez*, because one of the things that Justice Kennedy focused on was, "to what extent does the First Amendment protect false speech?" That was really the issue in that case, that he falsely claimed the Medal of Honor. And it did get a great deal of attention in Justice Kennedy's opinion. I think it's a much harder issue than Justice Kennedy gave it credit for, because we are now seeing it in the context of social media and the internet where you have a great deal of false speech. But I think the result of *Alvarez* was exactly right.

I agree with you that *NIFLA v. Becerra* was a terrible decision. But it is terrible for reasons beyond what you describe. And what was wrong in regard to this is compelled speech. No clinic had to say anything to any patient. All they had to do was post a truthful statement on the wall, for some it was a truthful statement, that the state would pay for abortion and contraception for women. For others, it was really a noncontroversial statement that it wasn't a licensed facility to provide medical care. I think what explains *NIFLA v. Becerra* isn't First Amendment doctrine, but it was the Court's hostility toward abortions.

Post: I totally agree with that, although the compelled speech cases are such that [unintelligible] so over the top with compelled speech. But I agree with you. Let's talk about *Alvarez* and let's talk about the school case, *Mahanoy*. So, in *Alvarez*, the question is, is false speech protected? It's very hard to make a general statement about that. It's plainly protected if your intent is to defame a public official, it's plainly not protected if you're selling toothpaste. So to formulate a question might be to misinterpret the question. That's why I think *Alvarez* was off, because again, it formulates the wrong question. The way they formulate the question actually comes off of something called the two-level theory of the First Amendment. That says all speech is protected unless it is fighting words, unless it's obscenity, unless it's a true threat, and we have these exceptions. Geoff was rightly talking about how we have this case called *Stevens* where the court refused to add to these exceptions. But the problem is that all speech isn't protected "unless," that's not the way speech works. And all speech is not protected the same "unless." So we formulate a question that's like [unintelligible] because we have different kinds of speech which are subject to all kinds of

protection. It's not an off and off switch; it's not that mechanical. And those are not the only categories that turn the First Amendment off. When *Alvarez* was formulated around the wrong question, it's no wonder that the case was wrong.

Let's talk about *Mahanoy*. It is totally right to say that the function of [unintelligible] is to give guidance to lower courts. So, to my mind, the way to [balance] this is to illuminate the stakes. If you see what's at stake, then you can understand the stakes and apply them in the complex situation that you're facing. So what are the stakes? In a school, we have to protect [] free speech so that the State can be responsive to what we want. This is *Stromberg*; this is the origin of our free speech doctrines. We get together, we try to form a public opinion, we want the State to be responsive to public opinion, we want the State to make laws in response to what we want them to make laws about. We are autonomous, the State can't tell us what to talk about. There's no content discrimination in public discourse. The State can't tell us what view to take, that's viewpoint discrimination, etc., etc.

But now, once we've gotten together and decided what to do, how does the State act? So let's say we want to get together and make an institution that will give healthcare. How would we do that? We'd make an organization that extends healthcare. How would that speech work for the organization? The speech within the organization doesn't mean people get to say whatever they want. You've got an organization and it's organized to accomplish the purpose of the organization. Speech within the organization will be regulated to obtain the goal of the organization.

A school is like that. We organize a school to educate students. That's why, to speak about freedom of speech in a school as though it were a form of freedom of speech in a newspaper is to make a false comparison. Any speech which disrupts the school, which is inconsistent with the mission of the school, and I get education and open-mindedness and all that, but I can't stand on my desk and say, "The teacher's asking too many questions," I can't march up and down in the middle of a lesson, I can't not shut up, I have to answer questions. Is there compelled speech in school? All the time. We call that what? Grades. There's viewpoint discrimination and content discrimination. You'll write a paper about the First Amendment or about the Thirty Years' War. When we view all of that, the school is violating every single rule of the First Amendment

doctrine we have, within school routine, and it does this to accomplish a particular purpose, which is education. We understand and we accept the regulation of the speech of students. So then the question is, what does it mean to be in school? And that's the question. This is a post made outside the school, not using school resources, about school. So, does the authority of the school, which they would have, if this woman were to walk up to her teacher and say, "Fuck you" to the teacher, she'd be disciplined by the school, no question. But this is now not in school, and that's the question the Court was trying to decide. That's not a rules question. That's a question of more or less, what factors do you consider? The authority of the school bleeds out in very complicated ways. It can be more encompassing when you're dealing with bullying, and less encompassing when you're dealing with a one-off kind of speech etc., etc. It can be hard to figure out what the dimensions on the school authority are outside of the geographical boundaries of the school etc., and that's what Breyer's opinion is trying to isolate. He's trying to tell you the factors and the point of asking these questions, and you can come up with your own conclusion. So, my own intuition is that it gives you guidance because it tells you what you're trying to find out, whereas a straight-out rule would actually mislead you to make some choices.

Chemerinsky: Can I say two sentences? But that's backwards to say you shouldn't have a printed rule, an articulate rule that says, "Speech inconsistent with the mission of the school can be stopped." I disagree with that rule, but then you are articulating a rule.

Stone: First of all, I think that the public school issue is like a range of other contexts which the Court has said the ordinary principles and doctrines of free speech don't exactly apply. So government speech, speech by government employees, speech by prisoners, speech by members of the military, speech by students and faculty members in public schools, those are all situations where the Court has recognized that those ensure protections in which it would not be sensible to apply the same standards that we do in public discourse. I think that is a good distinction, and it does make for a certain degree of ambiguity with the all the rules, as they inevitably do, but it also creates for a degree of clarity that would not otherwise exist. I think that's really important. The rules that have been adopted have been adopted

over a long period of time. That doesn't mean they're all perfect, they're not. But I don't think we want to "improve" them by creating ad hoc decision making. Part of the reason for that is that you don't trust government to regulate the speech. That's one of the critical purposes and reasons for speech. And the more ambiguity you have in the doctrine, the more opportunity there is for government to suppress speech because the majority doesn't like it. And that's what a lot of these doctrines are designed to address. And the importance of the rules, that's why they are so critical. That is the reason we don't want the government deciding which viewpoints are okay and not okay. And you also want to give people a degree of clarity. The chilling effect of the ambiguity problem is important. Having rules that are as clear as possible makes an important difference, and on the lower courts, it has a very positive effect. The ambiguities of the basic rules are mostly focused on what the Supreme Court does, the lower courts are going to [encounter] some, inevitably, but I do think that having relatively straightforward rules is terrific.

I'd also note that I agree with Robert about *Reed v. Town of Gilbert* and Breyer's dissent in the subsequent case and again with the application of that in *Barr v. American Association of Political Consultants*. *Reed*, as you've heard already, for the first time after the viewpoint/content distinction came into place, basically said, no, it's just the content. And you can't make the treat distinction based on content any differently than you can on viewpoint. And that, in my view, is one of the worst decisions that the Court has handed down under the First Amendment. As Robert said, lower courts have disregarded it almost across the board as I understand it. You don't want to apply strict scrutiny of the sort you apply to viewpoint-based restrictions to content-based restrictions, because content-based restrictions are all over the place. And would inevitably happen, if they actually got that question, is that the protection against viewpoint restrictions would be negligible. And that would be a disaster in terms of the protection of free speech. So I do think that the notion of an open-ended understanding of the First Amendment is usually worthwhile if you're trying to change the doctrines, but not as an approach in and of itself.

Post: You all should know that the reason why the Court said content discrimination is bad is because of a magnificent article that Geoff wrote in the 1970s.

Papandrea: I remember reading that at Ohio State. Did you want to remark, Geoff, some more on the cases where you thought Breyer got it right?

Stone: Breyer got it right on the campaign finance position. His understanding of those cases is that these are content-, not viewpoint-based, restrictions. A law that says Republicans can spend more than Democrats explicitly, would clearly be viewpoint-based and unconstitutional. But campaign finance laws are not viewpoint-based, they're content-based regulations of political speech, but none of them have the same evil as it were to say Republicans can spend more or less than Democrats. And I think that Breyer, as one of the more liberal judges to be sure, is correct in saying that therefore the standard of justification on these cases is less than it would be in a viewpoint-based situation. And that the government's interest is very important here. We do not want to have a democracy in which donators or corporations are able to dominate the process. Imagine if we had presidential debates where the moderator said, "Okay, who wants to have the first comment? Highest bidder." And that was the way the debate proceeded. We would regard that as obscene and absurd. And Breyer recognized that this is not the kind of restriction that raises the most serious of First Amendment questions, and having an idea of equality, or approximate equality, in the campaign finance context is really critical to a well-functioning democracy. And so that's an area where he was definitely right, though the majority disagreed with him.

I also agree that he was right in attacking the *Reed* case. And I think that's what I said earlier that it is a very important difference. I think he was right, as Robert noted, in the *NIFLA* case, recognizing that requiring these abortion-related organizations giving medical advice to put up signs that said the State offers treatment for pregnancy, and so on, is professional regulation and is not requiring them to speak themselves, any more than requiring a lawyer to speak or a police officer giving *Miranda* warnings is not a violation of the First Amendment. Again, the majority there took the wrong approach, and I think Breyer was right.

I think what he gets wrong, one of the examples is the *Brown v. Entertainment Merchants Association* case involving video games, which we were talking about earlier, where he said in his open-ended analysis that we should uphold laws that regulate

violent video games because the state and the parents' interest is significant and balancing a proportionality test says that this should be okay. The majority, written by Roberts, said "we don't want to create that ambiguity. We've never held that violent speech is not fully protected by the First Amendment. And we've never basically said, except in the pornography context, that speech could be regulated through children outside schools differently than it is for adults. And I think the majority was right. Another case where I think he was wrong was the Alvarez case, that we've talked about already, where the court basically said that they were going to limit the pure, low-value judgment for only those categories that are historically recognized as subject to regulation: defamation, perjury, fraud for example. But once you open the doors, Breyer says well, it's low value, so the government can regulate it, which is a very unclear standard. That can be very easily abused by the government. If you make it a crime for a politician or a person running for public office to make a false statement, they will prosecute people from the other party. And given that scrutiny, will decrease engagement. I think having clear rules in situations like that is very valuable, and I think he is wrong in his opinion concurring in that case.

Papandrea: Robert Post, I'd like to go back to you. I'm wondering if it would help Justice Breyer's reputation, I suppose, and the popularity of proportionality inquiry, if he engaged in it in a more structured way. I think one of the concerns I had about the *Mahanoy* decision, just as an example, is that it didn't have structure. For example, the European courts that use proportionality analysis, I think there is often a structure. And I think we heard this morning, Clay and others mention that he mentions sometimes a four-part approach, but other times it's more this free-form kind of thing. Do you think there would be more merit if there were more structure, or do you think it is better to have a more open-ended analysis?

Post: So I mean I think that open-ended is certainly better than the quote-on-quote structured European proportionality analysis. But what I would want to suggest is that this should actually be about the substance of the matter instead of the test that's applied to the substance of the matter; you're going to get a better result. *Brown* is a good example of that. This is the case about video games and putting labels on video games. So, Scalia, who is one for very bright, shiny rules. So he says that a video

game is a medium for the communication of ideas, so it is protected by the First Amendment like a movie is—all video games. Actually, if you study the law of video games and the people suing video games for right of publicity or other violations which can happen, lower courts don't treat video games as though they are protected by the First Amendment. They treat some as such, and other kinds of games they don't. If you're a North Carolina basketball player, and some kind of video game has North Carolina basketball players on it, and they're using your jersey number, you can sue for right to publicity, which you can't do if they're using the jersey, for example, which is protected. So, it turns out that video game isn't a bright-line rule. It turns out that anthropologically, we have different things in different kinds of video games, and yet the bright line rule now . . . When Breyer dissents, he dissents in a lot of ad hoc ways, which seem more or less irrelevant to what the case is really about, which is what the hell is a video game for the purposes of the First Amendment. So, I'm not defending ad hoc versus the other. There should be a rule about what the First Amendment is about. And if you have a standard, it ought to be resting in the substance of the issue and [unclear] don't, for the most part. They're far from that—sometimes they might with really important issues like a balancing question. So sometimes you do come across that, as Erwin said, and very often they're running into that. To me, our jurisprudence becomes clearer as we focus on actually what is the real First Amendment question at issue? I'd rather hash out stuff around that than take tests off the shelf, whether it's proportionality or—that's my critique of Breyer, is that as he gets later in his last few terms, he has come out more in favor of balancing, as he just did with the Outdoor Reagan Advertising case, which basically says "let's just balance the damn thing," and if you're balancing, you are looking to square the First Amendment stakes with other stakes and you're doing what courts very often have done in the past which is to balance. Stevens balances a lot. There have been many, many cases the court has balanced. And if you do balance in a subtle way and actually look at what matters, it is very informative. It's not the only way, but it is a way. So the issue is ad hoc, it's not proportionality. It's off the shelf versus actually understanding the relevant First Amendment issue in a way that is illuminating to others like lower courts.

Papandrea: That's very helpful. And just staying with you for a minute, do you think there's a whole—I want to switch and talk about the tests later and that analogy. [Unclear]

Post: Yes, if you look at this Reagan Outdoor Advertising case, which often gets a bad read, there's a passage in there where Sotomayor gives a nod to history and tradition just to get Kavanaugh's vote. This history and tradition is, to my mind, an advertising slogan or perfume that really isn't quality. That is especially true in the First Amendment area because, of course, we had no First Amendment judicial protections until the 1930s. So what are you going to look at when you're looking at history and tradition? What we know from history and tradition if you care about—say you're an originalist—and you care about the original meaning of the First Amendment, it meant no prior restraints. That's what it meant. That's how the court interpreted it in the Sedition Act cases. That's how Story interpreted it in the 1830s. That's how Oliver Wendell Holmes interpreted it in 1907 in *Paxton v. Colorado*. He said "the First Amendment offers no protection from subsequent punishments, only from prior restraints." This was pretty clearly the judicial consensus. The first cases that I know of in which the Supreme Court doubled down on this [unclear]. So, using history and tradition in, of all places, this place, it is going to be somewhat questionable.

Papandrea: Erwin, if you would pick up on that, it's interesting that in that Bruen decision, the Second Amendment case, the court said that "in the First Amendment context, we use history, text, and tradition and we're going to import that into the Second Amendment." And they certainly have used text, history, and tradition when creating new categories or not. But do you see even the conservatives on the courts selectively using text, history, and tradition as a methodology, or do you think they will become more consistent?

Chemerinsky: Yes, I think they're selectively using text, history, and tradition to get the conservative results they want, but second, I think, just as Thomas says in *Bruen*, is even more extreme than text, history, and tradition. In terms of the court using text, history, and tradition to get what they want, I think they do that in *Dobbs*. In an essay I just wrote for Geoffrey Stone, if you read *Dobbs*, Justice Alito, at the end, says, quite emphatically, "we are not going to overrule any of the other

rights under the liberty and due process clause covering family autonomy or contraception or same-sex marriage." If that's so, then they're rejecting that it's just about text, history, and tradition, and [unclear] is irrelevant. If that's true, then *Dobbs* is really just about potential life. I think in terms of text and tradition, more generally, the court only follows it when it gets it where it wants to go. Take, as an example, the Eleventh Amendment and sovereign immunity. You can't possibly justify the Supreme Court's Eleventh Amendment jurisprudence based on the text of the Eleventh Amendment or the history of the Eleventh Amendment. It's very much about conservative values, and I'll make a prediction. And I think you all will agree with it. The Supreme Court is about to overrule the affirmative action case, *Bakke*, and they're not going to pay any attention to text, history, and tradition. They're not going to look into the fact that the same Congress that ratified the Fourteenth Amendment also adopted programs that were race-conscious—things like the [unclear] Bureau—or like in *Shelby County v. Holder*, where Chief Justice Roberts says Congress says treat all states the same. That is not about the text of the Constitution, and it's surely not about history because the same Congress that ratified the Fourteenth Amendment also passed the Reconstruction Act [unclear] to the South. It's not about tradition because Congress's law stayed the same. So I think that this is just the guise that they use for their conservative values. The second, I think that *Bruen* and is much more pernicious than just text, history, and tradition.

Justice Thomas said he is explicitly rejecting looking at the ends that the government is trying to achieve with gun regulation or the means. And here I think that we should be looking at the ends. Saving lives is something the Government should be able to do with gun regulation. He says explicitly, "the only kind of regulation of the guns will be allowed are those that are historically permitted." He says that the Second Amendment makes a judgment that the right to bear arms is more important than all other interests. And so what is done in this case, which is different than other originalist decisions, is that usually originalism is used by conservatives to decide whether the right exists, and then the court would apply the levels of scrutiny to decide if the government could proceed. Here, the court is using originalism both to define the right and to determine what regulations are permissible. [Unclear] It hasn't gone on any other amendments.

Stone: I agree with all of that.

Papandrea: Okay, we need another dissenting voice, but I'm sorry. Geof you posed a question as a suggestion, but I thought it was a fun question. What First Amendment decisions that Breyer supported do you think might be in jeopardy in the future, and conversely, can you think of any decisions in which Breyer dissented that may flip the other way? In the near future rather than 50 years—who knows what's down the bend.

Stone: In thinking about that, I actually found that I couldn't think of very many, which would likely be changed. That's not to say there won't be significant changes other areas of First Amendment jurisprudence—there are many different areas—but in terms of his opinions, (this may not be accurate, as I've studied this case very casually) I looked at Breyer's majority, concurring, and dissenting opinions and looked at how he voted, and he actually voted to uphold restrictions on speech 87 times. That was pretty stunning to me. The data was raw and so maybe this is wrong, but my guess is that it was more than any other [unclear]. But again, I have no evidence in support of that. I found it very striking that he was so much in favor of upholding restrictions on speech. I think *Bartnicki v. Vopper* is one where the court's [unclear] might be overturned. This was a case where a radio host, the court held, could not be punished for illegally broadcasting the tape of a recording that unlawfully recorded a conversation between two officials. Even though the recording was illegal, and even though the reporter—the radio host—knew that the recording was illegal, the court held that it could not be restricted. That's a little bit like [unclear], where the New York Times, Washington Post knew that the Ellsburg information was illegally obtained for that, and the Court nonetheless found that even though Ellsburg could legally be punished, the Times and the Post were protected by the First Amendment. I think that the current court might agree, though that is a bunch of conjecture. I couldn't think of any of his conservative opinions that I thought would be reversible in my life time, which is unfortunate. *Walker* is a very interesting case in which the state of Texas allows individuals to create license plates providing certain messaging. I had not turned down any of something like—I don't remember the exact number—something like 240 requests until the confederate flag was put on it. The organization that monitors these things said no. The question was does that violate the First

Amendment rights of the organization that wanted to put it up. Breyer wrote the majority opinion saying that this was government speech. Government speech, as it has been made clear, that normal principles of the First Amendment don't apply. The President can give a speech advocating for whatever policy he wants without having someone else respond and give the opposite side, for example. The principle of government speech is basically that the government is allowed to speak, and there's not really an obligation to present the something they don't want. But in this context, I find it weird to think that the message on license plates, as there's so many of them, and they're so random, are government speech. And this is clearly like wide discrimination against a particular message that I don't like. A state can get rid of the ability to put messages on a license plate to be sure, but this clearly seems to be viewpoint-based discrimination. And if you can imagine the case as if someone wanted to put Black Lives Matter on their license plate, and the state said no, you can't do that, I can't imagine Breyer would have upheld that.

Post: In the next case, where they wanted to put a cross on their license plate and Texas turns it down, don't you think that Breyer would uphold that?

Chemerinsky: Breyer is joined by Justice Thomas and Ginsburg and Sotomayor and Kagan. That was a great example of government creating a forum for private speech. They don't have to allow private citizens to put things on license plates, but once they do, then it is a forum for speech.

Stone: I can understand why Breyer would take that position in the case, but calling this government speech is a problem, given that [unclear] and it's on a private individual's car, even though the license plate is state property . . .

Papandrea: It also worth noting that Justice Thomas provided the crucial fifth vote, and that was interesting. I was going to ask Erwin to talk more about that. He had written in the past on *Virginia v. Black*, and how that's inconsistent with the *R.A.V.* decision. And again, Justice Thomas, perhaps providing a crucial vote as well because of a particular view that he has on that kind of hate speech. So it's not clear, but Thomas did write separately in the *Walker* decision. So he ends up joining the

majority, and it seems inconsistent with this prior jurisprudence, so we'll see what happens.

Stone: I wanted to point out that Mary-Rose wrote a terrific article on the Supreme Court review about the case. To capture her point, this is Breyer writing the opinion: "Rather than engaging in a careful calibration of the competing interests that are in close consideration of settled First Amendment principles, Breyer simply engages in ad hoc analysis that by so doing, creates more problems than it solves," which I think is perfectly right.

Papandrea: That's so nice. Do any of you have any thoughts to add on what we heard from the religion clause panel earlier? Do you think there's—I mean I didn't generate a lot of questions about that, because it seems like the writing is on the wall as to where the court's going in this area.

Chemerinsky: Can I tell a quick story?

Papandrea: Of course.

Chemerinsky: It was something I was going to put in this morning, but I didn't. The question that I get asked, that I am most proud of my answer to at the time of the oral argument and that in hindsight, I most wish I could change was from Breyer about divisiveness. Breyer, at oral argument, said he finds it very hard to know where to draw the lines, and he ultimately thinks it's important to look to divisiveness. And my answer was that the Ten Commandments are so divisive that there are protesters outside the court. I received death threats prior to meeting. This is why it's some important that the Ten Commandments not end up there. And I thought that this was the right answer at the time, but in hindsight, what I wish I would have said—well of course it wouldn't have made any difference in the outcome—but if I said that any enforcement of the establishment clause is inherently divisive, because any enforcement of the establishment clause tells the government that it can't do something it wants to to advance religion, so divisiveness can't be the test with regard to the establishment clause.

Papandrea: Do you have any thoughts to offer on that *Kennedy v. Bremerton* case on the interplay between the free exercise and free speech? It seems like free exercise gets special treatment and

free exercise of religious speech is treated better, perhaps. I'm not sure.

Chemerinsky: Of course, anytime there is a restriction on someone who wants to pray, there's always a claim that it's violating free exercise and there's always a claim that it's violating free speech. I think what's interesting about the Gorsuch opinion with regard to speech in *Bremerton* is it's really backing away somewhat from *Garcetti v. Ceballos*.

Papandrea: Exactly.

Chemerinsky: *Garcetti v. Ceballos* is a 2006 Supreme Court decision that says that there's no First Amendment protection for the speech of government employees on the job in the scope of their duties. It's a terrible decision because it creates a bright-line rule that provides no protection for whistleblowers on the job. The argument here is that Joseph Kennedy was on the job. He was at a football event, which was what the job was all about. He was still functioning as a football coach. And so I think that when Justice Gorsuch is saying "well, this wasn't really speech on the job because it, in the words of Justice Alito, it was a unrelated activity and it wasn't really part of the governance of teachers' duties because he was speaking for himself." I think this opens the door to try to say that there's other instances where *Garcetti v. Ceballos* doesn't apply because it's an unrelated activity or it's not part of the official duty of the job. I like lessening the absolute nature of *Garcetti v. Ceballos*, but I worry that this is just like something being done in the religion area.

Papandrea: Right, see my forthcoming article on this very topic. I don't think the court really grappled what it was doing to the free speech side of things because it was focusing on the free exercise clause. And the *Garcetti* decision is so absolute, and I'm not a fan in any way, but it does seem like—now you say, "well, it wasn't something I was supposed to do on my job." Specifically, the employer does not want me to do this, so *Garcetti* doesn't apply, and I don't think the court necessarily expected there to be such a big road to drive right through with *Garcetti*.

Stone: There was a case where a teacher was doing something different.

Papandrea: The social media…?

Stone: Yes.

Papandrea: They used the *Garcetti*/*Connick*/*Pickering* framework and I'm not even sure they would say it was a matter of public concern. I mean, if they got past *Garcetti*, which that's the first thing: were they using social media as part of their job duties? It's possible that teachers can use social media as part of their job duties. But if they weren't, then the next question would be is it a matter of public concern? That was another fun, satisfying thing—in the *Mahanoy* case where the court suggested that saying "fuck cheer, fuck everything" is a matter of public concern. It just really wasn't clear to me what exactly they thought about that. It's not clear to me that it is. Certainly, lower courts in similar types of cases have said that that kind of speech is not a matter of public concern, so I don't think the teacher would fare well. Tell your teacher friends not to swear in school and certainly not about anything related to their jobs. That is not wise. But we're ready for some questions, so get your tails up there. Do you have questions? I've got plenty if you don't.

Audience Member: Thank you for spending your time with us this afternoon. So, I want to ask about exceptional circumstances, where the standard analysis of the First Amendment may not apply. We've talked a lot about *Alvarez*, and so I want to ask about electoral exceptions—that is false speech that is intended to affect the election. Now, in *Alvarez*, that wasn't the issue because he already had that position on the water board, and it's fine if we need to talk later. But, nevertheless, Breyer's concurrence in that decision seems to suggest that in the electoral speech context, a lesser tier of scrutiny might apply or some form of exception rules should be applicable when the speech is directed at getting elected or speech that is fraudulent. I wonder whether you see that the court might, in the future, begin to move in that direction, and secondly, whether that would be a good thing—whether the government should have more discretion to regulate speech.

Post: Right after *Alvarez*, there is a case called *281 Lexington v. [Unclear]* out of the Eighth Circuit, so there's all this bloated rhetoric in Kennedy's opinion where—whenever you have more speech [uncertain]. And so you have a Minnesota statute—there

are many, many, many statutes in the United States that analyze false speech and misinformation in the context of an election if there's actual malice. If there's actual malice. And this case struck it down saying, "well because there's a less—using strict scrutiny—there's a less restrictive alternative in the circumstances, always choose the less restrictive alternative, which creates more speech." Some might say, so what about in *New York Times v. Sullivan*? Because you could make the same claim in *New York Times v. Sullivan*, by the same view, regardless of election, there's always the lesser restrictive alternative. So, once you frame these things outside of the logic of why you're protecting and not protecting and in these kind of abstract categories, like lesser restrictive alternative, you can go anywhere.

Stone: One of the reasons for that, which I mentioned earlier, is if you're talking about the government and the Constitution, you cannot trust them to decide which false statements are political discourse because they will not give you the intended value. Actually, the Trump administration, for example, if they had the power to punish what was either actually false speech or what they claimed was false speech, they would be very biased and maybe the Biden administration would do that as well to many states. The problem is not that false speech is valuable; it's not. It's that we just don't trust the government to decide what's false speech and what's not false speech.

Post: The campaign of [unclear] sends out flyers to the local people or in a neighborhood, and gives them the wrong day of the election, at the wrong polling place, and you wouldn't trust the government with whether or not to prosecute them?

Stone: I would think such act is horrible, I agree. But I think that would depend a lot on what your vision is. I just don't trust them—people in power in government, and especially not this generation.

Chemerinsky: There was a Supreme Court case called *Susan B. Anthony List v. Driehaus*, that involved an Ohio law on false speech, and the Supreme Court found it to be ripe to review and then struck it down. So they had to back away from that. My instinct is to agree with Geof in being afraid of giving the government the power to decide what's true and what's false in

an election year through being prosecuted. Though I am now less sure than I used to be about that because of the internet and social media and the enormous prevalence of false speech and the harm that it causes has increased my skepticism that more speech really works when it comes to the election. So, I am torn between where you came out and said "I just don't want government to have the power to say what's true and what's false in an election" versus how do we deal with the huge problem of false information on social media and the internet.

Stone: I think the answer to both Robert's question and this comment is that you need to find a way to be able to trust the government to prosecute mutually. And a way to do that fairly would be to have a bipartisan committee that makes the decision whether to prosecute.

Post: Like the NFC.

Stone: So I think if you had an even number of people then they would be less likely to be partisan in the decision. And they may have to debate until they get 3 out of 4, or whatever it is, to agree. That's the only way I consider it.

Post: So you may want to consider why government in the United States has collapsed. Consider that it gets attacked from the right; the right doesn't like big government, and it doesn't approve government regulation. And it gets attacked from the left. We don't trust the government to do this, that, or the other. So if no one trusts the government to do anything, we get the government we deserve.

Audience Member: Thank you. Really, really fascinating. Geof and Erwin, do you think that ultimately the concept that these rules will prevent ambiguity really overlooks that there is a presumption in your premise that these rules are being applied consistently and in fact don't have ambiguity in and of themselves? In particular, if you create a test like the most exacting scrutiny, or exacting scrutiny, that can go all over the place. Sometimes it's least restrictive, sometimes it's narrowly tailored, and sometimes the rules are just not applied in anything where you could say "well, securities regulation should be founded in the Constitution." So, isn't the premise that the rules will be applied and sustained across—or can be applied

consistently—when in reality, when we look even at categories, for example, of the government speech, where they aren't really applying rules, but rather they are applying rules in a particular setting and based on the particular proclivities of the justice? And Robert, wouldn't it be, in terms of the breadth of coverage and analysis where, by the way, my article argues that Breyer is not ad hoc but uses this specific method, where he considered the speech involved, then the government concerns, then means-ends considerations, and whether there are alternatives to the proposition. It is deeper and more rigorous than the European tests of fact. But, what about just looking at the principles of the Constitution rather than deliberate democracy? Deliberate democracy being one of the critical considerations of the value of free speech. So too is personality; so too is the marketplace. For example, if I'm standing in the shower and I'm singing something against some political party, and no person hears me, I have no effect on Democrats, no nothing. I have a terrible, terrible voice, trust me. But it seems like free speech, and it seems like George Orwell's type of system, which we're pretty close with what we can certainly create with today's electronics. Apple Watches do, in fact, listen to you—they listen to people having sex on the other end, and the government could tap into that by paying—no state action—just paying Apple to give up that information. Then, the worry is that even in my private shower, where I'm not affecting politics, not affecting democracy, that there seem to be greater values that might be extended, called free speech constitutionalism. The final thing to mention, I would say, is the questionable validity of even saying that the court is using tradition, history, and text, even where it says very clearly that it is using text. In the Stevens case where we've got obscenity and child pornography. None of those are historic categories—they didn't exist until the 20th century. So, the critical thing is really formulating arguments here rather than thinking that there's something truly objective that the court was doing.

Stone: So to your first point, you're absolutely right that the existing categories are often vague and unpredictable. But I do think they have a serious impact on how lower courts and lawyers advise people and how they cite cases. There are always going to be marginal cases, and that's going to be ambiguous, but I think if you compare that to a more open-ended approach, you'll find that this enables a lot more certainty and a lot more

predictability than would be the case otherwise. And I think that certainty and predictability are very important to the ability to engage in free speech. As I said earlier, the fear of being punished for engaging in speech will deter an awful lot of speech because what individuals gain from speaking is not a whole lot. And I think the reason for having categories, we try to have as much clarity as you realistically can without going really overboard is to avoid both government bias in terms of how they enforce the categories of law, and there would be people who want a reasonable degree of confidence of whether what they do or don't do is subject to punishment in the speech area. Mainly because of the chilling effect problem and the danger of government misusing the ability to punish speech that they don't like. So, I agree with you that all of these doctrines, except maybe viewpoint discrimination, have all of these different views, but they're much better than an open-ended approach that would not get anything.

Chemerinsky: I was going to say the same thing. Just because rules often have ambiguity doesn't mean they're always ambiguous and always inconsistent, and it doesn't mean that they still don't serve a function, especially in terms of how lower courts, state and federal, have to deal with things. But, you mentioned exacting scrutiny, so I'm just going to focus on that. This is the place where I find a pinnacle of support for its imprecision. In [unclear], a year ago, Chief Justice Roberts said that exacting scrutiny is substantially related to a sufficiently important government interest. I don't know how it's different from intermediate scrutiny—substantially related to an important government interest—or why he feels the need to create exacting scrutiny. There's nothing magical about the three tiers of scrutiny. There could be a fourth, but I don't see how this is that. To me, we should be critical, if you believe there's any value to the levels of scrutiny, in either using the existing ones or justifying the creation of a new one.

Post: I think the question that you ask goes to public and private—I think that's what you asked. If you think about [unclear] and modern free speech doctrine, there are many critiques, but here are two that are enormously significant. When we think about freedom of speech, almost all people who theorize, theorize it in terms of the relationship of demos to its government. So, you speak so that the government can respond

in one way or another. That's imagining of a national public sphere. But you lose that sense of connection. So, what are we protecting, and how do we protect? No one knows that at all—that's one problem. The second problem is that almost every system of free speech regulation, of which I am familiar, the basic distinction between speech of public concern and private speech—think of defamation—you're speaking about a matter of public concern, the First Amendment is called, if you're speaking about a private person about a matter of private concern, then the common law can do what it wants—a distinction like that is at the root of almost every constitutional system that protects free speech. So we see that the public/private distinction is crucial to the architecture of free speech protections, and on the Internet, we don't know what that means. So, we don't know if a group of 250 of your closest friends on Facebook and you make a post to them, is that public or is that private? The inability to understand what's public and private on the internet, how to make this distinction, is extremely unsettling, in my view, to First Amendment doctrine and how we think about that architecture and structure for more protections. And we're not going to be able to clarify until practices emerge in which we instinctively begin to settle for ourselves—what is, in fact, private on the internet and what is public? And it's changing so fast, it's very hard to know what those distinctions may be.