This essay will discuss Stephen G. Breyer as a short biography focused on his current role in the U.S. Supreme Court especially surrounding First Amendment issues. After briefly mentioning his early life and education this essay will turn to noting his early career. After discussing his nomination to the Court it will turn to discussing his first term, and from there touch on his contributions to First Amendment theory. The essay then notes a few opinions of Breyer's before discussing what people see him as contributing to the Court going forward.

Stephen G. Breyer was born on August 15, 1938 to Irving G. Breyer and Anne R. Breyer in San Francisco, California (Cornell University Law School, 1994). He attended public schools and then went on to Stanford University graduating in 1959 with an A.B. of Great Distinction (Cornell University Law School, 1994). He went on to Oxford and finally graduated from Harvard Law School in 1964 (Cornell University Law School, 1994). On September 4, 1967 he married Joanna Hare and has had three children (Cornell University Law School, 1994).

His career began as the Clerk to Associate Justice Goldberg for one year, and he had also taught law at various universities between 1967 and 1993 (Cornell University Law School, 1994). He was the special assistant to the assistant attorney general between 1965-1967, assistant special prosecutor in the Watergate special prosecution force in 1973, special counsel for the Senate Judiciary Committee on administrative practices in 1974-1975, and chief counsel to that Judiciary Committee from 1979-1980 (Cornell University Law School, 1994).

On December 10, 1980 Breyer began his time as a judge in the 1st circuit of the U.S. Court of Appeals after being nominated by President Carter (Cornell

University Law School, 1994). It is worth noting that he was the only Democrat confirmed that year by what had just become Republican-run Executive and Legislative branches (Breyer, 1998, p. 48). He served on the U.S. Sentencing Commission from 1985 to 1989. He was the Chief Judge in this role between 1990 and 1994, while for that same period he was a member of the Judicial Conference of the United States (Cornell University Law School, 1994).

President Clinton nominated Breyer as his second nominee to the U.S. Supreme Court to replace Justice Blackmun as the 108th Justice (Joyce, 1996, p. 149) and he began in his role as a Junior Justice on August 3, 1994 (Cornell University Law School, 1994). Though he was confirmed quite convincingly the nomination was met with criticism, especially in people saying that his weakness lay in a lack of life experiences brought to the Court with experience primarily in the field of administrative law (Joyce, 1996, p. 150). However, he was seen as a consensus-builder (Gerwirtz, 2006, p. 1677), though that didn't turn out. He has been noted as being one of those justices who "peppers" advocates with a lot of questions, showing that justices must do enormous research ahead of hearing oral arguments (Breyer, 1998, p. 47). He is still serving on the current Supreme Court, and also still teaches law even while being a justice (Breyer, 1998, p. 48).

Once on the Court Breyer realized that he'd have been better situated for the position had he been on a trial court (Breyer, Interview with Associate Justice of the Supreme Court Stephen Breyer, 2010). He'd also tell people that being a judge (or I'd add professor as well) is a job doing homework because you did your homework well enough in school. Breyer has remarked, especially in connection with *Bush v*

Gore, how the public doesn't question the decisions handed down by the Supreme Court (Breyer, Interview with Associate Justice of the Supreme Court Stephen Breyer, 2010).

In his first term Breyer's opinions were clear of rhetoric, briefly stated, organized, and well composed with little bending in any direction but rather fact oriented (Joyce, 1996, p. 150). These opinions also were not shaped by general theories (Gerwirtz, 2006, p. 1676), and instead draw on multiple sources of meaning (Gerwirtz, 2006, p. 1677). He writes opinions that are written as if meant to be read by ordinary citizens (Gerwirtz, 2006, p. 1694). Having joined the Rehnquist Court (with a conservative activist majority) he found his voice speaking against their actions, especially when it came to federalism (Joyce, 1996, p. 150). In his dissent to *United States v Lopez* he criticized the majority for not relying on reality and giving general statements rather than actual facts (Joyce, 1996, p. 151). This dissent shows us what his philosophy is like. He is one to honor facts and to look at intent over anything else. You must look at what the party's intent was above the actual content, and we see this appearing in many of Breyer's opinions from his first term.

Breyer's theories on the First Amendment are one of his most important areas of work on the Court; some even say his are the most important new ideas since Justices Brennan and Black (Gerwirtz, 2006, p. 1681). He posits that the First Amendment's "freedom of speech seeks not only to protect a negative liberty, but also to promote active liberty by encouraging the exchange of ideas, public participation, and open discussion" (Gerwirtz, 2006, p. 1681). Protecting the freedom of speech is therefore to promote a system of free expression where

speakers have wide opportunities for both public and private expression. It provides listeners with many sources of information, thus fostering greater democratic participation, which in turn creates a greater sense of confidence in the democratic process (Gerwirtz, 2006, p. 1681). I see parts of this as relating to the marketplace of ideas.

This has led Breyer to argue that the particular restriction in any case isn't the only free speech interest involved, but rather that such restrictions may enhance the speech of some and thus constitutionally protected interests "lie on both sides of the constitutional equation" (Gerwirtz, 2006, p. 1681). The right question to ask is if the laws "impose restrictions on speech that are disproportionate when measured against their . . . speech-related benefits" (Gerwirtz, 2006, p. 1682). He has argued for greater restrictions on speech in concurrences he wrote for *Shrink v Missouri* and *McConnell v FEC* than the Court decided. While political speech is protected he sees commercial speech as deserving greater regulation (Gerwirtz, 2006, p. 1682). He has been more receptive to upholding restrictions on speech when another important value not connected to speech is competing for protection (Gerwirtz, 2006, p. 1683).

One of the recent free speech cases Breyer has concurred on was *Snyder v Phelps*. He agreed with the Court's decision, but notes that the Court should have taken the effect of television and internet postings into account (Breyer, Snyder v. Phelps, 2011). One can protect the picketing, but Breyer believed that the online postings that attacked the Snyder family, if taken into account, might have

augmented the decision and being, he thought, valid evidence shouldn't have been excluded from consideration (Breyer, Snyder v. Phelps, 2011).

Breyer's dissent in *Crawford v. Marion County Election Bd.* is worth noting as a dissent of Breyer's. I say this largely because of the topic of the case and its related significance to people of the same demographic as myself (college student), not really because it was a landmark dissent of Breyer's connected to free speech. He wasn't against Indiana's Photo ID law on principle, but instead dissented "because it imposes a disproportionate burden upon those eligible voters who lack a driver's license or other statutorily valid form of photo ID" (Breyer, Crawford v. Marion County Election Bd., 2008). In simpler terms, Breyer would vote for such Photo ID laws so long as the procedure to attain such identification isn't burdensome to any demographic of citizens.

Though like with the dissention example above this case isn't on free speech let me note *U.S. v. Brockamp* as one of those few times Breyer has written the opinion of the court (and that had a unanimous vote). This case involved instances where an individual paid the IRS thousands more than required and then the circuit courts decided that the submission of refund requests after the deadline was acceptable due to equitable tolling doctrine. The decision got reversed based on primarily an evidence-supported interpretation of the federal statutes that suggests no such provision for equitable tolling (Breyer, U.S. v. Brockamp, 1997). This majority opinion of Breyer's shows the way he approached economic issues as well as federalism.

Breyer is still an active member of the Supreme Court, so I can't discuss the legacy he has yet to leave behind. But I will discuss what people are saying about him as a justice today. His well-crafted opinions that disdain absolutes and definitive positions show that he is a Justice who defies easy categorization (Joyce, 1996, p. 163). Breyer will continue to be a powerful voice on the Court given his distinctive approach, method, and ideas (Gerwirtz, 2006, p. 1698). He rethought First Amendment law, so one can imagine that he'll find other areas of law that he can rethink with a fresh perspective (Gerwirtz, 2006, p. 1698). But by nearing retirement age what exactly he contributes going forward may be less than he has contributed in the past.

In this essay we've briefly touched on a number of aspects of Stephen G. Breyer's life and career. After noting his early life, education, and early career we turned to discussing his nomination to the U.S. Supreme Court. Then we discussed his first judicial term before mentioning the contributions he has made to the Court's interpretation of the First Amendment. Finally, once talking about three opinions he issued we concluded by talking a little bit about what he may contribute to the Court going forward before his eventual retirement comes.

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