



## Justice Breyer's Constitutional Legacy

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**[00:00:00] Jeffrey Rosen:** Hello, friends. In honor of the 234th anniversary of the ratification of the Constitution, the National Constitution Center is launching an exciting crowdfunding campaign. Thanks to our friends at John Templeton Foundation, every dollar you give to support We the People will be matched. And I'm thrilled to report that right now, we have 476 donations totalling \$70,620 from 49 of the United States. And we're only missing Wyoming. Uh, in response to my appeal last week for donations from Oklahoma and Wyoming, we got five donations from Oklahoma. That's much appreciated and spared all of you the pleasure of having to listen to me sing the song, Oklahoma, on the podcast. I, I'm not sure that there's a Wyoming uh, song. If there is, uh, please uh, let me know. But we are looking for people in Wyoming to show that they are old, faithful listeners of We the People and to, uh, think of all the light that is shining from Yellowstone National Park, that, that glorious Eden of America and beam toward We the People and, and donate so that we can have donations from all 50 of the United States of America.

**[00:01:13]** So, if you're from Wyoming or if you know, uh, friends from Wyoming, uh, or if you, uh, can be introduced to someone from Wyoming, please contact them and ask them to go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople) ... That's all one word, all lower case, and make a donation of any amount, \$5, \$10, or more so that next week, I can happily share that we donations from all 50 of the United States of America. That's [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople), all one word, all lower case. Here's to Wyoming and onto today's episode. 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 nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people. Last week, justice Stephen Breyer announced his decision to retire after 28 years on the US Supreme Court. To reflect on his legacy and constitutional vision, we have a two part episode today with guests who have unique insights into Justice Breyer's life and work. First, it's a great pleasure to welcome two former law clerks to Justice Breyer.

**[00:02:32]** Neal Katyal is a partner in Hogan Lovells and the Paul and Patricia Saunders Professor of National Security Law at Georgetown. He clerked for Justice Breyer and has argued 45 cases before the Supreme Court. He's also my brother-in-law. And if this conversation goes well, we're thinking of launching a new podcast called Brothers in Law. And Theodore Ruger is

another old friend. The dean of the University of Pennsylvania Carey Law School and Bernard G. Segal professor of law. He also clerked for Justice Breyer. Neal, let's start with you. You wrote a great oped in the Washington Post when Justice Breyer retired saying that justice's active listening will pave the way to a healthier democracy. And you talked about his constitutional humility. Tell us what you meant and give examples of his remarkable capacity to listen.

**[00:03:20] Neal Katyal:** Well, honestly, I've been thinking, Jeff, about that uh, piece uh, that I wrote uh, within about an hour of hearing about Justice Breyer's retirement. I've been thinking about it since January 6th of last year because on that day, I just remember thinking, you know, all of us have some extremist tendencies. And um, you know, that, that the way to deal with that is to listen to other folks and understand that there's a diversity of perspectives and views of seeing any issue and, certainly not, uh, take up arms or um, engage in violence. Um, and uh, uh, you know, I, I'm a, I'm a pretty peaceful [laughs] person. So, I've certainly never had any of those impulses. But I've had the impulses in my life to demonize the other side. Um, and I remember coming in as Justice Breyer's law clerk. I was 26 years old. I was in his third batch of law clerks and his third year on the court.

**[00:04:20]** And you know, uh, there was one case in particular in which I felt pretty strongly that the other side was not on the up and up and bent on taking away our constitutional liberties. And I spent weeks researching this position. I knew every case, everything. And the justice said to me, "You know, who am I to make this decision for the American people and take it away?" And which is totally antithetical to what my position was in the case. And I just remember thinking, uh, you know, "That's the way he lives his life." He went and always talked to his colleagues, conservative or liberal, tried to listen to them, tried to get into their heads not because he was trying to get their vote or anything strategic like that. It was because he genuinely thought that was his job as a justice and as a citizen. And honestly, you know, it brings tears to my eyes to think about the way he approached the task of judging, the way he approached the task of just being an American.

**[00:05:21]** Um, and particularly in this day and age when there is so much extremism and um, demonization of others, I think Justice Breyer's, like, the way forward. Um, and so he hu- leaves an enormous judicial legacy, which I know we'll talk about. But there's this other side to him, his character, his disposition, his temperament, his Americanness that I wrote that piece to celebrate.

**[00:05:48] Jeffrey Rosen:** Beautifully put. Ted, I asked Justice Breyer about these values of compromise, consensus, and humility when I had the chance to interview him for the NCC's high school civics class last spring. And here's what the justice said. He said, "I saw Senator Kennedy do this all the time. He was a Democrat. Republicans disagreed with him strongly. But if you need that Republican support, you say, 'What do you think? My friend, what do you think?' Get them talking. Once they start talking, eventually, they'll say something you agree with." That just encapsulates those values of listening, humility, and compromise Neal mentioned. Where do you think that came from with Justice Breyer? And how did you see it when you clerked for him?

**[00:06:26] Theodore Ruger:** Well, I think it developed through his entire life, um, and came from growing up as a boy, um, participating in institutions like the Boy Scouts and going through

to be an Eagle Scout, uh, which he would talk about occasionally in chambers. And uh, and then in a very different vernacular, uh, came from his training as an academic and the way he used to talk with judicial colleagues and clerks, and others, um, really with a curiosity that, that, uh, reflects the best uh, version of the academy, looking for answers. I think he was ... In an age where we who work at universities like to, to, to talk a lot about interdisciplinarity. Um, he was ... I think he's the most interdisciplinary justice ever in the court's history in his willingness to look for and defer to the insights from, and really be curious about the insights of other disciplines.

**[00:07:16]** So, what was exciting about working for him is, um, he would give us real research issues, sometimes ranging far beyond the, the law books, on questions where he was genuinely curious, that, that it wasn't kind of to ... A confirmation bias type research [inaudible 00:07:32]. He really wanted to know how hi- the decisions would impact the world, uh, what experts from fields like medicine and science, and economics, and uh, international studies would uh, would say about the importance of a, of a case and, and just this ... So, that kind of, um, curiosity, that I, I know started when he was a boy, about the world and his commitment to, to discourse and uh, American institutions that kind of facilitated that kind of discourse, whether it be best nature of the, of the academy or the, of our democracy really kind of pervaded uh, the interactions that we had with him.

**[00:08:10] Jeffrey Rosen:** Such powerful examples of his intellectual curiosity. And I experienced it too. You would meet him. And he would wanna talk about Proust or the latest, uh, episode of *The Crown*, or some work of philosophy that he'd just read. He was a lifelong learner. And he was constantly open to learning from others rather lecturing at them, which meant that he had an open mind. Neal, in this sense, one of his greatest influences may have been behind the scenes of the court. There are a couple important examples where he brought both sides together, uh, most famously in the decision that led to upholding of the Affordable Care Act case. Can you give some examples of how he was able, behind the scenes, to persuade his colleagues to find common ground?

**[00:08:59] Neal Katyal:** I can't because I was, uh ... I don't know what happened in the Affordable Care Act case. I, I wasn't clerking um, then. And if I were clerking, I wouldn't tell you. So, I'm sorry. Um, but I do think that his general approach was to really, as I said, listen to everyone on the court, be a true, honest broker. He was not strategic in the sense of trying to compromise for the sake of trying to get someone on their side, generally, or something like that. He's just truly a good guy. I mean, one of his close friends on the court is Justice Thomas. I'm not sure in any case, Justice Breyer ever got [laughs] Justice Thomas' vote, uh, on anything controversial, but nonetheless, great pals and friends. Um, and it's just such a magnificent, uh, sight to behold. Um, one other thing, I think that, is important as we think about Justice Breyer's legacy, which my piece started to touch on, is also his legacy of, of law clerks, um, because a justice leaves behind jurist prudence, but they also leave behind all these clerks, like Ted and I.

**[00:10:04]** And it is an incredibly diverse bunch. I remember ... You know, he has pictures in his, uh, in his chambers of every law clerk group going back to 1981. And I remember looking at 'em, and I said to him, "You know, justice, it's striking. There's a lot of women in here." And he

said, "Yeah. From the start, I basically resolved to myself half of my clerks would be women, or more. And that's true every single year." And you know, right now, I have a couple of associates working for me, including an African American woman who clerked for him. And he leaves that legacy behind too, which is a legacy of trying to get the bar closer to what America is. Um, and it's just uh, again, a magnificent, uh, piece of his ... Uh, of what he leaves with us.

**[00:10:49] Jeffrey Rosen:** Beautifully put. You're so right about his friendship with Justice Thomas. When he retired, Justice Thomas said, "It has been an absolute joy to have spent these years with Justice Breyer and Joanna from sitting next to each other on the bench for over 25 years to visiting them in New England." Ted, despite those friendships, Justice Breyer also said, when I asked him, "What did, have you learned most in your 27 years on the court?" He said, "That my ability to persuade other people is less than I thought." What was your sense of, of his, uh ... The limits of his ability to persuade others. Uh, there are the famous examples where he succeeded in the Affordable Care Act case. A famous example where he failed is in *Bush v. Gore*. How, how did he deal with, with the limits of his own powers of persuasion.

**[00:11:35] Theodore Ruger:** Well, I think ... I mean, and I worked for him in, in ... I, I suppose relatively early, in the first decade of his long career. And so I don't know that that conclusion, which you cite, which I say would be born out by empirical analysis and by astute observers like Linda Greenhouse, that for all the force of, uh, Justice Breyer's personality and, and the power of his opinions, and the way that I think they're, um, appreciated and taught in the academy, and influential in the lower courts, he um, for much of his career didn't really succeed in, in kind of persuading or attaining a, a majority. Um, uh, I think in an ... There's a interesting analog to Justice Scalia's career in that sense. I think, um, Scalia like Justice Breyer, was tremendously important methodologically in the way we think about and teach law just like Justice Breyer has been a major influence on lower court judges, just like Justice Breyer. But neither one of them necessarily uh, persuaded, uh, you know, the, the majority of the court.

**[00:12:33]** I think we, um, you know, judging in this way, although all judges are supposed to follow precedent, an interesting fact about our legal system that's not true, for instance, in the House of Lords court in England for in- which ... But in the US, the Supreme Court, each ... Sort of methodologically, each justice gets to pick their own interpretive regime. You know that well, Jeff. And uh, and that means that, you know, even somebody as powerful and persuasive as Justice Breyer might not, uh, always have the colleagues, uh, adopt the same approach to cases. And certainly when I worked with him, I never saw ... I didn't see any manifestation of that. It's interesting that as he looks back, he has said that. But I think that's just, uh, the nature of judging on a multi-member court. Um, as powerful and important as his opinions are it's not, uh ... You know, each, each justice brings their own, uh, interpretive priors to the table.

**[00:13:25]** And uh, we can look at the legacy of Justice Breyer and kind of wonder, you know, "What if there had been, you know, the, the combination of justices that would've had him write more important majority opinions, for instance?" And that's just uh, something that, again, Linda Greenhouse has been writing about. And it just hu- didn't happen, uh, in his career.

[00:13:43] **Neal Katyal:** So, I would be fine if there weren't any disagreement between my dear friend, Ted, and I. So, let me just offer a slight disagreement 'cause I don't think that the Justice Scalia analogy is right. Um, and in part, it's not right because Justice Scalia served on a Supreme Court, which looked, in many ways, very much like him. It was seven Republican nominated justices uh, for much of his time. It was never, you know ... Uh, he was ne- ... The, the Republican, um, majority uh, justices have been around since, I think, 1972. So, Justice Breyer was always at least, in that rough, crude sense, in the minority. And yet was able, sometimes, as Jeff, you were saying, to forge consensus. And I remember uh, when, when we were clerking, he came into us. And he called all the law clerks. And he said, "Uh, come in, come in. I figured something out." And we're like, "What, justice?" And he said, "I figured out how Justice Brennan got to five votes." And we're like, "Tell us. Tell us."

[00:14:41] And he says, "He started with seven." And that's really the difference, um, uh, between Scalia and him, or Brennan and him, and the like. And I think, you know, just to take one recent example, the COVID cases that, uh, the Biden administration uh, had before the Supreme Court in which, um ... And I think this really demonstrates what Ted was saying about his constitutional humility, something I agree with, and, about listening to experts. The Biden administration put forth all these experts that said, "Look, you need an employer mandate. Otherwise, literally, tens of [laughs] thousands more Americans will die." That was backed by enormous evidence. And yet his colleagues blew past that evidence and basically, kind of like, "We know best." Um, and that is, like, the opposite of the Justice Breyer legacy. I mean, to my mind, Justice Breyer carries ... And maybe the single justice, maybe Justice Jackson, I would say, alongside him, carrying forward our greatest chief justice, John Marshall's view of the Constitution, uh, as he put it in *McCulloch versus Maryland*, that it's a, a document intended to endure for the human crises to come, that is has flexibility and suppleness to deal with things the founders couldn't have anticipated like COVID.

[00:15:59] Um, and that view of the Constitution is so elegant. It's so rooted in our history. And yet it is exactly what is under attack now by several justices on the Supreme Court. And so one other piece of the Justice Breyer legacy is making government work for the people through this Constitution. It's what he said when he was nominated to the court. It's, indeed, President Biden singled that out in the, uh, White House ceremony last week. And it really is true in every opinion that he wrote.

[00:16:34] **Jeffrey Rosen:** Thank you for highlighting those two crucial themes of emphasis on empirical evidence and making the government work. Ted, we're gonna play now, a clip from one of the two cases that Justice Breyer identified during our NCC class as his favorite. Uh, and that was his dissent in the *Glossip* case, uh, where he said that it was time for the court to consider whether the death penalty was constitutional. And we're gonna play that clip now.

[00:17:01] **Justice Breyer:** Now, since that time, uh, 40 years of experience uh, with those procedures and protections, uh, we believe uh, shows that they do not work. And for that reason, we think it highly likely that the death penalty is now, violative of the Constitution. I shall highlight here, briefly, for special difficulties and considerations that 40 years on experience reveals and which, uh, the lengthy opinion we filed discusses in considerable detail. We now

have persuasive evidence, one, that innocent individuals have been executed. Two, that more than 100 individuals convicted of capital crimes and sentenced to death have later, been fully exonerated. And three, that the rate of procedural error in capital trials is alarming, well over 60%. In some, administration of the death penalty can take place swiftly, but unreliably. Or it can take place with long delays, but then without significant justifying purpose. We cannot have it both ways. And given that fact, it is difficult to see how the death penalty can be reconciled with the Constitution's basic demands.

**[00:18:37] Jeffrey Rosen:** Ted, as you listen to Justice Breyer invoking empirical evidence for his conclusion that the death penalty couldn't be constitutionally administered, what does that tell you about his judicial philosophy?

**[00:18:50] Theodore Ruger:** It suggests both, you know ... There's some of the themes we've been sort of ... An, an attentiveness and, and uh, interest in facts about the real world, uh, coupled with ... And, and how that interacts with the, the Supreme Court [inaudible 00:19:04] rulings in, in the sense that he is aware and, and, you, you know, was willing to change his mind. I think, uh, seeing these cases play out as he was a justice, you know, coupling it with what, with the research he did about the way the death penalty has been and is administered and just to, to, to kind of develop those doubts, I think suggests an open mind as well as an attentiveness to the real injustices in the way the, the criminal, uh, justice or injustice is administered and has been in our country. And so that's point one. Part two is there's an interesting ... You know, in the sense that he filled Harry Blackmun's seat, i- there's a characteristic humility in the way Justice Breyer dissented from, you know ... Or the, the, the notion of death penalty kind of within the court's uh, tradition of discourse and dissent.

**[00:19:52]** And, and then Justice Blackmun's more famous, more notable, more controversial statement, you know, "I shall no longer tinker with the machinery of death." Almost a kind of, um, an almost an outsider critique on the court. Justice Breyer's ... Even in dissent, he was kind of working within the court's norms, I think, more than when Justice Blackmun, several decades earlier, had issued a similar kind of dissent against the death penalty.

**[00:20:15] Jeffrey Rosen:** Thank you for that. Uh, he was similarly attentive to empirical evidence in the majority. And we're gonna play, now, a clip from his questioning in the Hellerstedt case where he ended, uh, writing the majority opinion, uh, asking about the empirical evidence that there was some benefit to requiring women to go to these ambulatory surgical centers before getting abortions.

**[00:20:39] Justice Breyer:** Prior to that law, the law was that the clinic had to have a working arrangement to transfer such a patient. Correct? I'm just reading it from this.

**[00:20:53] Speaker 6:** That's correct.

**[00:20:53] Justice Breyer:** Oh. So, I wanna know ... Go back in time, to the period before the new law was passed, where in the record will I find evidence of women who had complications, who could not get to a hospital, even though there was a working arrangement for admission? But now, they could get to a hospital because the doctor, himself, has to have admitting

privileges. Which were the women? On what page, does it tell me their names, what the complications were, and why that happened? So, let's turn to the second. The second one according to the amicus briefs here, which I guess I could validate, that even without the surgical [inaudible 00:21:55] leave it out. There are risks. Quite correct. Those risks are roughly the same as the risk that you have in a dentist office when you have some surgery where you don't have an ambulatory surgical center.

**[00:22:13]** There are 28 times less than a risk colonoscopy where you don't have ambulatory surgical center. And so what is the benefit here to giving, I mean, the woman ... There is ... I can't it's zero here. This ambulatory surgical center when the risk is minuscule compared to common procedures that women run every day in other areas without ambulatory surgical centers?

**[00:22:50] Jeffrey Rosen:** Neal, what does that exchange in the Hellerstedt tell you about the degree to which empirical evidence mattered for Justice Breyer in abortion cases?

**[00:22:59] Neal Katyal:** It mattered to Justice Breyer in every case. He really cared about the world actually was, not what, you know, some self interge- interested litigators would say it is. Um, you know, I, I got to argue before him 45 times. And I have to say in every case, he asked me a question that was in some sense trying to get at that, "What is the actual lived experience? What's going on in the world?" Um, he had another style of questioning, which was these hypotheticals, um, which were designed to try and get at, "What are the contours of your legal position? Where does it, where does your argument start? Where does it stop?" And that was his basic approach to oral argument. It was those two things, what's going on the world? And what's your actual legal position? I'm trying to figure it out." Because as lawyers, we can all craft briefs that try and paper over some of the hard issues. And he'd always be so good at getting at them.

**[00:23:53]** And you know, it was interesting. I, I think you know, Ted and I, because we got to spend a year with him, got into his mind a bit. And you could never predict, you know, as an advocate, exactly what the hypothetical would be in terms of, you know, red napkin or whatever [laughs], you know, unusual fact [laughs] pattern he was gonna come up with. But you could generally predict what the hypothetical would be trying to tease out. And with respect to abortion in particular, I have to say, um, I learned a lot from the justice about abortion. I mean, obviously, he's a male. And this is an issue that, um, in, in a, in a very significant way, uh, impacts women more. Um, I think he felt that viscerally. Um, I think he understood that he had to try and put himself in the shoes of someone whose rights were being taken away, um, particularly someone who may not have the money to go across state lines, uh, in the face of a, an onerous abortion restriction. And it was incredibly heartfelt and personal to him, uh, that uh, women have this choice. Um, and to me, one of the hardest things to think about is, uh, these abortion cases being decided without Justice Breyer on the court.

**[00:25:10]** I'm glad he's there now for this Mississippi case, which is designed basically, to overrule Roe versus Wade as the Mississippi lawyers have themselves admitted. And you know, next year, there may be a Texas case which has a six week limit, uh, on abortion as opposed to Mississippi's 15. Roe versus Wade, of course, is 24 to 25 weeks. Um, so, uh, you know, there's big stuff coming at the Supreme Court. It feels ominous. Um, and while Justice Breyer may not

be there for all of these cases, ultimate resolution, the written opinions he's r- uh, he's already authored in this area, I think, will stand, ultimately, the test of time and be the law of the land, ultimately, even if there is a blip over the next several years.

**[00:26:01] Jeffrey Rosen:** Thank you for that. Thank you for mentioning Justice Breyer's uh, style of hypotheticals at oral argument. Chief Justice Roberts in his statement about Justice Breyer's retirement said, "His fanciable hypotheticals during oral argument have befuddled counsel and colleagues alike." And that was an affectionate comment. We're gonna play now, a clip from a recent oral argument where Justice Breyer asked the counsel to imagine, uh, that someone was robbing someone else with a gun made of marshmallows.

**[00:26:28] Speaker 7:** The threat can be actions, not words.

**[00:26:30] Justice Breyer:** So [crosstalk 00:26:31]-

**[00:26:31] Speaker 7:** The threat need not be-

**[00:26:32] Justice Breyer:** ... gu- with a fake gun. It's ... Gun is made out of marshmallows. You know, and it's in his pocket. And it just looks like a gun. And he gets up close, but he doesn't take the gun out. And he doesn't do anything else. Uh, and the reason is because the teller turned the other way at the last minute, now, or because the policeman walked by at the last minute. You're saying that's not an attempt at a threat.

**[00:26:57] Speaker 7:** [crosstalk 00:26:56].

**[00:26:57] Justice Breyer:** I don't know. I don't know. [inaudible 00:26:59] why isn't it?

**[00:27:00] Speaker 7:** I, I, I think, Justice Breyer, a man walking into a bank with a bunch of marshmallows in his pocket-

**[00:27:05] Justice Breyer:** [inaudible 00:27:06].

**[00:27:06] Speaker 7:** ... shaped like a gun [crosstalk 00:27:07] has not committed an attempted robbery.

**[00:27:10] Jeffrey Rosen:** Ted, uh, what did you make of Justice Breyer's hypotheticals? How did you experience them? And what was he achieving with them?

**[00:27:18] Theodore Ruger:** Well, he did use food a lot in his hypotheticals, uh, you know, whether for guns or other things. Um, i- his mind was able to display intellectual rigor and playfulness at the same time and so, so that you'd have these, uh, pathways of hypotheticals that are both whimsical and incredibly illuminating at the same time. And uh, again, it's uh ... I would like to say that comes out of his time as an academic. Although, of course, that's very hard. And it, it reflects the very best of what, what we try to do in Socratic questioning. So, but he was very unique. Um, he was able to, to be really conceptually challenging and sort of playful, uh, intellectually at the same time. And, and uh, you, you know, Neal mentioned his friendship with Justice Thomas. I think, uh, you know, Justice Breyer was the junior justice for almost as long as anybody in history.



**[00:28:08]** He came, I think, a few months short of Justice Story, but he ... For a very long time, he ... The court was stable, um, for the first decade or so of ... And he sat next to Justice Thomas the way that ... In a way, justices are ordered by seniority. And during or after a lot of those hypotheticals in the court, you'd see the two of them, uh, smiling, laughing, whispering together in ways that, uh, I think Justice Thomas, uh, was taken by the intellectual playfulness uh, of Justice Breyer as well.

**[00:28:37] Jeffrey Rosen:** Thank you for that. Neal, tell us more 'cause you had the unique experience of clerking for and arguing before him many times. What were some of the toughest questions he asked you? And how do you think that his questions at oral argument influenced his own decisions and the court?

**[00:28:52] Neal Katyal:** Well, in a way, I would think of his questioning very much like Justice Stevens in that, you know, there was gonna be one central thing that really bugged him about your position. It, usually, was the thing that was the chink in your armor. He'd figure it out. And he'd ask you a question. The style that they each had was totally different. Justice Stevens would be a very gentle, "Counsel, may I ask you a question?" And the question would be under 30 words. Um, with Justice Breyer, the question was rarely under 300 words. Um, and as an advocate, the nice thing about that is it gave you a long time to figure out your answer because the question took up so much of your airtime. Uh, the frustrating thing is, you know, uh, that, you know, uh, you don't have that much time at the Supreme Court as an advocate. You're, you know ... It's only a half hour per side. And so if a question's taking up four or five minutes before you even get to answer it, that's a good, you know, one sixth, one seventh of your time.

**[00:29:51]** So, that could be sometimes, tough. And because he was such a gentleman, you never wanted to cut him off. And obviously, as an advocate, you can't do much of that, but there's a little bit you can do with some justices. But you really couldn't quite do it with him because he was always smiling and jovial [laughs], and, and it made it a little tough. Um, one other aspect of his legacy that I just wanted to mention, and it's really underscored by, uh, Dean Ruger here, is the legacy he leaves on law schools because so many of his law clerks have become brilliant, brilliant academics and deans, like Ted or Jenny Martínez, the dean of the Stanford, uh, Law School. And um, that's not something that we often think about when we think Supreme Court justices. But um, it is truly a, a, a magnificent legacy that he carries with him in, in the scholarship. You know, in that sense, he's more like Justice Story, the justice that Ted mentioned before.

**[00:30:47] Jeffrey Rosen:** Thank you for that. Thank you for the hypotheticals. We'll play some more involving tomato children and pussycat burglars carrying soft pillows as weapons.

**[00:30:58] Justice Breyer:** Here, they say that ... I, I take it, you're using this 'cause I was gonna ask you. Uh, you know, he grows heroin, cocaine, tomatoes that are going to have genomes in them that could, at some point, lead to tomato children that will eventually, uh, affect Boston. I have ... This is my hypothetical. You've heard of cat burglars. Well, this gentleman is called the pussycat burglar. And the reason is he's never harmed a soul. He only carries soft pillows as weapons. If he sees a child, he gives them ice cream. It is absolutely established that this person,

in breaking into that house at night, only wanted to steal a popgun and he is the least likely to cause harm in the world. Question, "He is convicted of burglary. Is that a crime of violence?" Answer ...

**[00:32:00] Jeffrey Rosen:** Ted, in commenting on Justice Breyer's retirement, you talked about his patriotism and his devotion to the ideal of civility and the success of the American experiment. It's such a powerful and, at this moment, so urgently needed sensibility. Tell us more about it and where it came from.

**[00:32:22] Theodore Ruger:** Yeah. It wa- it was remarkable and, and inspiring, working for the justice who ... He had such a, um, faith in American institutions and in American democracy, and in the notion that bringing good ideas to bear and people of goodwill could kind of achieve a better solution. Um, I saw this in a few ways. I saw it in the way he approached cases. I saw it uh, in, in what he did outside of the court. And this was an impor- ... A really important professional project, uh, that he did along with Justice Kennedy and O'Connor during the years they were working together on the court, where he would travel the world, giving speeches to fledgling judiciaries who ... About judicial independence and about kind of, um, the importance of, of the rule the law and an independent judiciary. I mean, it's telling in this week where we're thinking about uh, uh, Russia and the Ukraine. He, he went to Russia when I was clerking with him, and gave a talk to a bunch of Russian judges, um, and told us about that. He went to, to, to South America, to Colombia, to Brazil.

**[00:33:20]** Uh, it was really ... He believed that our tradition of rule of law and, and uh, the independence of the judiciary was one of our greatest export products. He worked to facilitate that. Um, and I could see it in the way he came to work every day. He just really believed in this country's institutions. And, and again, to me, that's the highest form of patriotism. It's not waving a flag or ... You know, although Justice Breyer, I'm sure, was patriotic in, in that way as well. But he, he, he lived his patriotism every day in the belief he had in this country's ability to, uh, work to solve our problems as, as formidable as they may be. And it was inspiring to see that.

**[00:33:58] Jeffrey Rosen:** Neal, final thoughts about what we can learn from Justice Breyer's inspiring legacy.

**[00:34:03] Neal Katyal:** Well, one thing is, is after living in Washington now for more than two decades, I've seen that the good person rarely gets the top job. It's usually the conniver [laughs], the, the, the person, manipulator, and the like. And Justice Breyer's the rare person who's so fundamentally decent and got the top job. Um, we've had the pleasure of talking about his analytic abilities and so on. But I just wanna speak to man's heart for a second because you spend a year with him, and you get to know, really, what makes a person tick. And this is a person who just has reverence for people. He's profoundly emotional. He's a deep family man. You know, as law clerks, we became friends with all of his children. He talked about his children constantly, Michael, chloe, Nell, what they were doing. Um, Michael was graduating from Stanford Law ... Stanford college that year.

**[00:34:54]** And I think we spent more time working on the Stanford graduation speech that, uh, the justice was gonna give at Michael's graduation than anything in the whole year [laughs]

'cause he wanted to make sure his son was proud and that he did a good job. Um, and you know, it's just another thing to think about as we think about his legacy, which is a profoundly decent man, uh, leaving the court, uh, perhaps, this summer, uh, if the, if, if the confirmation goes through of his successor, um, that has profoundly touched me and everyone who had the pleasure of working with him.

**[00:35:29] Jeffrey Rosen:** Thank you so much for that. Ted, what are your thoughts about what Justice Breyer's personal qualities of decency, humility, thoughtfulness, and concern for friends, family, and country can teach us today?

**[00:35:45] Theodore Ruger:** Well, I think ... I mean, I, I guess to speak most personally, because I, I should say having, you know ... I've worked in a number of different settings, a lot of kind of m- jobs that um, you know, are sought after or, you know, uh, uh, demanding. Um, I can't think of a single one where the workplace was more ... I mean, just in terms of the workplace he built with the clerks and other chamber staff, um, where the workplace was more pleasant, equitable, kind of inclusive. The way he would work with clerks, he would come out into the, the clerks' space, not make us, often, go into his office. And he would talk to all of us together, very, very kind of almost, uh, a seminar style, bouncing ideas around. So, so, he was a, an incredible um, mentor and boss. And that's something that I think many of us who worked for him try to bring to, you know ... To the extent we're, now, uh, in positions of authority ourselves, it, it impacted everybody who worked for him just in terms of making a ... You know, per- showing me, I guess, what sometimes is forgotten, that you could have an incredibly rigorous, substantive workplace, but still be a supportive and inclusive place to work.

**[00:36:49]** And that's something that's clearly affects the way I think about my job today. It's ... I think it's influenced a lot of people who's worked with him. Um, more publicly, again, I just ... We've already talked about his more public attitude of collaboration and collegiality. And again, I think it's uh, uh ... It, it, it's impacted a lot of people i- from different perspectives. Even though we don't always see it in the politic space, I think it's, you know, it's still ... It's, it's a legacy that will live on in, in a lot of, uh, in a lot of spaces of, of discourse in this country.

**[00:37:20] Jeffrey Rosen:** Neal Katyal, Ted Ruger, thank you so much for joining We the People for a meaningful and illumination discussion of Justice Breyer's legacy. The National Constitution Center relies on support from listeners like you in all 50 of the United States of America, including Wyoming, to provide constitutional education to Americans of all ages. Every dollar you give to support We the People will be doubled with a generous one-to-one match. And this week, we are looking especially for donations from beautiful Wyoming to ensure that we have participation from all 50 of the United States of America. So, please go to [constitutioncenter.org/wethepeople](https://constitutioncenter.org/wethepeople) ... That's We the People, all one word, all lower case, and give a donation of any amount to show your support for nonpartisan constitutional education, civil dialogue, debate, and the great unity that we share as citizens in all 50 of the United States of America. Now, back to the show.

**[00:38:30]** For part two of our conversation, we are thrilled to welcome Nell Breyer. Nell is the executive director of the Marshall Scholars Association and Justice Breyer's daughter. Nell,

you've heard Neal and Ted talk with great admiration, reverence, and appreciation about Justice Breyer. What's he like as a dad?

**[00:38:51] Nell Breyer:** You know, I'm, I only have a case study of one. So, I, uh, I don't have anything to compare it to. But I don't really have any complaints. He's been a very caring, uh, father and um, very attentive, and um, likewise, a wonderful grandfather. So, my children have the pleasure, as do my um, sister and brother, of, of having him share some of his passions that you heard about, um, and his love of his knowledge, and his genuine openness, um, and his ability to learn from everybody, including, you know, my children on, "What is TikTok?" You know. So, that, that remains a, a genuine approach to the world that he, he takes at home as well.

**[00:39:30] Jeffrey Rosen:** Wonderful. Justice Breyer's talked about the influence of his own dad on his sensibility and said that his father, who worked for the San Francisco School Board, gave him a faith in democratic institutions and the possibility of democracy working. Uh, did you know your grandfather? And what can you describe about the impact of Justice Breyer's father on his outlook?

**[00:39:54] Nell Breyer:** I think [inaudible 00:39:55] had a very important impact. My grandfather, Irving Breyer, I, I knew, um, somewhat well. I was obviously, um, quite young. But I think his, um, approach to making law work for the people and um, having a very collegial collaborative approach to problem solving, um, was something that my father took very much to heart. I think that he likes to reprise the refrain that I think his mother told him, that there isn't a view in the world that isn't represented in the city of Los Angeles. I think that her ... Coming from San Francisco, she felt that somewhat pejorative. But I [laughs] think he actually felt it was, uh, it was true and true of this country, and actually what makes the country really remarkable and an experiment really worth, um, [inaudible 00:40:39] for.

**[00:40:40] Jeffrey Rosen:** That's so interesting. In the Rose Garden, he quoted his mother's statement about the incredible diversity of views, race, religion, and political point of view, that existed in this country, and said that that most struck him about the job. Tell us more about your grandmother's sense about the remarkable diversity of America and how it influenced Justice Breyer.

**[00:41:02] Nell Breyer:** Uh, I think that his whole family, um, uh, understood that uh, their, this country is truly a melting pot. And I think that they instilled those [inaudible 00:41:14] the value of that rather than a, a segregated or homogenized approach to how to be a citizen and how to be an American. And I think as you heard from the um, other clerks, experiences like the Eagle Scouts and serving as a reserve in the US Army, and then later working on the Judiciary Committee, and working very actively with his counterparts and other staffers in trying to make sure that each day, they had a problem they could solve with the folks across the aisle. And, and he deeply enjoyed that because he felt it was constructive and inclusive, and has taken that approach, um, as, you know, as far as I can see in his time, um, on the bench both in the first circuit, um, and, and the Supreme Court. He also enjoys ... I know you heard from two of his former clerks, but he makes it a very important part of his practice to have lunch with the other justices' clerks and listen to them, and enjoys very much, learning about their perspectives.

**[00:42:11] Jeffrey Rosen:** That reaching out across the aisle is so important. And his colleagues noted that optimistic expansive, positive temperament. Chief Justice Roberts said, "He's a reliable antidote to dead-air times at our lunches, moving seamlessly from modern architecture to French cinema." And Justice Kennedy said that even when they were both undergrads and law students together at Stanford and Harvard, even in those school years, Stephen was known and respected for his intellect and friendly outreach. Talk more just about that temperamental inclination to reach out to the other person and learn about them, and find out about their points of view.

**[00:42:53] Nell Breyer:** Well, I mean, maybe you could start with that he married my mother, who is, is British. Um, he, like you, was a Marshall scholar. I think he was the class of 1959. I think you were considerably later. And he loved that experience. It was the first time that he'd ever been overseas. It's a wonderful program supported by the British government, as you know, to pay, uh, graduate um, studies in the UK. And he took that very much home with him, the idea of learning from not just your counterparts down the street or across the aisle, but overseas as well, and that there's an enormous amount of history and um, culture, and approach to, to law, and many other things. Um, he loves France. He loves all of the, the possibilities that things aren't American bring to bear on his decision making as an American. Um, and I think that it's a, maybe a, a combination of his love of learning and his curiosity and, and his true optimistic nature that he loves to see the best in other people, and because of that, tends to bring out the best in other people.

**[00:43:55]** And I think that as you, um, saw from the comments um, shared on the, on the court's website from his colleagues, I think there's a deep, deep mutual respect that, uh, has partly ... You know, because uh, they all work, really caring for each other as human being and recognizing that different philosophies and different political and, um, jurist prudential values are part of the project and doesn't mean that they're on different sides. It means collectively, we have to solve the problem of being an American today with all, all of the, uh, challenges that we have with a legal framework that works, a legal framework that works for us, not for s- one group of people and not another. I think that inclusivity and that, um, deep caring for other citizens, not just of this country, but others is something that, that drives him and, and makes him, as, as you heard, want to make the institutions work for the people, and wants to continue to have the experiment of um, self governance really be a successful one.

**[00:44:59] Jeffrey Rosen:** That's such a powerful thing you just said about ... He looks for the best in other people, and he bring out the best in other people. And it's so true. That's what his colleague said too. Justice Kagan said, "He listens to other views with care and generosity. He does everything he can do to find common ground. And he's the best possible friend. He's kind and warm, and funny. He has boundless optimism and a great heart. I can hardly imagine the court without him." There's such a close connection between his personal temperament and his judicial temperament. I just need to ask, was he like this in the family? Did he bring out the best in you? Was, was he kind? Was he optimistic? H- how did you see all that at home?

**[00:45:40] Nell Breyer:** Well, there were definitely many arguments at the dining room table [laughs] and uh, I mean, I think all in good spirit. But he would definitely a- attempt to have you

articulate or have each of us articulate why we felt strongly about one thing or another. I think at one point on a family trip, um, he decided that we would have a vote. Everybody would vote for, "Who is the head of the family?" And at the last minute, he changed his. Assuming that everyone [inaudible 00:46:07] he changed his vote and, and voted for my sister who then became the ad hoc [laughs], defacto head of the family-

**[00:46:11] Jeffrey Rosen:** [laughs].

**[00:46:13] Nell Breyer:** ... which he has never let anybody forget. But he likes the-

**[00:46:15] Jeffrey Rosen:** [laughs].

**[00:46:16] Nell Breyer:** ... the idea that everyone was responsible for what they contribute and that you have control up to the last minute, and, and you shape the community that you're in. Think he's found that that is, uh, the way everyone has a stake in the solution.

**[00:46:30] Jeffrey Rosen:** That is amazing [laughs]. He voted for the head of the family and voted not for himself, but for your sister. Wonderful example. And he also talked about the importance of not taking credit, you know, "Let the credit go to someone else." He, he ... In that, in that sense, he didn't seem to be hugely ego based.

**[00:46:48] Nell Breyer:** I think he, he has [inaudible 00:46:50] many of the former staffers of Senator Kennedy, many lessons learned, "Take the long view. The glass half full, the glass half empty. Credit is free. Credit is something that we can all share. In fact, we should all share." That really, again, what you heard, trying to find a center point where you come to consensus with people who disagree with you is the starting point for solutions. I absolutely feel that as he's experienced, you know, life overseas and life from so many different points of view, the role where he feels he can contribute the most constructively is to find those centering points of gravity where we can begin to share common ground and build on those.

**[00:47:32] Jeffrey Rosen:** Now, as any dad of younger kids knows, especially at some point, though, you may have to side with one person rather than another. Wa- was, was he willing to uh, exert his authority when he had to?

**[00:47:43] Nell Breyer:** Sure. [inaudible 00:47:44] probably, he would just defer to my mother, who [inaudible 00:47:47] [laughs]-

**[00:47:46] Jeffrey Rosen:** [laughs].

**[00:47:47] Nell Breyer:** You know-

**[00:47:47] Jeffrey Rosen:** [crosstalk 00:47:47].

**[00:47:47] Nell Breyer:** [crosstalk 00:47:47] she would make the hard, hard calls. And he would uh, remain the favored parent as a result.

**[00:47:54] Jeffrey Rosen:** [laughs].

**[00:47:54] Nell Breyer:** So, he knew exactly how to play that game. Um, no. But he, they, they were both very reasonable. Um, and he is as, as uh, Neal mentioned, he's very emotional. So, he

really does care. He cares enormously for his clerks. He cares enormously for his colleagues, for his students. You know, I think he really h- loved teaching over the years. And that's one of the reasons he, he continues to write and um, [inaudible 00:48:17] down in informal, um, terms, you know, some of his ideas about jurist prudence, the role that language and history, and tradition, and precedent, and purpose, and consequence all play in judicial decision making, and why those pieces are so important to interpreting our democratic Constitution. As you teach at the Constitution Center, there are many factors in, um, in, in jurist prudence that are important. I do think that it stems from a, a deep um, love of humanity and a deep belief that, that uh, law more like art than a science, is about constructing frameworks where we can live together, you know, with comity and respect and, and solve problems in a fair and, and just way.

**[00:48:59] Jeffrey Rosen:** It's so meaningful that you mentioned his emotionalism. And Justice Barrett, uh, mentioned that as well in her tribute. She said, "I admire Steve Breyer for many reasons, not the least of which is his judicial temperament. Steve feels passionately about the law as his many writings reflect. Yet his passion never manifests itself in anger. Both in print and in person, Steve aims to persuade through exuberance rather than bite. He is a model of civility." Talk more about that very unusual combination of reason tempered by passion.

**[00:49:34] Nell Breyer:** I think that that's been something he's really held up. And, you know, anytime I raise my voice, he remind- [laughs], uh, he reminds all of us, uh, you know, there, there is never a time, despite how heated the arguments and the decision and the, and the questions, um, raised on the bench can, can be, there's never a time he's heard a voice raised in conference. And there is a wonderful practice of everyone goes once before anyone goes twice. And I think as you know, in the conference when they're, when they're sharing their views, that's a very important framework for respect and a premise for listening, that you must hear what your colleagues have to say. And you must start from that open-mindedness in order to share your point of view constructively in relation to theirs and the case before you.

**[00:50:20] Jeffrey Rosen:** You know, that comity is something that outside observers of the court have the most trouble accepting. Pe- people who don't know the court will say, you know, "Surely, they can't actually get along 'cause they're so strong in dissent and in criticizing each other." But you saw it up close. Is i- it's true that they actually do get along just as Justice Breyer said?

**[00:50:42] Nell Breyer:** Oh, absolutely. Absolutely. I mean, we had ... I personally had the, the, the privilege as, um, you were a s- a, a speaker moderator, Justice Gorsuch and my father spoke at a, um, forum recognizing the 70th anniversary of the Marshall Plan a few years ago at Harvard. And um, you know, the- they're ... Every single one of his colleagues, um, they remain ... They are extremely cordial. They talk to each other with a lot of frequency. Um, they are absolutely a good faith effort. They see each other outside of the, the work time um, uh, uh, and are in- involved in each other's lives in a very respectful and supportive way. Um, you know, it's much talked about, the s- Scalia and Ginsberg's lu- shared love of opera. And I think that there's many other um, examples of shared interests and a, a mutual respect that is, um, I think, critical to the institution working, uh, over the long term.

**[00:51:38] Jeffrey Rosen:** What did he and Justice Thomas bond about?

**[00:51:40] Nell Breyer:** Uh, so many things. Uh, uh, mainly jokes. Probably was my father telling a [inaudible 00:51:47] awful joke that he could make Thomas laugh in despair. That could've been one [inaudible 00:51:51] [laughs]. They're [crosstalk 00:51:53]-

**[00:51:53] Jeffrey Rosen:** [laughs].

**[00:51:53] Nell Breyer:** Justice Thomas, as you know, has a wonderful sense of humor. And my father [inaudible 00:51:57] [laughs]. He has a very good sense of humor. But he, he enjoys making people laugh. So, and Justice Thomas has a wonderful laugh. So, probably, the first decade was my father [laughs] trying to see um, how, how much he could uh, uh, evoke, uh, invoke that laugh. Um, but, but a lot of different things. You know, I think there's been such a, a close bond developed between, between the uh, them and, and uh, the, um, [inaudible 00:52:23] and the, and the families. It's, it's really, uh, wonderful to see. And I know my father will miss that daily interaction a lot.

**[00:52:32] Jeffrey Rosen:** M- m- wonderful. Uh, laughter is the greatest of all things to bond over. Um, let's talk about his love of books, his love of learning, his erudition, which he wore so lightly, but was so central to him. When I reported on his confirmation way back in the early '90s, I told a story of a Christmas party that had recently taken place. And during a fireside game of charades, he acted out the Epic of Gilgamesh. And according to the piece, it said, "His daughter's according to a guest, rolled their eyes indulgently as if to say, 'Oh, Daddy, not the Epic of Gilgamesh again.'" Was that anecdote correct? Do you remember [laughs] that happening?

**[00:53:15] Nell Breyer:** [laughs] Not at all.

**[00:53:16] Jeffrey Rosen:** [laughs].

**[00:53:17] Nell Breyer:** No. [crosstalk 00:53:14].

**[00:53:18] Jeffrey Rosen:** [laughs].

**[00:53:19] Nell Breyer:** My son's high sch- ... No. I don't remember him reenacting Gilgamesh. Um, there's [inaudible 00:53:25] ... I mean, he does love French. He loves speaking in French. He taught himself Spanish. Uh, so, he loves reading aloud, French poetry or something in, in, in Spanish and will take any, any audience member [laughs] who's willing to-

**[00:53:39] Jeffrey Rosen:** [crosstalk 00:53:39].

**[00:53:39] Nell Breyer:** ... sit and listen. Um, uh, there were quite a lot of, um ... Because again, my, my uh, m- m- mother is, is British, we had a lot of histories of England, um, uh Ethelred the Unready, uh, repeated readings of the history of England, which is very old and [laughs], as you know, takes a lot of time. Um, uh, but he, but he reads, you know, very widely, um, and I think really enjoys uh, sharing and listening and, and, and learning from, uh, different great books as well as not so great books. I think he genuinely will retain, you know, for his ... The- this love of learning for his whole life. I think that's part of what of his, you know, his more recent



commitment and discovery of architecture, um, his y- you know, love of cooking. He has a, a, a very um ... Loves travel, and a great sort of appetite for learning about the history and culture of other countries. And I think that that's um, as you heard earlier, something that he, he feels proud to be an American and proud to ha- have shared these values, um, very important norms like the value of an independent judiciary and the importance of the rule of law, but also very humble and open to learning from other cultures and other histories. And books is certainly one of those most important, um, uh, avenues for his doing so and continuing that.

**[00:55:03] Jeffrey Rosen:** The humble and hum- openness to other cultures is, is key. He, he loved reading Proust in French. He read it with the French ambassador. And he described to me, the sensation of reading Proust in French and said it was more a, a feeling than an intellectual experience. It was an aesthetic experience. What does that say about his relationship to, to books and language?

**[00:55:26] Nell Breyer:** I mean, he, he absolutely, uh, loves language. And he loves ideas. And he loves the possibility of putting form onto idea through language. But he also um, enjoys architecture. He enjoys looking at paintings. He goes to theater. He goes to performances. I think he has a deep respect for all m- manifestations of, um, creative expression as well as for things like Hamilton that helped, uh, connect the lived experience as we heard about with some of our institutions and histories that, that uh, define the United States, and our more recent, um, kind of more recent, our 250 plus years of, of uh, this experiment.

**[00:56:06] Jeffrey Rosen:** You just used a really powerful phrase. You said he's interested in, uh, putting form into ideas through language. And I thi- I, I, uh ... I think as I recall, he, he said that Proust did that too. J- just say more about that 'cause that seems significant.

**[00:56:20] Nell Breyer:** Uh, I, I think that comes from being a teacher. I think he thinks a lot about, um ... Uh, he, he's written several books, uh, some of them, I think, more uh, for the, for the general public than others. But I think part of the um, the exercise for him is taking complicated and technical, and diverse sets of knowledge and trying to distill from that, uh, "What is the framework? What is the approach?" And especially with jurist prudence and with the role that, um, the United States courts play in the world, trying to take first principles and explain those first principles in ways that other people can access and use them. I think that's a reflective approach for him. And I think it's because he's a teacher at heart, and so sees the importance not just of sharing content, but of looking for form and, uh, the mechanisms, the frameworks um, the motives and trying to describe some of that and share some of that to help people share in the project, you know, to help people understand they're responsible for that infrastructure.

**[00:57:32]** They are part of how jurist prudence, uh, affects us all. They're, they're, they're in the system. And they're shaping the system as well as experiencing the system. I think that form is part of him thinking, um, part of him articulating his experience in an accessible way.

**[00:57:49] Jeffrey Rosen:** That's beautifully put. You just said he's a teacher at heart. And you gave a very powerful, uh, expression of what it means to be a true teacher. I was always struck that Leonard Bernstein noted the word for teacher in German is learner, learner. And to be a

great teacher, you have to be a learner, as he is and was. And he does have that urge to synthesize complicated ideas, so they can be put to use by citizens. And his opinions are a form of teaching citizens about basic ideas. And in that sense, he is a learner and a teacher in the truest sense. It's a rare thing, but he embodied it very, very powerfully.

**[00:58:31] Nell Breyer:** I think that his opinions are actually quite readable. I mean, I don't know, maybe not everybody's cup of tea, but I do read his opinions and his colleagues' opinions. And he purposely does not include a lot of footnotes. I think uh, hi- his, his time with Justice [inaudible 00:58:47] taught him that [laughs]. Uh, uh, and he tries to make them very clear, straightforward, and um, thinking, uh, about how, you know, uh, any, any person on the street might pick this up and try to understand.

**[00:58:58] Jeffrey Rosen:** He said when he was nominated, that he wanted to write his opinions, so they could be read by high school students. And I had thought at the time, it showed a rather rarefied view of the abilities of high school students, but have now come to believe with him, that by expecting the best in people and writing clearly that citizens of all ages can rise to challenge. Did you find yourself sharing his optimism that ordinary citizens, if they take the time, can read his Supreme Court decisions and others, and are basically up to task of democracy that he was inviting all all of us to engage in?

**[00:59:34] Nell Breyer:** I, I mean, uh, I hope. I don't know. I have spent a lot of time, um, working with high school students and, and civics, and helped uh, create a wonderful center for teaching about the United States Senate, uh, uh, up in Boston. I think we have a ways to go. I think that uh, teaching civics and having high school students learn about the branches of government and our history, and certainly reading the Constitution, if not some of the uh, [laughs] [inaudible 01:00:03] the, the cases from the court, uh, is a very important first step. So, I absolutely think and hope ... I hope you're doing that. I think you are e doing that. Um, so, I think that's very important at the Constitution Center, an enormous, important role that you're playing. Um, I think it's critical. And that part of the expectation. Uh, I don't think our country will work if people don't have a deep understanding of the principles and values, and founding documents, and, and the institutions that, that uh, branches of government that help realize that and make it operational today.

**[01:00:33] Jeffrey Rosen:** It, it is an urgently important mission to inspire Americans of all ages to learn about civics. And uh, we're so honored to take that mission on at the Constitution Center and are looking forward to working with uh, Justice Breyer in the years ahead. He was instrumental in the founding of the Constitution Center as a scholarly advisor. And it's so meaningful to work with him to help citizens keep the republic, as he quoted Benjamin Franklin as saying during our last civics class. I'll let you go in, uh, just a moment. Uh, we're, we're learning so much from this wonderful conversation. But you said something a few beats ago that I wanted to ask you about. You said that among his interests, there was cooking. And I didn't realize that he liked to cook. What did he cook?

**[01:01:18] Nell Breyer:** He loves to cook. Uh, there isn't anything he doesn't cook. Um, he's, he's shared that love of cooking with my son. And they often do joint cooking projects together.

His brother, um, Judge Chuck Breyer is also an avid cook. And um, m- m- I, I, I'm not sure what they don't cook. Uh, so, uh, uh [laughs] I think that's been a, a shared passion. Um, he often does host his colleagues on, on the bench and, and, and cooks the meals himself. Um, so, uh, that is something which um, is sort of an art form for him. I think it's meditation, and he also good food. So, I [laughs] think he's just decided he, he better step up. And he, and he's a, he's a great cook.

**[01:02:02] Jeffrey Rosen:** Wonderful. It is an art form. And it's marvelous to hear of his devotion to it. And he meditates as well.

**[01:02:09] Nell Breyer:** He does. I think that's been a, um, a, a practice that my, my mother who uh, many, many years worked with children who have cancer at, at Dana-Farber and their families, uh, found to be such a important um, calming, and centering practice, um, and taught it to my father. And my father has been very disciplined about meditating once or twice a day. And I think it helps um, bring perspective and uh, and allow him to focus and, um, reduce the level of stress in his daily life, which I'm sure his, you know ... I may not be doing a good job of that. But the meditating is [laughs]. So ...

**[01:02:47] Jeffrey Rosen:** And you know, you know what I took from ... One takeaway is just ha- just the optimism and the, and the positive outlook can carry us all a long way forward. So, we gotta keep that [crosstalk 01:02:57].

**[01:02:56] Nell Breyer:** Yeah. I, I think that's ... I mean, uh, we didn't talk about Justice O'Connor. But you know, I think probably of all the living justices ... I mean, he m- so respected and cared for her. But I think it's an era. I think people born in the '50s who came out America that, you know, h- weighed into the war and had this, you know, enormous impact, there was just a great hope. And I, I think we're in a different m- time in history. And we don't have that ... I don't, I don't know. I think we've, we've lost a lot of that. I mean, and it's not good to, to bind with, with war. But there is a kind of optimism that grew out of that, that uh, just, you know, the opposite is happened with, uh, post-internet, post-2007, post, you know ... I think technology's had uh, the most schisming, um, polarizing influence. And so it, it's the opposite of what's needed for a democracy like ours to work well. So, it is very ... It's a very, very different mindset. I don't think you can teach optimism.

**[01:04:01] Jeffrey Rosen:** I'll close by asking you about any life lessons, uh, from Justice Breyer that you wanna share with We the People listeners. We've talked about so much that he exemplifies, his, his ] focus, his kindness, his willingness to m- be a lifelong learner and teacher, and to cook and meditate, and maintain his energy so that he can contribute to the best of his potential. But if you had to share some life lessons, uh, from being his daughter, what would they be?

**[01:04:26] Nell Breyer:** Uh, I think uh, he is a great pragmatist. But I think he invites everybody to participate. So, I think participating starts with reading [inaudible 01:04:37] reading the Constitution, reading about the, um, parts of this country where you can become involved, serve on the, a jury, serve in a school board, uh, serve in your local student council. I think he really views the service part of, um, being an American as critical to the survival of the country as we know it. Um, and I think it, it is very sincere, the idea of listening and working collaboratively to

solve the problems, most particularly in this country. It's how it's been designed. It's the nature of the, the Constitution. We have, um, a messy, uh, democratic um, problem solving machinery. The sausage making is, is there. And the problem solving is, is a collective challenge. So, I think the main lesson he, he s- says to students and colleagues, and everybody w- that will listen is, "This is our experiment to solve. Participate, participate. This is not a ... Don't just criticize. Don't just point the finger. It's not your problem, not my problem."

**[01:05:41]** "It's our problem. And, and together, we have to try to find a way. I may never agree with your point of view, but we have to come to a consensus about how to share this space together, live, uh, you know, in, in peace and without a breakdown in, in war or, uh, total chaos." So, I think participation and a deep respect and, and listening are the, the legacy he'd like to leave.

**[01:06:06] Jeffrey Rosen:** Participate, participate, don't just criticize. We have to share this space together. Participation and listening. Beautifully put. Thank you so much, Nell Breyer, for sharing the personal and constitutional wisdom and vision of your dad, justice Stephen Breyer.

**[01:06:24] Nell Breyer:** Thank you. Thank you, Jeff. Thank you so much for the work that you're doing ... It's wonderful, at the Constitution Center. And uh, what a privilege to be with this group. So, thank you for including me.

**[01:06:37] Jeffrey Rosen:** Today's show was produced by Melody Rowell and engineered by Kevin Kilbourne and Greg Scheckler. Research was provided by Kevin Klotz, Ruben Aguirre, Sam Desai, and Lana Ulrich. Please rate, review, and subscribe to We the People on Apple Podcasts and recommend the show to friends, colleagues, or anyone anywhere who may enjoy a weekly dose of constitutional debate. But especially, recommend the show to friends in Wyoming. That is the last state that we are missing to complete, uh, donations from all 50 states of this great union for our We the People crowdsourcing campaign. So, pick up your text and your email, and whatever your communications platforms are and contact your friends in Wyoming, and tell them to donate. We got five great donations from Oklahoma last week. And we know that the great state of Wyoming, uh, which is so beautiful, will rise to the challenge as well. Thank you so much for listening and learning. And thanks to Justice Breyer for inspiring us to listen and learn together, and for his service to the United States. On behalf of the National Constitution Center, I'm Jeffrey Rosen.