Justice Stephen Breyer on The Promise of America

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[00:00:00.2] Julie Silverbrook: From the National Constitution Center in Philadelphia. This is We The People.

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[00:00:08.0] Julie Silverbrook: I'm Julie Silverbrook, Chief Content and Learning Officer. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. On May 12th, the National Constitution Center published *The Promise of America: Reflections on Our Enduring Ideals*. The book is an inspirational collection of essays exploring the founding principles that continue to shape American democracy from the nation's leading constitutional scholars. In celebration of the publication and the opening of our newest permanent gallery, Governing the Nation, we're sharing a conversation from the launch event with U.S. Supreme Court Justice Stephen Breyer and Judge Cheryl Ann Krause of the Third Circuit Court of Appeals. Justice Breyer is honorary co-chair of the National Constitution Center and author of the introduction to *The Promise of America*. He is in conversation with Judge Cheryl Ann Krause, who is also a member of the National Constitution Center's Board of Trustees. For more information and to order *The Promise of America*, visit constitutioncenter.org/promiseofamerica. Here is Judge Krause.

[applause]

[00:01:16.1] Judge Cheryl Ann Krause: Welcome back to the National Constitution Center, Justice Breyer, and welcome, ladies and gentlemen. So let's begin where your introduction does, and that is with six founding ideals, liberty, equality, the pursuit of happiness, government by consent, separation of powers and human rights. Why those six? And where did you find them? Is it founding documents, is it philosophical tradition, or in Americans' shared experience?

[00:01:54.1] Justice Stephen Breyer: Probably 'cause I was born in San Francisco. [laughter] Right. I was born in 1938, don't tell anyone. But just after the war is when I grew up. And I can remember my father taking me down by the opera house and he said, you see those people there? And he says, they're writing the United Nations documents. And there was Carlos P. Romulo, the

first president General Assembly. And at that time, when we grew up, certainly that list encompasses who the president then, Truman, Acheson, De Gaulle, De Gasperi, Adenauer, former enemy, that country, but no longer. And what did they agree about? They agreed about what will be the principles. Uh-huh, yes. Basic human liberties, democracy, rule of law, equality, and we'll trade more. And we will also do things with what word that I love? Together. Now, you see what growing up in San Francisco was like? And it was the same everywhere. It was, well, we're not so bad, we can... And you think that that's just a myth? No. My fifth grade teacher, Mrs. Squataguaza, she says, you're gonna write an essay about San Francisco, it's gonna be cosmopolitan, metropolitan, a city that knows... Whatever it is.

[00:03:33.3] Justice Stephen Breyer: Groups of four, one grade. You learn pretty tough then, quickly then, to pay attention to what other people are saying, you see? And so I associate that in my mind with the groups that came around in Cambridge, Mass, to what? Groups came around. What? To see if old people were all right during Covid. And that same kind of thing took place not just in Cambridge, Mass, but here and in San Diego and all and in St. Louis, you name it. Because we were pretty good at taking that word, together. And you get that word together and you say about what? And then you take those words that you listed, words in the Declaration of Independence. I'm not really 250 years old, but I did know what they were thinking about, and we all knew that because we all went to school. And we all knew that because you can sit here, which I can't do, every day in this beautiful room and look out and there it was, there it was. And that's an ideal, but it's not just a Fourth of July speech. It's an objective that we learned about in school and that we try to put into effect. So that's the word, together. And together about what? And then we have that document and there we are. Thank you. And thank you for inviting me here. Not only is it a treat, thank you.

[applause]

[00:05:19.4] Judge Cheryl Ann Krause: It's a wonderful example of ways of bringing to life those civic virtues even in our own time as people coalesced to help each other and be a community through the Covid period. But as you've described it, Americans have over time called upon their government to live up to those virtues.

[00:05:47.0] Justice Stephen Breyer: Yeah, because you're describing ideals. You're describing what the documents say. You're describing which, if we're pressed and you ask me a question and I have to answer it, I'll appeal to those ideals. Do you think we've always lived them? Certainly not. I mean, we've had our ups and downs. Did we not have slavery? Did we not have a civil war? Terrible. Jim Crow, you name it. You name it. We've had some not terrific moments. But I look around and say, those 340 million people, every race, every religion, every point of view, my mother used to say that. She was a good San Franciscan. She'd say, there's no view so crazy, there isn't somebody who doesn't hold it in this country. And then she'd add... Don't tell anyone, but she'd add, and they all live in Los Angeles. [laughter] That was it. Okay. So there we are. But we go back, you see, we go back to those words. We go back. We're a nation of many

different kinds of people, but the kinds of people are probably less definitive of our nation than are our two basic documents. And you mentioned the word, you see, that's in those documents, Declaration of Independence and the Constitution. And of course, because of my job, here it is. They have it at this institution, this is their copy. I have a copy here, too, but mine isn't as attractive as this one. It's... I don't know, I lost it. [laughter] There it is. There it is. There it is. Okay.

[00:07:26.8] Judge Cheryl Ann Krause: Well, many of those principles that you wrote about in your foreword and we were just talking about, they date back quite far. Our founders were drawing from John Locke, the idea of a social compact, David Hume on moral philosophy, Montesquieu, separation of powers, and Cicero, Plato on citizenship and classical virtues. Even the practice of law in America, it's epitomized in organizations like the American Inns of Court, which talks about the ideals of the legal profession, dates back to British Inns of Court back in the 1300s. So when we think about the law and those virtues, what makes them and which ones are truly uniquely American?

[00:08:22.2] Justice Stephen Breyer: No, they're not American. Truly American? Jeff Rosen wrote a pretty good book, which I recommend, called *The Pursuit of Happiness*. And he went back and he spent some time, I guess, reading everything that the founders read. And what did they read? The classics. And what are the classics? Cicero. I had to do that in Latin class. Oh, God. But Cicero, Seneca, Aristotle, the French Enlightenment, the Scottish Enlightenment, that's what they read. And they came out of that with an interesting thought, in his view. He said the thought that they had is, how do we lead a happy life individually? We don't. We can't find a happy life necessarily. We can pursue a happy life. You see, it's pursuit, pursuit of happiness. And he said, well, why did they think we... Let's see if we can try an experiment. The experiment will be, can we get a government that will pursue happiness? Well, what did that mean to the classicists? It means you yourself have classical virtue. Temperance, stomach, don't eat too much. The food's very good here, so it's hard to keep to that one. [laughter] But temperance, courage, wisdom, justice. It's called a life of reason.

[00:09:46.0] Justice Stephen Breyer: That's what the classicists called it. You try to find it. And why did they think we could do that? Because they thought, well, that's what Madison wrote. It's interesting, they had a Library of Congress exhibition which showed everything he was reading at that time. And he was trying to figure, how did they govern Syracuse? How did they govern this? How did they govern that? Well, Madison's thinking, we can. We can have a government that will pursue reason because it's a very big country, and faction, which is driven by emotion, will calm down by the time it gets across this great big country. And besides, it takes a lot of time to communicate, that'll calm people down. And besides, we have a government that's so complicated, you better start teaching it in every classroom, not all simultaneously.

[applause]

[00:10:36.6] Justice Stephen Breyer: Okay. And that's the question I'd ask them. I'd say, well, you think we have a big country? Have you heard of the jet plane? You think we have a long time to communicate? Have you heard of these nanoseconds? I don't even know what that means, but it has something to do with the internet, I don't know. But... And the government's complicated, but not in the same ways. And can we find the substitute that will keep faction from taking over and will maintain what the founders hoped for? That is, together we can maintain these virtues. My wife, Joanna, who is a psychologist—I'll add, it's very good for a lawyer to have a wife who is a psychologist. [laughter] But she said that she would pay each of our grandchildren $20 if they memorized Lincoln's Gettysburg Address. Why? Think of that. Think of the first two lines. Four... Four score and seven years ago, our fathers set forth upon this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. We are now engaged in a great war, to determine whether this nation, or any nation so conceived and so dedicated, can long endure. What's that about? It's called experiment. And read a letter I read that George Washington wrote to a friend of his, and he called this country, this Constitution, this Declaration, the great experiment. So what I say to the seventh graders when they ask me, they ask me, what do we do now? What do we do now?

[00:12:23.5] Justice Stephen Breyer: And I say, my friends, don't ask me. It is your document now. And you are the ones who will now have to make certain that it's reason, not faction and division, that prevails. And you want the ideals? There they are in our declaration. And you want the ideals? There they are, making an effort to reduce them to what I'd call legal practicality in our Constitution. Here we are, you see? But you're the ones who are gonna have to figure it out. And that's why we're here, really, in this building, because it's this building which houses people who are, in fact, like you here tonight, dedicated to the proposition that we will teach that next generation. And they will learn, and they will see these ideals are not just a speech on the Fourth of July. And they will participate in this government. And it's all gonna happen because we're gonna teach them 12th grade civics, even if we teach them that in the seventh grade or the fourth grade, I don't care when. What I care is that they know it. And they say, is there any advice you can give us? I say, no. But I can tell you that those people in that building there, they thought this is not gonna work if you don't participate. And that's what I hope you'll teach them.

[applause]

[00:13:59.9] Judge Cheryl Ann Krause: So in that document, our founders put in place some structural protections. And I wanna home in on one of the ideals that you've talked about, and that is separation of powers. You've described our Constitution as a democracy with a separation of powers both horizontally, that is among our three branches, executive, legislative, and the judiciary, and also vertically between the federal government and the states. And our new gallery, Governing the Nation, is designed exactly around that architecture. So why did the founders think that we needed that sort of division of power between branches and between sovereigns in order to preserve the rule of law?

[00:14:53.2] Justice Stephen Breyer: Well, the obvious answer to that is you don't want anybody to become too powerful, no particular group. And so we have this one checking this one and that, it's a mess, but, but consider the alternatives. And that's what we can see in a lot of other countries. But can I... I can't resist it because I wrote some, occasionally I'll write... I mean, I write lots of opinions and people get... Fall asleep reading them. But nonetheless, a couple of things I felt... Because we used to debate very often, Nino Scalia and me. And we didn't... You'd be surprised at what we agreed upon a lot, but we didn't agree upon everything. And in terms of attitude, I wrote one dissent that I thought had something in it that I prevailed over what he was thinking. Of course, naturally I'd think that. But nonetheless, it was about separation of powers. And he puts in his opinion, he took the view that was more rigid in that particular case. I won't go into what the case was about. But so he says, as the poet said, good fences make good neighbors. No, I know that poem better than him. [laughter] So I wrote in my opinion. And he had the decency, because he likes little gimmicks, he like, not to change it. I said, but that isn't what the poet said. That's what his New Hampshire neighbor said. [laughter] And what the poet says is, before I built a wall, I'd like to know what I was walling in and walling out. Now...

[applause]

[00:16:39.6] Justice Stephen Breyer: That's Robert Frost. And that's why this is a difficult question that you ask, and more difficult than people think, because you have to decide where and when, and that's the job of being the judge, I guess, and also a member of Congress, and also, and also, and also. But it's not so easy to do because where does that line cut? Do you wanna just get rid of the line? Please don't do that. Turn on your television set and see what happens in countries that have few bars to people becoming too powerful. I see. So the separation of powers in the vertical and the horizontal is just part of a structure that is designed to prevent that from happening.

[00:17:21.7] Judge Cheryl Ann Krause: That's one that you've talked about as both constraining and enabling of government, along the lines of the ways to think about the fencing, what you're keeping in, what you're keeping out. Is that model still one that works in our times?

[00:17:44.3] Justice Stephen Breyer: Well, works, works depends on how people implement the model that's there. Should the model work? Of course I think yes, and I imagine most of you think yes, it should work. And how can we? Well, one of the wisdoms... One of the things that shows, they must have had some special brain powder over in that room over there across the way, because you look and you see things that are surprising. What? They thought of all kinds of things. So, the... For example, to take a very controversial issue, which I'm expressing no view on except I will, but a very controversial issue right now is drawing district lines, gerrymandering and so forth. Okay. And so what I happened to, somebody pointed out, I didn't know it was there, if you have your copy of the Constitution, you can look at Article I, Section Four. I'll read it to you, it's only one sentence. The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof.

[00:18:59.2] Justice Stephen Breyer: But, but, the Congress may at any time by law make or alter such regulations. Ah, ah. Why do I point that out? Because these powers and limits and so forth are not just clear lines written in the Constitution. Sometimes they are, but not always. Sometimes you disperse power, and the ultimate dispersal recipient, giver of power is the people, that's why those are the first three words. And how do you get there? And who participates in our getting there? Well, it's not just the Supreme Court of the United States, I'll tell you that right now. It is also, and also, and also states, city councils. And I tell that to students when they come to the court. God, I say, where... What's law in the United States? 90% is state law. Federal law, which is what the Supreme Court deals with, and only that, is maybe 10%, 15% max. But it's in the states. Okay? But most important law is federal. Ha ha. That's what they want you to think in the federal government. [laughter] No. All kinds of things, contracts, torts, wills, you name it, it's over there in the state. And I wanna tell those students, if you wanna make a difference, you go back to your state, your city, and talk to the people in the schools, and talk to the people in the press, and talk to the people in the City Hall, and you remind them of those basic virtues in that document and Constitution.

[00:20:41.0] Justice Stephen Breyer: Yes, but they're not the whole story. They're an enabling story, or they are a limiting story. They are like what I think of, back to San Francisco, when I was there in 19... Growing up in 1952, I would sneak the radio in at night when my mother wasn't listening, and I would listen to Sergeant Preston of the Yukon. Why? Sergeant Preston of the Yukon was a great hero. He was a boundary patrol. The Royal Mounties, they patrolled the boundary up with Alaska and so... And the boundary was cold and tough and miserable. So I say, there we are. You think abortion's inside or outside? That's a harder question than you think. And which? Okay. And that's a boundary patrol because we're trying to define the boundaries. And that's mostly what we do at the Supreme Court, define the boundaries. And is the court always right? Well, I've written a certain number of dissents, so obviously I think they're not, [laughter] not always right, but... Including abortion. But you see, what it's designed to do is to maintain limits and also enable, but have the separation of powers and have the two, horizontal, vertical.

[00:21:57.8] Justice Stephen Breyer: So that is the people. Oh, that's corny. Ah, but it's true. And so that's why you're here, really, because you think the way to maintain the people's control is to, in fact, enable the people to work through Congress, work through the state legislatures, work through the state councils, work through the... You work all over the place. Just as those groups delivered the supervision of seeing if old people were alright during Covid, all over the place. And we're not so bad at that. But that's the documents enabling you to do it. And that's the message we're trying to give, you and me and everybody else, to these seventh graders or twelfth graders, whatever you want there, participate. It's your country. And they're not at the window anymore, those seventh graders. When we start having this discussion, they're back interested, and they wanna know how, and they wanna know what they can do. And it's the look in their eyes. It's the look in their eyes when we're talking about that, which makes me on the optimistic side about the United States of America.

[applause]

[00:23:31.7] Judge Cheryl Ann Krause: You've touched on the role of the court in policing those boundaries, if you will, serving as an authority to ensure that there are constitutional limits on the other branches. But of course, the judiciary doesn't have a sword or the purse. Its power, as you've pointed out in other forums, it depends upon public respect and trust for the institution. The polls suggest that trust in our Supreme Court and Judiciary at large has fallen dramatically. 60% in 2020 and about 35% in 2024. What do you think accounts for that? And what can we do, judges, lawyers, concerned citizens, about restoring a sense of trust in our public institutions?

[00:24:29.1] Justice Stephen Breyer: That's a problem. [laughter] That's a problem. But it's true of all the public institutions. It's not just the courts. But I think if you ask most people, they think, well, really, the judges, you and me, we're just politicians in robes. That's what they think. And it's not obvious the contrary. So what do I say? If they don't ask that question, I ask it for them, and they all agree. You see? I say, well, politics and the court is... Now, every... When there's a vacancy on the Supreme Court, every political group in the country's interested. And they use politics, but they're directed at the president who names the judge. And they're designed, group by group, to try to get somebody appointed whom they think sometimes wrongly, sometimes rightly, they think that the view of the law that that judge has, will, in fact, produce decisions that we, our group, will like. Okay? And they're right on that, sometimes they're not. But when you're a member of the court, when you're a member of the court, whatever your court, our court, you get the robe on, there you are, you're a judge. And if you're a federal judge, you're not likely to be removed before you're pretty old.

[00:25:51.4] Justice Stephen Breyer: And yeah, okay, please, what's the benefit to be... No. Maybe the people who appointed you were politicians and confirmed you, yeah, but you're answering the question presented as a judge. Now, we have different views of what the law demands, that I've seen in recent years and even before. And I was there for 28 years, and I know we didn't always agree. But what we didn't always agree about was the law. Okay, so I can say that, and they think, oh, well, you're a judge, you're just sort of being nice to them. No, I'm not. That's what I've seen. Okay, or what then accounts for differences? Well, one thing, they have different views of what law demands in these difficult cases, and we only take cases where lower courts have come to different conclusions on the same question. So of course they're difficult. Of course they're difficult. Or maybe people have different views of what is this country like, because some of the questions do require you to think about that. Or maybe they have different views because they grew up in different places. Is that relevant? No.

[00:27:02.7] Justice Stephen Breyer: Well, I was, as I said, San Francisco, Lowell High School, Stanford. I've lived the life I've led, so have you. And you think you can just jump out of your skin? Well, you can't. And you can try to keep it down. You can try to keep it under control. And I used to think, well, this court's so awful. Since I grew up in San Francisco, Boston, I've lived there for many years, Cambridge, Mass, and so forth, and why are they disagreeing with

me, when I'm so right all the time? [laughter] And then I became a little bit more mature and thought, it's a big country, 340 million people. People think a lot of different things. It isn't so terrible having people on courts and other places where they come, have different basic upbringings and views and are somewhat different experiences. So that can be... And there's more than that, you don't want a judge who's totally popular. You think in a criminal case you want a judge to be looking over his shoulder, what does public opinion say? Of course not. And it is true, and sometimes it's very political. I'll give you an example.

[00:28:05.5] Justice Stephen Breyer: Miscegenation. Remember the miscegenation cases when the court was trying to desegregate, and they first got a case, and Frankfurter told the conference, the other judges when they were deciding it, we better not take this case because this is what miscegenation, interracial marriage, is what the South is really afraid of. And this isn't the time because we're trying to get *Brown* enforced in other places. And they listened to him, they didn't take the case. A few years later, they did take it, and they said miscegenation is... Anti-miscegenation is unconstitutional. You have to let people marry who they want. But okay, I'd say Frankfurter was a political view. And when I clerked on the court, when I clerked for Arthur Goldberg, and I'd say 1964, '65, it was a court that had a mission. It was a court that was trying to enforce *Brown*, and they were having some, but not complete success, 10 years after *Brown*. Ha, ha. So well, what? The best description of the relation of politics to the court that I found was Paul Freund, who was a very good law professor at Harvard, and he said about politics and the court, he said, no judge decides according to the temperature of the day, but every judge is aware of the climate of the era.

[00:29:39.5] Justice Stephen Breyer: And it's that latter, you see, that sometimes accounts for the disappearance of cases like *Lochner* and all the ones that were popular in 1906. And suddenly in the Depression, people believe a little bit less in laissez-faire. And 25% unemployment, you can't... I mean, really, and the stock market fell about 90-some-odd percent, and you had to... And the court, slowly but surely, changed to beginning to accept developing principles of law, administrative law, that would be receptive to Franklin Roosevelt's programs. All right, the climate of the era. Yeah, I think there is something to that. There's something to that. The views, the basic views that are being written about in all the law reviews today, the textualism and originalism and all that stuff. I had to write a book which said why it was wrong. Now, so far, only 32 people understand why it was wrong because they're the ones who read the book. But none... [laughter] But nonetheless, you see, there are changes over time, but it isn't politics. And to call it politics is to misunderstand it. And so that's as far as I can go. I can just say no, it's not politics. They're not trying to please a particular president or a particular something else, but they do have different views. And those views, boy, I've already said that.

[00:31:16.9] Judge Cheryl Ann Krause: You're highlighting what we sometimes talk about when judges are engaging with the public, the distinction between judicial philosophy and political agendas. When it comes to judicial philosophy, in the book that you were just

referencing, you've defended pragmatism in contrast to strict textualism. In what way do these different interpretive methods tie back to our ability to use the Constitution to fulfill those ideals?

[00:32:00.0] Justice Stephen Breyer: Well, why I'm hesitating is I don't wanna go on for an hour or two in answer to that, I'll just say it in a minute. In a minute, people right now are paying a lot of attention to text. You read the text and rules. Let's have rules. Okay. And originalism is just a form of textualism. And what did the people think at the time they wrote these words into the Constitution, that they meant in ordinary English then and so forth. So I say there's nothing wrong with reading the text. You have to read the text. Of course the text is important. But the person who said this best was a French legal philosopher called Portalis, who wrote the Civil Code, and/or helped. In any case, and he said, of course the text. When the text is clear, you follow the text. But the text is never clear. [laughter] True. So other people, and the ones I learned about in law school and admired, Brandeis, Holmes, et cetera, what they would do is, yes, we read the text, but also look to the purpose. What was the mischief that Congress was after in writing this? Or consequences?

[00:33:05.5] Justice Stephen Breyer: If I decide this way, what disaster will occur? If I decide the other way, not so much a disaster. All right, that counts. And what about the values that are there in the Constitution, in the documents? And is there a rule for telling you when which applies? Yes, the rule is it depends on the case. Now, you see? You see? And you say, that's right. And you try to get it right. Experience helps and a lot of things help, a lot of things help. And will I ever know whether I've gotten everything right? No, of course I won't. Years from now, maybe somebody'll say, this turned out right, maybe they won't. You don't know. And that was debate, Nino and me debating. He'd say, Stephen, you have a system so complicated nobody can understand it except you, maybe. And I'd say, Nino, you have a way of interpreting... We did though, we had a great debate at Lubbock, Texas. It was fabulous. And then I'd say, Nino, you have a system of interpreting the Constitution, you'll produce a constitution no one would want. Who wins that? We'll never know, we'll never know. And who is it that made the best argument, I think, against Nino's love of rules, which he liked.

[00:34:25.8] Justice Stephen Breyer: And there's something to be said for rules, and you have to have them. Try procedure without rules, you'll get nowhere. But not too much. God, I heard that. I heard... Well, the person who had the best argument against it, I think, is Montaigne in 1584. If you've never read his last essay, On Experience, it's worth reading still. And he says Justinian, who was a Roman emperor, was such an idiot that what he got angry at the judges because they were interpreting the words of his code in ways he didn't like, so he said he's gonna write codes with many more words and then they'd have to follow what the code said. And what Montaigne says is that man was so stupid that he didn't understand that every extra word in a statute is just an extra argument for a good lawyer. [laughter] He says, I'd rather live... He says, there should be principles, there should be approaches, there should be standards, but beware of specific rules. Not always. Not always. Much, much, much, it depends. And so... And what I was thinking of as a lawyer, we once got a very good trial lawyer, F. Lee Bailey.

[00:35:35.3] Justice Stephen Breyer: He got a lot of publicity, too. He was a great trial lawyer years ago. And so we had him at a judicial conference and somebody asked him, he said, well, what accounts for a success of a good trial lawyer? By the way, my brother is a trial judge and he thinks the only people who know any law are trial judges and trial lawyers. I mean, yeah, that's right. That's what he thinks. Nobody... All right, skip that. [laughter] The fact is that he said, you have to believe in your client's cause. You have to understand where your client is coming from and you have to believe in your cause, his cause or her cause, but not too much. And I said, a lot of law's like that. A lot of law. Yes, we follow this principle, but there will be. And how do you know where it stops? And are you gonna have an exact rule? Probably not, but sometimes, yes. So have I confused you enough? [laughter] And you see why Nino says, you see, Stephen, you're just too complicated. I say, that's true. Life is complicated. It just is. It just is. And so we're trying to do what with law?

[00:36:47.7] Justice Stephen Breyer: Well, we're trying, as I learned in law school. What do you want? The system, I say, it's the system. That's what Hart and Sacks used to say, and Lon Fuller. It's a system that people have devised over time. For what? To help communities live together. How? Peacefully and productively. And sometimes it works. But if you look at it as an institution, yes, that's what it's after, even if it doesn't always achieve it. And you say, what is my real criticism of all this textualism and stuff? It isn't just a different philosophy. It's that I'm afraid if you're too literal, if you forget the overall purpose of law too often, and you just follow these words too much wherever they happen to go in the 18th century or something, you're gonna divorce law from life. And if you divorce law from life, a problem for any nation or community that does that. Of course, that's very self-serving for a lawyer to think, but I do.

[00:38:00.0] Judge Cheryl Ann Krause: You've given us, in your own experience, these anecdotes with conversations with Justice Scalia, a wonderful illustration of the ways that you can disagree without being disagreeable. But we're living in an era, and our children are growing up in an era, where we have a country that seems increasingly polarized, where traditional news media and trusted anchors have been replaced with social media and influencers. And now we have the advent of artificial intelligence, which makes it harder and harder to distinguish fact from fiction. So how do we continue the trend of finding grounds for agreement, coming to some center, when it's difficult to even identify a shared reality?

[00:39:04.0] Justice Stephen Breyer: I don't have an answer, but I can tell you what I tell the seventh graders. Remember, they were at the window and now I wanna get them back into their seats. And so I said, which is true, I worked for Senator Kennedy twice, two years, two years. And what he would tell his staff in the Senate, he would tell his staff this. When you find we're trying to get something or trying to stop something, we have an effort here, first of all, forget about credit. Credit is a weapon. If the thing works, there'll be plenty of credit. If it doesn't work, who wants the credit? All right. But I'd say what he'd tell us to do is, you find a person whom you respect and rather like, and that person believes on this issue exactly the opposite of what you think. Well, you go and talk to that person. Oh, wait, don't talk too much. Get them to talk if

you can, and you listen. And if you go on long enough, in most instances, you will find they say something that you actually agree with. And when they say that thing that you actually agree with, you say, what a good idea you have.

[00:40:18.5] Justice Stephen Breyer: Let's see if we can work with that. And then you try to work with it. And maybe you get 30 or 40%. If you get 30% of what you want, take it. Don't hold out for 100% so that your followers will say how brave he was and got nothing. You try to get that 30%. And I saw Kennedy so many times, the press would say, Senator Kennedy, you've done such a good job on that issue. And he would say, don't thank me. Thank Orrin Hatch, the Republican who came up with the idea that helped get us together. Now, remember, I'm telling that to the seventh grader, the eighth or the ninth or whatever, but suddenly they're really interested. And as I say, it's that look. Maybe I'm wrong to interpret it, but I do interpret it that they wanna know how. What can they do to help bring this nation together? So I've told them what I've learned and I've told them some other things about the Constitution, and I think they pick it up. And I think we're still a country that can take a lot of different people and try and get them together. Because despite our ups and downs, the 340 million now, not four million anymore, but the 340 million are, they're still one country, they're still together, and they still in many ways work with each other.

[00:41:45.8] Judge Cheryl Ann Krause: So let's... Looking at compromise as a product of good listening to each other, you have also advocated for listening beyond our own shores, to looking to examples of other countries, including how they've tried to put in place democratic values. Why do we look outside of the U.S., and what can we learn from what's going on outside the world to understand better how to preserve our own democratic republic?

[00:42:23.7] Justice Stephen Breyer: Well, I was at a, sort of a conference once with some members of Congress and judges and some others, and that subject came up. And I said, well, the reason that I think, it's not so much that their opinions are gonna be better than our opinions or whatever, but look, more and more countries, it used to be more and more anyway, have similar kinds of values and they have similar kinds of problems, disease, environment, communication, business, commerce. They're more and more worldwide. And they have more and more countries where there are judges who have constitutions somewhat like ours and rolls somewhat like ours and try to be. So if they write something, why don't I read it? I don't have to follow it. So the congressman who was most against me said, well, that's fine, read it. He said, read it, but just don't put it in your opinion. I said, look, it's more than that. It's that there are now a lot of countries, this was at a time when Russia was lowering the Iron Curtain and they don't know about independent judiciaries. And they cite our cases and we refer to a few of theirs, and that helps them with their legislatures and with public opinion and so forth.

[00:43:44.0] Justice Stephen Breyer: So the congressman said, fine, he said, but just don't cite them, write them a letter. Well, that was a point. But because we do have, Madison did think, over there they did think, you see, it's not freedom, the center, the king delegates freedom to the

people. It is here, people who delegate power to the government, that's a different way of looking at it. That's an argument for not looking at other countries. But I say that's a very theoretical argument. I see the point, but still, where are we living? Here. When? Today. And communication, investment, et cetera, et cetera. What I said, the problems are more and more. Immigration is not just a problem in one nation, nor is the environment, nor is health, nor is poverty, nor is... They're all over. So learning how other people are dealing with it or what the results are can sometimes, not always be helpful. But that's why I've said that. I don't wanna be too insular. You can be insular in your result, but look at, listen to, find out. And I think, look, I had a case, we had a case involving copyright. That's pretty technical. And what had happened was up at Cornell, there was a student from Thailand and he was taking a course and discovered the casebook was pretty expensive, but the same casebook in English in Bangkok was selling at half the price.

[00:45:22.8] Justice Stephen Breyer: So he said... Wrote to his parents, send me some. They sent more than some and he began to sell them to all of you. [laughter] But and the company got annoyed, brought a lawsuit, and it got to our court. And we got briefs from China, we got briefs... Not China, but Japan, European countries, all over the world, they were sending in briefs. I couldn't... What was this case? It's interesting. I hope the kid graduates. [laughter] But it's interesting. But why all these briefs? And I found out later from one of the lawyers, he said, the reason you got briefs from all over the world is this very technical issue. And if you think it isn't technical, you should have read the statute on this. I mean, my God, it was... All right. But he said, the reason you got all those briefs is because your decision in this case is going to affect nearly a trillion dollars worth of commerce. And that was a lot of money then. [laughter] All right. You see, that's the world that we live in. And that's why I thought a little knowledge is okay there.

[00:46:41.1] Judge Cheryl Ann Krause: From the vantage point of the rest of the world, America at different points in time has been looked to as an ideal itself and a model for civic engagement, for civil liberties, those ideals of the Constitution that we've been discussing, is that role for America something that you think the founders had in mind?

[00:47:16.9] Justice Stephen Breyer: No, no, I don't know. I do know that they thought they were going to see if this experiment can work. And what experiment? Well, I've been through that. But certainly the people they read and certainly... What about the French Enlightenment philosophers? My mind, don't say I said this, but I think that the philosophers, Lumière, they were like professors at Harvard where I teach, as I always say, professors at X College. They think they have the greatest idea in the world, but nobody'll ever be able to do it because I'm the only one who could do it, think they. Okay? Yeah. Okay. So Washington, Jefferson, Lincoln, Madison, they're gonna say, you're wrong about that, we can do it, or we can try, and we hope we succeed. And I think that's first and foremost what they wanted. And when you read the opinions of John Marshall, read *McCulloch* if you wanna reread an opinion. It's a great opinion. This is a document that's gonna last for, I don't know how many years, but more than two, and

maybe a 1000. And it's going to have to adapt. It's going to have to take into account the circumstances.

[00:48:34.9] Justice Stephen Breyer: And that's what I'm trying to debate with Nino. I mean I tell him, George Washington didn't know about the internet, and his response to that is, I knew that. [laughter] And we had a good time. We enjoyed it. It was interesting. In Lubbock, Texas, they probably hadn't seen a Supreme Court Justice, and they were all out in the football field. They must have thought there was gonna be a football game, I don't know. But they were interested. See, they were interested. And I thought, that's the point. We can't tell them about the solution. We're not even sure about the solutions we try. But we can tell them, this is yours. It's your responsibility. You better think about it, and you better try to figure it out, and best try to figure it out together, and best at least talk about your differences. And when I worked in the Senate, I learned that the best way to get another senator on your side, don't make an argument to that other senator. Find out who in his constituency is interested in his election. Those are the people you wanna talk to. So when I say, how can we help the judicial system, the legal system? I don't believe, and I tell, I don't believe the judge is going around and talking about it, then we can do it.

[00:49:54.6] Justice Stephen Breyer: It's not a bad idea, but it may not do that much good. Lee Campbell, who was my colleague on the First Circuit for many years, told me that. He said, beware as a judge talking about things that aren't... A judge is a person with a lot of power in a very narrow place. And when he starts talking about other things, the lawyers will all be polite. They'll say, oh, that's so interesting, Judge. That's so interesting. And then they get out of the room and one turns to the other and says, there he goes again. [laughter] You see? All right. But the lawyers have more effect, and they're closer to the ground. And on Law Day, they can go to a school and tell the kids what they do. They can go to the newspaper editorial board and be sure those reporters know what you do as a lawyer in a case. It's not always wonderful, and sometimes it is wonderful, but they should know how it works. And there, the lawyers can help a lot. And that's what I told this woman who is the president of the Supreme Court of Ghana was in my office once, and she was trying to move things in a more...

[00:51:06.2] Justice Stephen Breyer: Somewhat more civil liberties direction. And she said, why do people do what you say? I thought, that's a good question. That's a good question. Andrew Jackson probably didn't, and that produced a real mess. And it takes time. And we fought a Civil War, and we did have Jim Crow, and we've had all kinds of things. And I was talking about this to a group at Stanford, a group of students, and I heard, I told them, we were talking about *Bush v. Gore*, where I was on the dissenting side, really. But *Bush v. Gore*. And I said, Senator Reid, whom I'm sure thought that that opinion was worse than I thought, I said, that opinion was the wrong side, I thought it hurts a lot of people and the public is against it, probably at least half or maybe a few more than half. But nonetheless... And wrong, I thought. I thought in key ways. But what Reid said, the most remarkable thing about that case is never remarked, there were no paving stones thrown on the streets. There were no guns. There were no riots. So I said

to the Stanford students, I am sure that at least a third of you, and maybe more, are thinking, too bad there weren't a few paving stones, are thinking too bad there weren't a few riots or worse. But before you come to that conclusion, turn on your television set, we used to have television then. Turn on your television set and look what happens in countries that decide their major problems that way. And that may bring you back somewhat to a virtue of a rule of law in cases that you think are really wrong, even are wrong, there we are. That's the most I can say. I can say one other thing about the rule of law. Should I do that?

[00:53:06.2] Judge Cheryl Ann Krause: Absolutely.

[00:53:08.0] Justice Stephen Breyer: What could you say. But I usually... And I ended up in the book, which I thought was a great quote. I thought a great quote was Albert Camus. I don't know if you've read Albert Camus, he's a French writer. He wrote about *The Plague*. I thought that was his great book. And he ends up... It's the story of a plague that took place in Oran, in Algeria, where he was brought up. And some people behaved well, some badly, and so forth. But he writes about that. But he isn't writing about that really. I think he's really writing about, most people think he's really writing about the Nazis taking over France in World War II. And at the end, he says, why did I write this book? I wrote it in part, I wanted to know how... I wanted people to know how others behaved when they were suffering from the plague. Some well, some badly, some da-da-da-da-da. But I also wanted people to know, because the hero is a doctor. But a doctor is a person who does not have a theory as to why or a philosophy as to why you just help other people.

[00:54:08.7] Justice Stephen Breyer: What a doctor does is he just helps. And I think that's it. But most of all, he said, because the plague germ never dies, it never dies. It goes into remission. It goes into remission. It lurks in the attics, in the file cabinets, in the hallways, in the cellars. It lurks for one day to re-emerge. And then for the education or for the misfortune of humankind, it will send its rats once again into a once happy city. I like that quote, because then I can say the rule of law... You see, and the lawyers understand, they see that. The rule of law is one weapon, not the only weapon, but it is one weapon that we have to protect ourselves from the re-emergence of that plague germ. You see. And I say that's what at heart a lawyer or a judge and others too, that's what we have to teach that next generation. That's what we have to teach them. And we have to teach them the basic principles in the documents they wrote. We have to teach them those basic principles upon which our rule of law rests. And above all, I think we have to tell them... Not tell them.

[00:55:38.0] Justice Stephen Breyer: They won't do it if you tell them. Anybody have grandchildren or children? [laughter] Okay. No, we suggest and bring out what they have to think, participate, talk to people who don't agree with you, try to see what these differences are and where they amount to and what you can do about it, if anything, and help bring us together. So that's why I'm so pleased with what you're doing. Obviously, it's something I would be doing

if I can. And you're trying to bring these people together through education, which is, I think, our most important help.

[applause]

[00:56:29.4] Judge Cheryl Ann Krause: Justice Breyer, you have reminded us tonight that this *Promise of America* is not just something inherited. It's something that we have to practice. It's something that we have to teach. That is what we are doing in this remarkable institution, the only nonpartisan museum dedicated to the Constitution and to teaching constitutional values, civil dialogue, and civic engagement. And it falls to us, generation after generation, to call on our government and, as you've said, to live up to those principles. So thank you for your inspiring words tonight, for your contribution to our collection of essays on *The Promise of America*, and your service to the nation.

[00:57:21.9] Justice Stephen Breyer: Thank you.

[applause]

[music]

[00:57:29.3] Julie Silverbrook: This program was streamed live from Philadelphia as part of the NCC's America's Town Hall Series on May 16th, 2026. This episode was produced and mixed by Bill Pollock. It was recorded by Advanced Staging Productions, Kevin Kilbourne, Greg Scheckler, and David Stotz, with production support from Charles Sahm. Research was provided by Anna Salvatore, Trey Sullivan, and Tristan Worsham. Please recommend We The People to friends, colleagues, or anyone anywhere who's eager for a weekly dose of constitutional education and debate. *The Promise of America: Reflections on Our Enduring Ideals* is out now wherever books are sold. For more information, visit constitutioncenter.org/promiseofamerica. And as always, remember that the National Constitution Center is a private, nonpartisan nonprofit, and we rely on your generosity, passion, and engagement for all of our programming, including this podcast. Please consider donating today at constitutioncenter.org/donate. On behalf of the National Constitution Center, I'm Julie Silverbrook.