

The Legacy of Justice Souter

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[00:00:00.4] Jeffrey Rosen: On May 8th, 2025, Justice David Souter passed away at his home in New Hampshire. Hello friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a non-partisan nonprofit chartered by Congress to increase awareness and understanding of the constitution among the American people. This week we honor the memory of Justice Souter by welcoming two of his former clerks for a conversation about his life and constitutional legacy. We'll also be joined by Justice Steven Breyer, who came to the National Constitution Center this week and offered some reflections about his former colleague. Judge Kevin Newsom serves on the U.S. Court of Appeals for the 11th Circuit. Before his appointment in 2017, he was a partner at Bradley Aaron Bolt and Cummings. From 2003 to 2007 he served as Solicitor General for the state of Alabama. He clerked for Justice Souter during the 2000 to 2001 term. Judge Newsom, it's wonderful to welcome you to We the People.

[00:01:07.6] Judge Kevin Newsom: Thank you so much Jeff, for having me.

[00:01:09.0] Jeffrey Rosen: And Jeannie Suk Gersen is the John H. Watson Junior Professor of Law at Harvard Law School. She's a Guggenheim Fellow, a Paul and Daisy Soros Fellow, a Marshall Scholar, and a recipient of Harvard Law School Sacks-Freund teaching Award for Teaching Excellence. She's a contributing writer to the New Yorker, and she clerked for Justice Souter during the 2003 to 2004 term. Jeannie, it's wonderful to welcome you back to We the People.

[00:01:32.2] Jeannie Suk Gersen: Thank you. It's great to be here.

[00:01:34.4] Jeffrey Rosen: Let's start with your memories of Justice Souter. Judge Newsom, what do you want We the People listeners to know about him?

[00:01:46.7] Judge Kevin Newsom: Oh boy. So many things but I think I would really start with just his down to earthedness, if I can coin a phrase, coin a term. He was one of those people who had all the tickets, Harvard College Rhode Scholarship, Harvard Law School, all of it. And yet me as sort of the public school educated kid from Alabama, he and I got along famously and he understood me. And so I think for all of the brilliance and all of the accolades and all of the fame, which of course he detested I would want people just to know that he was an ordinary guy in some pretty extraordinary and idiosyncratic ways, which I'm sure we'll get into. But a really ordinary, humane person. The history books will tell you what you need to know about his

intellect, his impact on the law, his impact on the court. But to me relationships are always paramount. And so I would want people to know about the relationships he forged with people around him.

[00:03:08.0] Jeffrey Rosen: Wonderful. I think of Justice Souter often called an 18th century man, a deep reader more at home in the texts of the founders than in modern life. But that's so interesting that you emphasized the fact that ultimately he was an ordinary man. Jeannie, would you use that phrase and how do you want to introduce Justice Souter to We the People listeners?

[00:03:32.8] Jeannie Suk Gersen: Well, one of the amazing things about Justice Souter is that people do often emphasize that he would've been right at home in, say, the 19th century or even the 18th century, any century other than the 20th or the 21st. People do say that about him, but there was a way in which he was essentially very modern. And I don't mean that in the usual ways, like I'm sure he probably was on the internet maybe a handful of times only when necessary to learn enough about it to resolve a Supreme Court case. And he was not somebody who I think had a lot of exposure to television or popular culture. And so in that way, it was when you would interact with him, you kind of... He was kind of untouched by any of those developments.

[00:04:25.5] Jeannie Suk Gersen: So even though there were many men of his generation who had adjusted in terms of their personal style with the times he was kind of frozen stylistically in a pastime, a lost time. But at the same time, he had a certain minimalism and an elegance and a way of getting from point A to point B that just felt extremely modern to me, a kind of a neoclassical modernism. And that's how I think about him. And he just inspired incredible devotion and love in the people who knew him. I think that is extraordinary. So, yes, the ordinary way in which he could connect with all kinds of people. Obviously we know that he was an uber wasp from New England, but his clerks were not for the most part. And they ranged from immigrants like myself to people from all the different areas of the country and orthodox Jews, extremely religious people, very secular people, you name it. And he was able to have that personal connection with each of them. And it just, yeah. So I think that's why you're seeing this incredible outpouring of love from the people who got to work with him.

[00:05:58.3] Jeffrey Rosen: An ordinary man who had neoclassical elegance. We're already digging in a wonderful way. Let me tell the story of my unsuccessful clerkship interview with Justice Souter to give my sense of his remarkable personality. And then Judge Newsom, I'm gonna ask you about your successful interview. So we were talking, and he paused at one point and said, I told him about my thesis about Henry Adams, and he said, "If I had my druthers, I would leave this job and go teach a course at a small college comparing Henry Adams to Marcel Proust." And then he said, "Have you read Proust? You should read him in a Gulp," he suggested. And later I asked permission to use this story for a piece I wrote about him in *The New Republic's* Nice issue, which was the one time in the year when *The New Republic* wrote the nice pieces about justices. And he gave me permission to use the story. That obviously summed up a lot about him for me. Judge Newsom, how was your interview and how did you find him in that kind of setting?

[00:07:01.6] Judge Kevin Newsom: Yeah, so Jeff, if you'll indulge me, this might take a few

minutes, but I've got a great interview/hiring story because it ended happily but it began somewhat inauspiciously. So I'm dating myself here, but I interviewed for the job in the spring of 1999 for a job to begin in six months sort of, or in August or September of '99. The justice famously hired late in the cycle because true to his character, he thought his was the worst clerkship in the building, which Jeannie and I, of course, know is not remotely true. But he was so humble that he just sort of thought that he would wait around and then sort of hire late. But so in any event spring of '99 I go in to interview, meet the Justice, meet the clerks, thought that the interview went well enough.

[00:07:53.8] Judge Kevin Newsom: It's like the LSAT or something. You never feel like you've blown this thing outta the water, but I felt like I had survived it. And a couple of months later I got what I understood to be in the mail, a very nice handwritten note that sounded to me what it seemed to say to me was sort of thanks, but no thanks. And so you know I was a little disappointed, but figured it was a moonshot anyway. And so I settled back into my practice. I was a lawyer at Covington and Burling at the time and was really lucky. In practice I was working with a couple of partners there on cases in the Supreme Court. I was kinda the low man on the totem pole in a couple of cases, neither of which was particularly interesting, but both were interesting to a 25-year-old nobody like me. One involved ERISA, the other was effectively a breach of contract case against the government for Exxon. So long story short, the second of the two cases still hadn't been decided by late June of 2000, and it didn't make any sense why this breach of contract case for Exxon would be one of the last cases handed down. So I think it was the second to last day of the term of hand downs. I just decided on a slow morning at the office to get in the cab and ride up to the court and listen to them hand down decisions, which they did. So Chief Justice Renquist says, "Justice Breyer has the opinion for the court *in Exxon versus the United States*." Exxon wins, sort of hooray for our client. I get in the cab, ride back to the office, and I've got a thousand voicemails from partners asking me to get them a copy of the opinion or whatever.

[00:09:24.9] Judge Kevin Newsom: And the last of them is from my secretary. And she says, "Kevin, this is Barbara, a gentleman named Souter from the Supreme Court called and asked if you would call him back." And so I didn't know too much about the Court. Again, I was a nobody but I did know that the clerk of the court was a guy named William Souter, and I knew that the Court had, as it still has, a practice of calling the lead lawyer on either side of the case, literally, as the opinion is being announced to tell you, you won, you lost, whatever. I wasn't really sure why William Souter would be making these calls himself, and I wasn't really sure why he'd be calling me, because again, I hadn't argued the cases. But I had a number and I dialed it up, and some voice says hello.

[00:10:04.4] Judge Kevin Newsom: And I said, "Hi, this is Kevin Newsom calling from Covington and Burling." And he said, "Oh, hi Kevin. Congratulations on winning the Exxon case this morning." And I said, "Thank you." And he said, "But I'll tell you what, this Exxon case has been a really sticky issue for me." And I said, "Oh, is that so?" And he said, "Yeah, yeah, yeah. This is a call that I've been needing to make for more than a year." And I said, "I'm sorry, sir, I don't understand." And he said, "Well, so if you still want the clerkship, it's yours." And I thought, dear God, I'm not talking to William Souter I'm talking to David Souter. It wasn't until that moment that I had any idea who I was talking to. And the backstory here is that what I

interpreted as thanks, but no thanks, he meant as a thanks, but not this term thanks, but not right now.

[00:10:54.4] Judge Kevin Newsom: And he just sort of filed it in the way away in the back of his mind that he would hire me for the following term but by the time he got around to doing that, the cert petitions had come in with my name on them, and he thought, oh, that's weird. I probably can't hire him now, so I'll just kinda hold the spot for him, hold it, hold it, hold it. And then he got kind of desperate when the Exxon case took so long to decide. And so he said that at the conference before that opinion announcement, he basically polled the conference and said, look, when Steve, Justice Breyer announces the opinion for the court in Exxon can I call this kid and hire him, or do we have to wait for the petition for rehearing to come in and be denied? And so he said, just sort of by acclamation, everybody said, no, no, no, you can hire him. And so the punchline here, I guess, is that I've been the subject of a conference at the Supreme Court. So yeah, it didn't start out so well but it ended really well.

[00:11:49.5] Jeffrey Rosen: Hiring by acclamation. You cannot beat that. Excellent. Jeannie, what was your clerkship story and what does it say about the justice?

[00:11:58.1] Jeannie Suk Gersen: Well, I interviewed in kind of a late winter, early spring afternoon. And it was like I think late afternoon, because I remember walking into his office and it being dark like no lights on, no electricity, and just only the light of the window. And it was just kind of a dark unlit atmosphere in there. And of course there were piles of books everywhere. And I'm expecting to... Like I'm all like girded for some like legal grilling. And instead of just even like taking a seat, he says, here, come here, come here. And we go over to his desk where he's got several framed woodcut prints that had just come back from the framer. And he was excited to show them to me. And we stood in front of the prints looking at them for a little while and discussed sort of what we saw and what we thought about them.

[00:13:06.3] Jeannie Suk Gersen: And so I'm thinking like, oh my goodness, is he thinking that I'm so nervous that I really need kind of an icebreaker? But it worked. It was an icebreaker. And then after that, what I remember is just there was definitely a disquisition in the middle of it about Baudelaire and couple other topics of art history and French literature. Going back to what you were saying about Proust, I mean, he definitely did have an interest in French literature. And so after... There was nothing, literally nothing about legal doctrine that came up in the interview. And then at the end of the interview, I guess he does the thing where he says, "Do you have any questions for me?" And I said, actually, why I do.

[00:14:03.9] Jeannie Suk Gersen: And I asked him, "You know you have a really distinctive writing style that doesn't sound like other people, and I wonder to what would you attribute how you developed that?" And the answer was very surprising because it would never have occurred to me. But he didn't hesitate. He said, "Oh, it's the Book of Common Prayer. It was church every Sunday. And the kind of the refrains and the repetitions and the cadences of the Book of Common Prayer just kind of in my ear. And that's, I think, where I got my writing style."

[00:14:44.1] Jeffrey Rosen: That is remarkable. What a great question you asked. What a revealing answer. Judge Newsom, let's talk about justice Souter's distinctive writing style. When

I was writing the piece for the Nice issue, his clerks reported that he would get drafts from them, and then joke, let me put some lead in it. He sort of wanted to give it his distinctive style, and famously he would use phrases like enquiry rather than inquiry spelling it in the 18th century style with an E. And it was indirect. And well, I'll just put it distinctive. How would you characterize, and just to push this along a little bit, his style made his opinions difficult to sum up, he didn't have memorable taglines. What was the relationship between his unusual writing style and his legal legacy?

[00:15:39.4] Judge Kevin Newsom: Oh, good question. So Jeannie will have to help me remember, but as I recall, there were only four iron clad drafting rules and enquiry with an e was one of them, perhaps the prohibition on the use of the word impact as a verb. But I think, as I recall, there were only four. But as you say when you would work up a draft and you would give it to the justice, and quite literally, and Jeannie will back me up, he would do cut and paste jobs by which I mean, he would cut out pieces of paper and tape them back together and give them to Shelly Blinko, his principle JA, and then she would help you decipher what it was that sort of how these things were supposed to be entered into the working draft.

[00:16:33.7] Judge Kevin Newsom: But yeah, so he does have a very distinctive writing style. I had never heard the story about the Book of Common Prayer. That is fascinating to me. And it is on brand and it checks out. And it's interesting because, so I have like a very different writing style. And one of the lessons that I try to teach my clerks, because I'm often asked, "Where did yours come from?" And the truth is, I don't even know. It just, it simply is how I communicate. I don't aspire to a particular style. I'm not aiming at anything. It's just how I talk and how I communicate for better or worse. And so if I tried to write in Book of Common Prayer lingo, it would just come off as fraudulent and ridiculous. Likewise, if Justice Souter tried to write in sort of a conversational tone, it would come off as fraudulent and ridiculous.

[00:17:33.3] Judge Kevin Newsom: And so one of the lessons I try to teach my clerks during their year with me is, look, the opinions are going to come out sounding like me because I'm super involved in the drafting and the editing. Even if they give me drafts, then it's gonna come out sounding like me, because I will have worked it over 15,000 times before it comes out in the same way that justice Souter's opinions come out sounding like him. But take the opportunity in writing your bench memos to me to find your own voice. Don't try to mimic mine. Like mine is authentically mine for good or ill. Justice Souter's was authentically his for good or ill. And so find yours. And I think that was something he never asked me to write his way in the same way that he never asked me to think about the way that he did. He never asked me to write the way that he did. He wanted me to write the way that I did, and then he would, as you say, Souterize it. And I think that's as it should be. I think that's as it should be.

[00:18:33.8] Jeffrey Rosen: Jeannie, you're such a great scholar of writing as well as the law. What was the effect of his style on his legacy? And just to put the question a little more directly might the fact that his opinions were sometimes hard to sum up and immediately distill have affected his lasting influence?

[00:18:56.1] Jeannie Suk Gersen: Well, so I will start first by reflecting on some of the Souterization that the draft opinions would go through. Sometimes if you are a person in the role

of making drafts for a boss, in other contexts you produce something, you give it to the boss, and then if it doesn't come back with any marks on it, then you've succeeded and if it does come back with lots of corrections, then oh no, I haven't done a good job. Well, in the Souter clerkship, you couldn't really use that standard because as Judge Newsom was saying it was extremely clear that Justice Souter was going to be writing those words and those sentences and those paragraphs in the way that he saw fit. And of course, you would produce a draft, but the draft was kind of like a, almost like a memo for him to start thinking about it and to bounce off rather than to actually use as a real template for his own truly self-authored work.

[00:20:13.8] Jeannie Suk Gersen: And so I think that was interesting as an adjustment, because often young people who are in that role, they're trying to do something and really thinking the successful thing is if you write just like your boss and mimic his voice, and then have them just have to do no work at all. That was never gonna happen with Justice Souter 'cause that just wasn't the way he used his clerks. But I remember things like, there was a case about flushing drugs down the toilet and how long the police had to wait at the door before busting in after they knocked. And if there were drugs in the house, then would people have time to just get rid of them? And instead of the word toilet or as like the mode of disposing of the drugs, he used the word commode.

[00:21:10.7] Jeannie Suk Gersen: I mean, it's in the opinion. So there were constant things like that that you'd be like, oh my goodness. But what you're getting at though is the decipherability, which affects the interpretability of an opinion, and the fact that often the soundbite is missing from his work. And even when you think about the three justice joint plurality opinion in *Casey*, there are zingers in there, but usually those zingers like liberty finds no refuge in a jurisprudence of doubt, or at the heart of liberty is... Those kinds of phrases. People don't tend to attribute them to justice Souter, even though, look, we don't know for sure who wrote what, but it's understood that some of the formulations in even that joint opinion that are sort of the zingers that people quote like that, I think that justice Souter in our age became a not totally quotable justice because of, I think what you were getting at is a certain elliptical style. I love the enquiry versus inquiry because when I write for the New Yorker, New Yorker style is also enquiry, not inquiry. And it's a very ironclad rule there. And this is the one thing that probably I get the most critical emails about from the public that people write to me and say, you misspelled inquiry.

[00:22:53.8] Jeannie Suk Gersen: But yeah, I think that he was gonna stick to his ways in terms of his own style. But I do think that there is a way in which many of the justices in the era in which he served, and even increasingly even after he served, started to think of their work as something that at least in some parts had to be accessible to people who, let's face it are as a whole our public ourselves. We have experienced a kind of degrading of literary style in the way that we express ourselves. And I think that that has had an effect on the ability of people to really process Justice Souter's opinions.

[00:23:44.8] Jeffrey Rosen: That's such a good word. You use an elliptical style and a very interesting thought about the contrast between that and a more soundbite style that connects more easily, but takes longer to process. Will you mention Justice Souter's contribution to the joint opinion *Casey* versus *Planned Parenthood*, which upheld the core of *Roe v. Wade* in 1992, by many reports, justice Souter was responsible for the section on *stare decisis* or precedent. I'm

gonna read the key paragraph where he laid out the test for upholding precedent and then concluded that *Roe* should be upheld just to give listeners a sense of his style. And then Judge Newsom ask you to respond to that opinion. Justice Souter said, "So in this case we may enquire, spelled with an E, whether *Roe's* central rule has been found unworkable, whether the rule's limitation on state power could be removed without serious inequity to those who have relied upon it, or significant damage to the stability of the society governed by it. Whether the law's growth in the intervening years has left *Roe's* central rule, a doctrinal anachronism discounted by society, and whether *Roe's* premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed. Judge Newsom, what should we think about Justice Souter's contribution to the *Casey* opinion?

[00:25:19.2] Judge Kevin Newsom: Well, I mean, I guess what I would say is, as a member of what the constitution calls an inferior court, stare decisis is easy for me. I'm bound down by lots of precedent all the time both vertically and horizontally. Because I've got to abide by the Supreme Court precedent, and I've got to abide by even three judge panel precedents within my own circuit. I mean, frankly, I think the sort of the stare decisis debate is much more interesting both inside the US Supreme Court and frankly inside the Academy than it is for plug and chug sort of middle management judges like me. Because rarely do we have occasion or the need to sort of plumb the depths of the stare decisis theory.

[00:26:23.0] Judge Kevin Newsom: It is simply a fact of life every day. And so it's not frankly something... There are a lot of topics that I've tried to give very sustained thought to, and when I've given sustained thought to something then I feel comfortable unburdening myself about it. But one of my cardinal rules is that one shouldn't have takes before one has done the work. And so I don't really have a hot take about stare decisis theory, so to speak, because I haven't had occasion to do the work. But I certainly think Jeff that you're right, that that opinion, that joint opinion and the pieces of it as, as Jeannie said, we don't quite know who wrote exactly what, but the E inquiry gives away who wrote that. But that will certainly be a large piece of his legacy I think that the participation in that joint opinion.

[00:27:16.4] Jeffrey Rosen: Absolutely. Jeannie, what can you say about the relationship between his approach to stare decisis in *Casey* and his entire approach? You could call him a precedent based judge or a common law judge, or a Burke of conservative or what have you, but clearly he cared greatly about precedent in a way that makes his approach somewhat distinct today. So what should we know about it?

[00:27:42.9] Jeannie Suk Gersen: Well, I don't have a confident view about how he would've voted in *Roe versus Wade* in 1973, had he been on the court at the time. I mean, his confirmation hearing and everything he said about Justice Harlan, the second Justice Harlan, makes it clear that he associated himself with that justice and he concurred in *Roe versus Wade*. And so one could maybe think, oh, maybe he would've done what Justice Harlan did in that case, or you might think he may have concurred with him on the idea that there's a right to privacy, but whether he would've also said that that includes the right to abortion, I think it's not totally clear what he would've done in 1973, but to me it seems utterly clear that an unsurprising knowing him that he would, in 1992 thought that what was proper was not to overrule a case that was

barely 20 years old.

[00:28:47.4] Jeannie Suk Gersen: And as he said, had not been shown to be clearly wrong. And so the interesting part I think about that discussion about stare decisis in *Casey* was I think... And it became, even though the idea of stare decisis and of not overruling cases, except in the most compelling circumstances, that all doesn't seem very controversial. But I think what did become controversial in later debate about that case and also in justice Scalia's critique of the plurality opinion was this idea that was expressed in that stare decisis section, that if you overrule *Roe v. Wade* right then it would be a surrender to political pressure and an unjustified repudiation of the principle on which the court staked its authority in the first instance. That connection between the legitimacy of the Supreme Court, the authority of the Supreme Court, which really comes from its maintaining its legitimacy, and the idea that you'd be as a justice thinking about the legitimacy of the court and the authority of the court in making a decision in an individual case beyond just, do I think this was rightly decided or wrongly decided, or is this legally correct or incorrect, really based on the text and the history and things like that. So the idea that you would take into account, like, what is the role of the court and should we be thinking that even if say the prior case was wrong, it should not be overruled because it would harm the authority of the court, and it would be a surrender to the political pressure, which we know had been very strong since 1973 after *Roe versus Wade* it was an extremely controversial and politically radioactive issue that the court inevitably was going to have to revisit. So I think that that's a really interesting debate, and *Casey* really brought that to the fore. Even though that stare decisis section one might think was the least controversial of the sections in the *Casey* opinion in a way that it just went to the heart of what all this is about. Like what are the courts? What are they here for? How in the world do they actually have authority and people listen to them? Even though as we know, they don't have the power to actually force people to do it in any way other than, that they write opinions. People are persuaded by them, and then there's a social practice of obeying them.

[00:31:46.1] Jeffrey Rosen: It's so true, as you say that that discussion of legitimacy in the stare decisis section has become among the most influential parts of the *Casey* decision. Justice Breyer repeatedly quoted from the discussion of the court's legitimacy in his dissenting opinion in the *Dobbs* case, and that disagreement among the justices on the court today about whether or not stare decisis is necessary to maintain the court's legitimacy, of course, continues. Let's talk for a moment about justice Souter's substantive due process methodology in the *Glucksberg* case. His concurrence invoked justice Harlan's dissenting opinion in *Poe v. Ullman*, which he said supplied the modern justification for substantive due process review. And he held that the question is whether a statute sets up one of those arbitrary impositions or purposeless restraints at odds with the due process clause of the 14th Amendment. Judge Newsom, of course rejection of substantive due process has been key to the textualist on the Supreme Court today, including Justice Thomas, who says that the whole idea of substantive due process is an oxymoron. Without asking you, of course, to comment on whether or not you agree with it, just describe how central substantive due process was to justice Souter's jurisprudence, and how did he apply it in different cases?

[00:33:20.0] Judge Kevin Newsom: Yeah, so I mean, I think Jeff, I appreciate the delicacy of you sort of giving me the out. On this one I don't even really think I need it because I've been so

out of the closet for so long as a critic of substantive due process laws long before I was a judge. The only academic writing I had done really until very recently was an article that I published in the Yale Law Journal in 2000, right around the time I started clerking for the man, for the Boss. Very critical of substantive due process and sort of in favor of a reinvigoration of the privileges or immunities clause. So I do think frankly, and I've said both in academic writing and frankly since I've been a judge in my own separate opinions, that I tend to agree with Justice Thomas and others, that substantive due process makes no sense that it's been sort of backfilled to cover over an error that was made a hundred and something, sort of a hundred and something years ago.

[00:34:27.2] Judge Kevin Newsom: And I do think it has sort of mangled some of the doctrine where we've begun to pencil in, on both sides, frankly, I think begun to pencil in reasoning in reverse to reach results that we might like. Now, I don't have a simple solution to this problem. I think the beginning of the solution is to get back to an original understanding of the privileges or immunities clause and what that was intended to do so that we don't have to do these textual gymnastics to cram into a clause that isn't designed to accommodate sort of the absolute protection of substantive rights the doctrine that we have. But in terms of the tests that have been developed, I mean, one of my great concerns about things like purposeless restraint and ordered liberty and even history and tradition, is that they're very much in the eye of the beholder. And it gives judges... I worry that tests like that give judges a range of discretion that in the hands of sort of someone who wants to exert his or her will can do so. And I genuinely worry about judges having that level of discretion. And I think that the tests that the court has adopted to operationalize substantive due process are uniquely or perhaps not uniquely, but certainly are subject to manipulation and abuse.

[00:36:12.7] Jeffrey Rosen: Thanks so much for all that. Jeannie, how would Justice Souter have defended his substantive due process methodology? How did he apply it in other cases? And is he the last Supreme Court justice openly to defend the Justice Harlan history and tradition ordered liberty approach that we've seen since?

[00:36:39.4] Jeannie Suk Gersen: Okay. Well, one thing I recall is that this was a topic he was very, very interested in. And I believe it wasn't my year, but I know one of the years surrounding the clerkship interviews of my year, it was either the year before or the year before that, maybe it might have been even Judge Newsom's year. When he interviewed clerks, he had one question that he would ask all of them. Like he would have the clerk and then he had one sort of question that all the clerks would get, and each year would be a different question. But I know that one year the clerk was widely doing their interview and then they would be hit with this question. The question was, where does substantive due process come from? Now, thank God I was not interviewing that year because I don't know what I would've done. I don't know what I would've said.

[00:37:34.0] Jeannie Suk Gersen: But it was something he was very interested in and he was thinking about it a lot. And I do think that you will mention the opinion *Poe versus Ullman*, I will just confess I love, I love Justice Harlan's opinion in *Poe v. Ullman*. Like I actually look at it repeatedly. And there is something about the Souter sensibility in there and it's very different from the Penumbra and Emanations approach of Justice Douglas that is often kind of made fun of in *Griswold* and what *Poe v. Ullman* and then Harlan's later kind of repetition of his

comments in *Poe v. Ullman*. And then later it became kind of I think the basis of the privacy cases later on. What it really does is I think express a core of kind of southerian thinking, which is that the constitution is really a kind of, as he put it in one of the speeches that he gave at Harvard, a pantheon of values.

[00:38:56.1] Jeannie Suk Gersen: And even if you take these values have been clearly expressed in all of the different amendments in the Bill of Rights. Even if that is, that is your assumption. The thing about human life and politics and the complexity of our desires as a society is that they inevitably come into conflict. And that conflict means that constitutional law itself cannot be as simple an endeavor as looking at the text and then fairly reading the text, and then looking at what the history says, and then having this kind of determinate way of like a rule that promises any kind of like certainty or reliability in a way to predict all the different cases that are gonna come before you. And I think that that embrace of the conflict and that embrace of the openness and the fact that there will be change both constancy and change, all of those contradictions, I think are part of the constitutional method that he espoused and substantive due process, even though it's not in the Bill of Rights, but the idea of interpreting the concept of due process of law, the idea that you can't deprive someone of life, liberty, or property without due process of law and to look at that not literally as a parsing of like, what does due mean? What does process mean? What does life mean? That kind of like shrink wrapped idea of interpreting words was just so counter to what Justice Souter stood for, which was really about taking a broad view of the meaning in the context of the society as it changes and evolves over time. He was not somebody who wanted sudden moves or bold pronouncements or some kind of like flashy change. What he wanted was a respect for tradition that also evolved over time.

[00:41:08.0] Jeffrey Rosen: That is such a good way of distilling his judicial conservatism. And now I know why I didn't get the clerkship, 'cause he asked me, where does substantive due process come from? And...

[00:41:20.7] Jeannie Suk Gersen: It was your year. Oh my Gosh.

[00:41:21.8] Jeffrey Rosen: It was my year. And unfortunately I'd been studying with Akhil Amar at Yale, and I said, well, I think it's kind of made up and maybe you could reconceive it under the privileges or immunities clause, but I don't really believe in it. And then of course he decided *Casey* a year later, and the rest is history. So I totally blew it for that reason. Judge Newsom, he was not a fire breathing war in court liberal, and many of his decisions declined to find sweeping new rights, I think of the *Atwater* decision, a crim pro decision that refused to find that a warrantless arrest for a low level crime like driving without a seatbelt was an unreasonable search under the Fourth Amendment, and he refused to locate a proportionality test in text and history, although Justice O'Connor came out differently there. What are some of the more conservative opinions that you think of when you think of Justice Souter and what do you think of his approach in those cases?

[00:42:18.4] Judge Kevin Newsom: Yeah, so great question. And if I may, just to circle back briefly to the discussion we were having earlier, I think one of the coolest things about Justice Souter is that, so this article that I wrote, it was in draft form when I interviewed with him. We talked about it at length. It came out before I started clerking for him. And as I said it was quite

critical of substantive due process. It sounds like it kind of gave the Jeff Rosen answer which was, it's made up that there is a better way. It's led to all kinds of mischief. And yet he not only hired me, but loved me. And I think that is the most important thing that I have taken away from my time with him and that I have tried to translate into my job as a judge is that... And I've said this several times since he passed.

[00:43:20.6] Judge Kevin Newsom: He never wanted to hear me tell him what I thought he thought. He knew what he thought. He wanted to know what I thought. And he sort of genuinely respected my kind of different way of thinking about the law and judging and wanted to be pushed and prodded and tested. And he said to me like, look, you'll understand, you'll know. Like when I've made up my mind and it's time for you to stop pestering me you'll know. Don't worry about it. But until then he would never put it quite this way, but it was sort of like, come at me, bro. It was like, bring it on. And I really, really, really try to inculcate the same sort of ethic in my chambers because I will have instincts and impressions and perspectives, but what I really need from my clerks is to be pushed and prodded and tested to make sure that I'm not missing something, that I don't have a blind spot, that there's not some better way of thinking about this.

[00:44:27.3] Judge Kevin Newsom: And I really learned that from him. He really valued intellectual independence. He didn't want a bunch of yes men and women, at least that was certainly my impression. And that freed me up to I hope to be to him a good clerk. He didn't need much making better. But to the extent that I could participate at all in making him his best self, I think that was what freed me up to do it. But yeah, so like as for, boy, I don't know conservative opinions, I sort of blanch at labels. I'm not much of a labels guy myself. But *Atwater* stands out. *Atwater* is a case where the honest truth is, I think Justice Souter, while not necessarily an originalist, he cared deeply about history, deeply about history. That's a very good example. Whatever you think about the case or how it came out he just said, let's go figure out what the history tells us and let's spend as long as we need to in the books to figure that answer out and wherever it leads, it leads. And that again, I think is a wonderful lesson for a young lawyer. I certainly wasn't aspiring to be a judge then, but as I look back now, where it leads it leads mentality is really, really, really important. And one of the things I love most about my job as a judge is not having to know or care about the answers in advance.

[00:46:04.3] Judge Kevin Newsom: I love that. I liked being a lawyer but as an advocate almost of necessity you know the answers before you start the case because your client has told you what the answer is and now it's time for you to pencil in the reasoning in reverse and explain to the court why it ought to rule for you. One of the great things about being a judge is that you just get to sort of untangle the thicket, piece together the puzzle. And that is, again, I feel like during my time with him, I really learned that from him.

[00:46:36.6] Jeffrey Rosen: Beautiful. Jeannie, do you want to single out some favorite Justice Souter opinions?

[00:46:43.8] Jeannie Suk Gersen: I take a lot of delight from the fact that he was the author of a case, I think the title is *Campbell*. I was just, right now, as I was talking, having a flash, as I was searching in my head for the name of the case that often he also had trouble with case names and he would say things like, well, you know that abortion case, what was it called? Do you mean

Roe versus Wade? He didn't have a knack for remembering case names, although he would remember every detail about the case itself. But in any event that he had, he was the author of this intellectual property case *Campbell*, and it involved the song *Pretty Woman* by Roy Orbison. And then there was a two live crew version, I guess of the song.

[00:47:43.9] Jeannie Suk Gersen: And so this was about whether that was a fair use. And I just remember, this was long before my clerking for him, but when I read the case and having now clerked for him and knowing him, the idea that Justice Souter, the person least likely to have heard in his ordinary life, the two live crew version of *Pretty Woman*, and having to listen to it over and over again in his chambers and then come up with the theory of why this was or was not a parody I found that really delightful. And I really liked that opinion and have used it in my scholarship 'cause I have done some writing about intellectual property. And I also love, there was an opinion that was my term in *Hamdi versus Rumsfeld*.

[00:48:41.4] Jeannie Suk Gersen: And it was really pure justice Souter. It was all him. And he just found sometimes ways of like in between spaces, like places where you didn't know there was space and he would find them and write in them. And that was something that I think that for a lot of academics who are in the field, I'm not in the national security field in particular other than just teaching constitutional law, but people who are in the national security field and in the field of international law, I have heard many, many people just say that was an extraordinary... It was a partial concurrence and a dissent in that case. And for me the beauty of that opinion is finding that in between space.

[00:49:36.8] Jeffrey Rosen: Finding that in between space, what a beautiful and interesting way of putting it. One more round and then we'll wrap up. Judge Newsom, maybe some favorite opinions in the idea of finding the in-between space makes me think Justice Souter was entirely inner directed. He had little interest in applause or publicity. He famously hated Washington, which he constantly said he was eager to get out of. He resigned from the court at the age of 69 in order to do what he loved best, which was to hike and read books back in his beloved New Hampshire. Did that complete indifference to pop culture, popular approval, and to the ordinary methods of modern approbation influence his distinctive jurisprudence?

[00:50:26.4] Judge Kevin Newsom: Boy. Maybe. I think the... And I guess I mean this in the most respectful way imaginable, but not giving a damn is I think often a real virtue. And I remember when my kids were teenagers I told them, the day will come when you won't really care all that much what other people think about you. And that's a really freeing thing. When you reach the point where... I try to be a nice guy on balance. I hope people like me but if they don't, then I simply don't have the emotional energy to care about that. I'm just gonna try to do my best and let the chips fall where they may. And I'm not really sure that I learned that from him, but he certainly had that in spades.

[00:51:17.6] Judge Kevin Newsom: And I think that like the truest test of his sort of self possession is that he did choose of his own accord to leave one of the most powerful jobs in the world as I've said in judge years as sort of the top of his game, because he is the one person ever so far as I know, who simply didn't view as a lawyer being on the U.S. Supreme Court as the pinnacle of one's life. He thought it was good, it's been a good run, but he thought there were

other and equally important things to do, to commune with nature and learn more about things he didn't know. And that's pretty cool. They just don't really make them like that anymore. And so yeah, I mean, I just think that's a lesson not about lawyering or judging, but just about life. As I tell my kids all the time, you only get to do this life one time. Sort of whatever you think about what comes next, the only life you know for lock solid certain that you've got is this one. You get to do it once, and so you'd better do it right. And I think Justice Souter did his right.

[00:52:45.0] Jeffrey Rosen: Beautifully put. Jeannie reflections on that really unusual decision to retire so early. Why did he hate Washington so much? And was he disillusioned with the court when he left? He wrote an impassioned dissent in *Bush v. Gore*. He wrote a note to the Rhode Scholar alumni magazine after *Bush v. Gore* came down that he'd never be able to look at his colleagues in the same light again. He was so disillusioned with what he viewed was a political decision. Did that contribute to his decision to retire or not?

[00:53:16.7] Jeannie Suk Gersen: Well, I very much doubt that that was any kind of trigger or even a significant factor. I really take him at his word, which I think is, he was 69 years old, there's a quite bit of life left, and he didn't want his identity for the rest of his life to be fully just only and solely as a Supreme Court justice. It's a pretty consuming job and he did it in a way that was very consuming because he was in the office sometimes seven days a week throughout the weekend from morning till dark. And through Christmas, I once asked him, oh, justice, what are you doing for Christmas? He said, I'm gonna have a Puritan Christmas. And I had to go look up what's a Puritan Christmas? And yeah, he basically worked really, really hard.

[00:54:19.6] Jeannie Suk Gersen: The way he did the job was not sort of a halftime commitment. And what that meant was that he didn't want to, or halftime to do other things that really gave him a lot of meaning and joy to the extent that he wanted. And I believe that in the end it was a decision about what is a good life? A good life is one where I've done my duty and provided service to the country and 19 years is a long time to do that. And then it's time to regain an identity as something other than a justice of the Supreme Court. And as Judge Newsom says, I think that's unusual because people who often reach that position of that sort of magnitude and the heights of power, they generally don't wanna give it up. They don't wanna leave that. But I think that possibly he had... We have many examples of people who stayed in their jobs for too long. And when I have recently thought of those examples, the wisdom of his model has really impacted... Now I've done the thing that I used to.

[00:55:41.2] Jeannie Suk Gersen: All right. I have to cut out my own writing style. So yeah, so it had a deep impact on me. Think about that model of leaving before you have to, and then also the notion that you are not the... Your identity is not just the trappings of your position. And to remind yourself of that and to really embrace it and to say, I can have a full life without this position. It's really too bad when people don't have a life to go back to because they've been so overtaken by the position that there's very little to return to. And it gets harder and harder. And I think retiring at the age of 69, it's kind of the perfect time because you still have a lot of life left to live.

[00:56:36.5] Jeffrey Rosen: How inspiring. You both put it so well that in deciding to retire early, to return to his books and his farm, he really was embodying the ideal of Cincinnatus, the

Roman statesman who returned to cultivate his garden. And in doing so, he provides an example for all of us of giving up power before it's too late, and of the transcendent meaning of lifelong learning. Thank you so much, Judge Kevin Newsom and Professor Jeannie Suk Gersen for an illuminating, moving and inspiring discussion about the inspiring life and legacy of justice David Souter. Thank you so much.

[00:57:19.1] Judge Kevin Newsom: Thank you for having me.

[00:57:20.1] Jeannie Suk Gersen: Thank you.

[00:57:24.2] Jeffrey Rosen: And now I'm honored to welcome Justice Stephen Breyer to reflect on his relationship with his former colleague, Justice Souter.

[00:57:32.3] Justice Stephen Breyer: Oh, it was a privilege for me to be on the court with him. I mean, he was a great judge. He was intelligent. He had a good sense of humor. He was a thoroughly decent person. And he thought mostly about, not himself, but of the people that the Constitution is designed to serve. The judges are going to miss him. The lawyers are going to miss him. The country is going to miss him. And I will certainly miss him very much indeed. He was my friend, my very good friend.

[00:58:16.7] Jeffrey Rosen: You shared a love of books and learning. Did you talk about books and give us a sense of what he was like as your friend.

[00:58:24.2] Justice Stephen Breyer: He was just fun to talk to. We would talk about anything, but also all the time people kept... I used to say sometimes if I was speaking about the court, people would say, well, are you recognized? Do people recognize you when you're in Washington and walking outside? And I'd say, not usually, but sometimes they do. And if they do, they always ask the same question, one question, so that they fell for, and they'd say, well, what was the question? And the question they'd have asked was, aren't you David Souter? Then this is absolutely true when I was appointed to the court, you have to go through a confirmation process. And so my face was a little more familiar. He was having lunch at Jacob Wirth restaurant in Boston with some friends. And the waiter kept looking at him and then came up and said, aren't you on the Supreme Court? And he said, yes, I am. He said, well, what do you think is the best thing about it? And he said, oh, the best thing. He said, that's working with David Souter. It was fun. It was fun.

[00:59:31.1] Jeffrey Rosen: When I met Justice Souter he asked me if I'd read Proust and said I should read him in a gulp. And you of course read Proust in the original. You're the only two justices I know who have read Proust. Did you talk about Proust?

[00:59:42.0] Justice Stephen Breyer: Not very often, no. Not really. But he used to have specially good jokes that I liked. I was might to be the only one. Do you wanna know a David Souter joke?

[00:59:50.1] Jeffrey Rosen: Please.

[00:59:50.7] Justice Stephen Breyer: This is absolutely a David Souter joke he would tell at lunch. He would say, man one winter's evening, 5 o'clock is walking on the Boston Common and he walks into a dentist's office and he says to the receptionist, I need to see the dentist right now. It's an emergency. She says, but the dentist is going home. It's 5 o'clock. I need to see him. It's an emergency. Dentist comes out and he says, well, can I help you? What's the problem? He says, well, doctor, the problem is I think I am a moth. He says, you think you are a moth? Yes, that's what I think he says, but I'm a dentist. He said, you need a psychiatrist. Why did you come in here? And the man says, because the light was on. That's a David Souter joke. You either like them or you don't.

[01:00:49.8] Jeffrey Rosen: He was famously indifferent to public opinion. He marched to his own drummer. How did that make him a good judge?

[01:01:00.0] Justice Stephen Breyer: He's not that he's indifferent, it's that these cases in the Supreme Court particularly are almost all cases where lower court judges have come to different conclusions on the same question of federal law. I mean, mostly what appeals court judges do is they look at some words in a statute or in the Constitution, and different judges may have applied those words differently. Some think they have a scope like narrow. Some people think they have a scope like broad. And so if there's a difference, the Supreme Court should try to work out that difference so they apply similarly across the country. Now, that takes a lot of doing. It isn't just asking someone who has looked at them for 30 seconds. No, you have to read the words, you look at the history and why did Congress pass this? They used to say this in the 18th century. What is the mischief that Congress wished to cure with these words? And what did the founders want those words in the Constitution to help with? What values were they trying to promulgate when they wrote the freedom of speech? And he'd look through that and he'd try to find out the answer to that. And then he'd try to write something that made sense in terms of history purposes, consequences words in the statute. And so I wouldn't call that indifferent to public opinion.

[01:02:34.1] Jeffrey Rosen: He cared greatly about the legitimacy of the court. And in his concurrence, in the *Casey* opinion he talked about the importance of stare decisis. You quoted his language about legitimacy in stare decisis in *Dobbs*. Talk about his view of the court and legitimacy.

[01:02:50.7] Justice Stephen Breyer: Yes, you go back. The founders did have ideas. The ideas they did have are mostly put in the Constitution in terms of values, the freedom of speech. Justice Black used to say, just read it. It says Congress shall pass no law abridging the freedom of speech. Well, no law means no law. Oh, I agree with that. But those aren't the difficult words. The difficult words are the freedom of speech. So let's go back, said David, and look perhaps at what kind of country they were trying to create and that will help. It won't necessarily answer the question, but it will help. Stare decisis, beware of overruling older cases. You can't say never, but you can't say either do it a lot. Because if you overturn older cases too often, you'll discover tremendous instability. The client will walk into the lawyer's office, the lawyer will say, you can't do what you want, it's illegal.

[01:04:00.3] Justice Stephen Breyer: And the client might say, well, let's go ask the court to

change the law. No, that way lies chaos. And so he would try to hit it right with a lot of things. You don't say never, but you don't say all the time either. You try to keep it down to a minimum. I wasn't on the court when they decided *Casey*, but in *Casey* they decided not to overrule *Roe versus Wade*. I think that was the right result, and I think that was the result we should have come to in the *Dobbs* case. And I did use some of the things he said.

[01:04:34.5] Jeffrey Rosen: You and he were together also in *Bush v. Gore*. Tell us about that.

[01:04:38.5] Justice Stephen Breyer: Well, *Bush v. Gore*, we were, we thought that our court should leave that case alone. People think that really the court decides the biggest political issues. That's a mistake. It shouldn't, it can't. They are nine people. They're not elected. There's a lot of work to do, which is not just political issues. Most interesting thing, I think on the *Bush v. Gore* was told to us by Harry Reid, who was the Democratic Senate leader, and he was in the court at dinner, and he said the most remarkable thing about *Bush v. Gore* is very rarely remarked despite the fact that it affected a lot of people, despite the fact that maybe half the country was against it, maybe a little more than half, despite the fact that it probably was wrong. That's what he thought. I thought, David thought we descended.

[01:05:38.1] Justice Stephen Breyer: Despite that people did follow it. And I told that to a woman who was Chief Justice of Ghana. I said, that's called the rule of law. And when I said that at Stanford, I said, I know from your faces that a lot of you think the students, that it's too bad there weren't a few riots. It's too bad there weren't rocks thrown or paving stones. But before you come to that conclusion, you go and turn on your television and look at what happens in countries that make their major decisions that way, doesn't work. Well, David thought that, David thought that, and he thought you have to be careful on the court, obviously, and try to get them right. But he would've been glad that there was not chaos and fighting after *Bush v. Gore*.

[01:06:27.8] Jeffrey Rosen: So you and Justice Souter were concerned about the court's rulings being obeyed. Did you talk about that and try to be cautious?

[01:06:35.0] Justice Stephen Breyer: There wasn't much of an issue in that case. I mean, I gather something now, it's a bigger issue, but what I wanted to explain to the woman from Ghana who wanted her court to be more civil rights minded, I suppose I said the rule of law really means following cases quite often or sometimes anyway, which you'd think are wrong, which you don't like. So why do it? Why do it? Well, what you have to do is convince with examples, going back into history here and there, why have people learned to follow that law? You have to convince not just the lawyers, I mean, nobody will find them convincing. They get paid for doing this but the people who live in the villages, in the towns. Contrary to popular belief in America of 330 million people, 329 million are not lawyers. And they're the ones that you have to convince. They're the ones that have to understand that you need a rule of law or you will have chaos, and you will not have a country that can live up to the values that are contained in that constitution.

[01:07:50.9] Jeffrey Rosen: Any favorite opinions of justice Souter or favorite moments with him that you wanna share?

[01:07:56.7] Justice Stephen Breyer: Well, I liked his opinion, as I said on the Voting Rights Act, because when I kept getting confused about it, I would go read it. And the moment I've heard of is when Sandra O'Connor's clerks took him to lunch, and they were interested in how we were related. So they said to David Souter, is it true that you and Justice Breyer are often mixed up? And then she thought, well, that isn't a very good thing to say. So she changed it and she said is it true that you and Justice Breyer are often confused? Well, that sort of seemed worse. So they went on to another topic.

[01:08:38.0] Jeffrey Rosen: He was called an 18th century man. Is that right?

[01:08:41.3] Justice Stephen Breyer: No, no. He didn't like a social life in Washington. He would find if he was at a reception or something and there was one person who wanted to talk to Supreme Court justice, he couldn't get away from the person. And they weren't people he knew necessarily. And he just didn't enjoy the sort of follow the role and so forth very much. He preferred New Hampshire. He preferred hiking in the White Mountains. He preferred being out of doors.

[01:09:12.0] Jeffrey Rosen: You kept up with him after he retired. Did he hike and read and...

[01:09:15.7] Justice Stephen Breyer: Yes. Yes. I had lunch with him, as I said last year.

[01:09:20.4] Jeffrey Rosen: Good spirits and he'd enjoy it?

[01:09:21.6] Justice Stephen Breyer: Yes. He seemed to be in good spirits.

[01:09:23.4] Jeffrey Rosen: Yeah. Well, sum up for We the People listeners what they should remember about the life and legacy of Justice Souter.

[01:09:31.3] Justice Stephen Breyer: Oh, he is a serious person who reads in depth, not the relevant books and articles written long ago in the relevant books and articles written now. And he would read the briefs and think about it and try to reach a sensible decision. Holmes has tried to do that. There is no single answer as to how you do it. You try your best to reach what I would call sound decisions.

[01:10:01.7] Jeffrey Rosen: Justice Breyer it's always an honor to have you at the National Constitution Center. Thank you so much.

[01:10:05.1] Justice Stephen Breyer: Oh, thank you.

[01:10:10.8] Jeffrey Rosen: This episode was produced by Samson Mostashari and Bill Pollock. It was engineered by Bill Pollock, Dave Stotz, and Greg Sheckler. Research was provided by Samson Mostashari. Please recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional debate. Please check out the new Constitution 101 course that we launched in partnership with Khan Academy this fall. Sign up for the newsletter at constitutioncenter.org/connect, and always remember that the National Constitution Center is a private nonprofit. It would be so wonderful if you considered a donation of \$5, \$10,

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