



Justice Breyer On the Importance of Civics Education
Thursday, October 6, 2022

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[00:00:00] Jeffrey Rosen: 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.

[00:00:22] All of us at the NCC are thrilled that Justice Stephen Breyer has recently joined us as our new honorary co-chair, serving with Justice Neil Gorsuch, Justice Breyer came to the NCC on September 23 to help us launch our new *Constitution 101* class for learners of all ages.

[00:00:40] To celebrate, we hosted more than 200 middle and high school students at the center on the overlook under the beautiful First Amendment tablet, and we had a great conversation about civics with Justice Breyer, and I'm so excited to share it with you today. Enjoy the show.

[00:01:01] Justice Stephen Breyer: Look, what a beautiful day it is and here you are inside, [laughter] but it's cold out there.

[00:01:07] Jeffrey Rosen: Well, we are inside, but in one of the most inspiring spaces in American.

[00:01:12] Justice Stephen Breyer: Yes, this is [inaudible 00:01:13]

[00:01:13] Jeffrey Rosen: Hello, friends. Welcome to the National Constitution Center. It is so exciting to welcome you into this magnificent space with the words of the First Amendment shining behind us, and Independence Hall glimmering before us, to introduce you to the new honorary co-chair of the National Constitution Center, Justice Stephen Breyer.

[00:01:37] Justice Stephen Breyer: Thank you. Thank you.

[00:01:43] Jeffrey Rosen: We're so honored that Justice Breyer has chosen to lead us in our education efforts. This is his first visit to the Constitution Center in, in several years, and I'm so looking forward to our conversation.

[00:01:57] Justice, here we are in this very sacred space. We have this great audience of students, and I'm gonna start by asking you the obvious question, "Why is it important for these students to study civics and the Constitution?"

[00:02:13] **Justice Stephen Breyer:** Because this place here, and your school, and your house, and your neighbors, and your friends, and even some of your classmates you don't like, we're all part of the same country, and we've stuck together.

[00:02:31] I grew up in San Francisco. So, what grade... What grade are you [all] in, I forget? The eighth, okay. When I was in the eighth grade, we used to take a trip to Sacramento, which everybody looked forward to 'cause there's this fabulous ice cream place on the way to Sacramento, [laughter] and when we'd get there, we go to the Governor's office because in this place here, and in San Francisco, and in all the places I've mentioned across the country, people, citizens of the country vote, and they try to figure out what kind of city, or town, or state, or nation they want.

[00:03:12] And we decide when people disagree by electing people, by voting, and we try to be certain that everybody, like they put up there saying, "You see? You have freedom of speech. People can say what they want."

[00:03:28] Wait, if you start popping off in the middle of class—you think you can say what you want? No, 'cause it's regulated, but basically, the idea is there. You have a thought, you can express it in some place or other, maybe not in the middle of class, or maybe so.

[00:03:48] Well all that, all these people, 300 million living together, and they've done it with a lot of ups and downs over nearly 250 years. Well, this form of government is a form that is set down in writing in the Constitution.

[00:04:12] And you know who's gonna be responsible for keeping up even the ice cream places, even the Governor's office, even the voting system? Even the system of friends, and neighbors, and enemies even, living together and getting on reasonably well?

[00:04:30] You know who's gonna be responsible for that? Guess who. One guess. Yeah, you. Yeah, you are. I am not. You will be. Get it? [laughter] Now, you are getting the idea why we have this room, and why he's here, and why we think we'd like you, if you're willing, to know something about this country that you are going to run, and it's really going to happen.

[00:05:07] You think what's gonna happen next week is the great, I don't know, soccer game that my grandson's playing on. I'm very sorry you're not up in Boston watching it, [laughs] I think it's the two pretty good teams. But beyond that, yeah. You are in charge.

[00:05:25] Sorry to tell you that disappointing news, but there we are. And so, we want you to learn, we want you to understand. What does that all mean, aside from words there? What did they do in that building? You can see them. You can see there, there are statues in there, you know, of the people who were in that building.

[00:05:46] I don't know if they were really as tall as the statues, but regardless, they were in that building, and this is the document, pretty much, that they wrote. Here it is. Okay? That's why.

[00:06:00] **Jeffrey Rosen:** Beautiful, it's so inspiring. And-

[00:06:02] **Justice Stephen Breyer:** Well, I don't know, they're the ones that have to be inspired! [laughter]

[00:06:05] **Jeffrey Rosen:** Yeah. Well, well let's inspire-

[00:06:08] **Justice Stephen Breyer:** All right.

[00:06:09] **Jeffrey Rosen:** Let's inspire everyone some more-

[00:06:11] **Justice Stephen Breyer:** Yeah. Right, yeah.

[00:06:11] **Jeffrey Rosen:** By, by talking about what those words, and what they did over there. So, when it comes to what those words mean, you mentioned speech in school, and you said to our friends, "You can't say whatever you want in school."

[00:06:24] But nevertheless, you, Justice Breyer, wrote one of the most important free speech decisions about school speech in the history of the Supreme Court, and you said that a cheerleader on Snapchat could curse, she could express frustration that she wasn't chosen for the team, 'cause it was important for students in school to learn to be good citizens. Tell us about your reason for protecting that student's speech, which the-

[00:06:46] **Justice Stephen Breyer:** He sort of sanitized it. [laughter] I mean, this young lady, who was very disappointed that she didn't become on the...what was she? A cheerleader, I think, on the... For the high school basketball team, or football team, or something.

[00:07:02] Expressed herself to her friends, you know, she had friends that... I don't even know about this, this is something you know. You have this machine, and it has on there who your friends are, [laughs] and she went to her local coffee shop, I think, and sat down and spoke to her 250 closest friends by means of this machine.

[00:07:23] And when you say she expressed herself, how did you say it? I would say she used rather vulgar, really swearing language, which is not desirable, and I'm not saying it's desirable, and I don't even think her parents thought it was desirable, expressed her emotion, all right.

[00:07:41] But they wanted to punish her at school for that, and we did think they couldn't punish her at school because people do have a right, they're outside of school, she was, and she didn't hurt anybody in the school, and so the court thought that she does have a right to express herself, though I'm not advising you use these words.

[00:08:03] Anybody watching *Ted Lasso* on television? [laughter] Well, I mean, they use these words “nonstop!” so I figure, well, okay, there we are. The world's changed. But anyway, you get the point. The point is we did think she had a right to go and express herself. In not a very nice way, but nonetheless, and the school couldn't punish her for that because she didn't do anything that really hurt the school.

[00:08:29] **Jeffrey Rosen:** It's such an important opinion, and you... And you talked so powerfully about schools as laboratories of democracies, places where [inaudible 00:08:37]

[00:08:36] **Justice Stephen Breyer:** No, I said to everybody, I said what I said. I know what I said 'cause my law clerk and I discussed it, and we had one good line in that. You know, I write, and when you write, you want to write something that's nice, so I said that America's public schools are the nurseries of democracy, and that's true.

[00:08:56] Not that you're in a nursery, [laughs] but the idea is you're gonna learn something there, and you're gonna learn something about democracy. And what the system is, and how we work it, and why work it? By participating, and you will participate. You will do it; it will really happen.

[00:09:15] And, and you, you will then go out and, and I hope you will participate in Philadelphia. Get on the school board, go to the library commission, but vote! I know you can't vote now, it's not fair, but nonetheless, nonetheless, you will.

[00:09:34] So, that, that was really the point, that you will learn how this country works here in this building, and you will learn how the country works, and you're part in it in your... In your school, and certainly when you're in high school, and eighth grade is the beginning. Next year, next year you're a freshman in high school.

[00:09:55] **Jeffrey Rosen:** Well, it's such an important reminder that learning, the habits of deliberation, begins in middle school, continues in high school, and it is indeed a nursery of democracy. So, then you said we've got to talk about what happened over there, and one thing that happened over there was deliberation and compromise, and you learned about those values from Senator Kennedy.

[00:10:15] What did your experience in the Senate tell you about the importance of deliberation and compromise as the key to success in democracy?

[00:10:22] **Justice Stephen Breyer:** Yeah. Well, I worked with... I taught. Most of my career was primarily as a teacher, but then I became a judge. And then when I was a [inaudible 00:10:32] before that, I worked for Senator Ted Kennedy, who's from Massachusetts, and I worked in the Senate on his staff for two or three years, and I worked on the Judiciary Committee.

[00:10:42] Okay, so my law clerks now, [laughs] we put it on a mug, 'cause I'm always repeating what he said. We put on a mug the things that I repeat the most that he told me, and this... I don't know if I should tell you this because I'm not sure your teachers would agree with this.

[00:11:00] But when you get out, one of the things he used to say a lot, he said, "The best is the enemy of the good." And what he meant by that, when you're trying to agree with something, with somebody who disagrees with you. When you're trying, for example, maybe it's even, whether you're gonna have a game on Saturday, or whether you're going to go to a movie, or whatever it is that you're agreeing about, or whether we should end school early, or whether we should...

[00:11:30] Look, people disagree. And what he meant was when you disagree with somebody else on somebody else's staff, and you can get agreement but not everything you want, maybe just half of what you want, half is better than nothing. So, it's better to take half than it is to say, "No, I'm not going to agree with you because you're being such a pain."

[00:11:53] I've heard that. I have grandchildren, you know, and there's a... And I have twins, in fact, and one of them says to the other, "You are a pain." And I say, "Oh, I get the point. Why don't you be nicer to her?"

[00:12:05] "How could I be nicer to her, she's terrible?" [laughter] And then I say, "No, no, no, no. Calm down, and if you're trying to reach an agreement, calm down, and if you can get a compromise, that's better than all your friends telling you you're wonderful when you lose.

[00:12:21] In other words, don't go for the applause, go for the compromise. Go for getting what you think is best. And what I always used to say, the second thing on there is credit. And I don't think you're too young for this. I mean, credit is a weapon. When you're trying, say, in the Senate, or you're trying in the government, or you're trying in the mayor's office, or you're trying in whatever business you're in, and you're in an argument with somebody, the way to get an agreement is let the other person talk.

[00:12:53] Just calm yourself. I mean, I'm sure you've had some arguments in your time. Have any of you ever had arguments with your sister or your brother? Yes. Have you ever had arguments with your parents? Yes. Do you want to get them to agree? Geez, I used to tell Clara this. This is my oldest granddaughter.

[00:13:13] She got into a big argument where she's going next Saturday. I'm trying to make... But the same thing could be true of public policy, it could be true of everything. I'd say, "Stop arguing! Listen to your mother. Let her talk. You keep quiet. Then, when she says enough, she might say something maybe you could agree with, like maybe we try the concert next Saturday, or what about blah blah blah.

[00:13:44] When you hear her say something you agree with, you say immediately, "That's great. That's great. Let's work with that. Let's work with it." And see where you go, and maybe you'll get something not perfect, but you'll get something you actually want, so stop screaming at your mother, or stop disagreeing and telling everyone how right you are, and how wrong everybody else is.

[00:14:10] Listen to them, and maybe you get something that works. And when you get something, and if it does work... And this was true in the Senate, and you won't see this talking to your sister, or your mother, or whatever. But if it works, the press comes around, and they say, "Oh, Senator Kennedy. You did such a good job."

[00:14:30] "No!" He says, "It isn't me. This was Orrin Hatch's idea, the way it worked." This was the person I was arguing with. Give them the credit, let them take credit for the good thing that happens. They had something to do with it, they deserve it, and stay out of it.

[00:14:50] Because he said if the... Something. If you got to go to the concert, if you went to the movie, if you won your argument, even if it wasn't at the time you wanted, even if it wasn't as long as you wanted, when you basically won, keep quiet! Let the other person get the credit because if it's a good thing for people, there'll be plenty of credit to go around.

[00:15:09] And if you end up with something bad, who wants the credit? That's what he used to tell us. And we saw him put that into practice a lot, a lot. And that happens all over the place in this city, in offices of the mayor, or in other places, in the City Council, in the state legislature, in the Congress of the United States.

[00:15:35] If you want to be forceful, and effective, you've got to work with other people, and some of them will not agree with you, and listening to them is the secret weapon. Listening to what... You don't have to agree with them. You wait 'til they say something that you agree with, and you try to explain as clearly as you can why you think what you think. And listen to what they say, and why they think what they think.

[00:15:59] Well that, I think, was the most important thing that I learned in working for Senator Kennedy. And that's what I've... I do that in the court, and I think people do that all over the place, and it helps. It helps get somewhere.

[00:16:15] With Clara, I tell her, "It's gonna help you get to the rock concert, you idiot. Stop shouting." [laughs] And sometimes she does, and sometimes it works.

[00:16:25] **Jeffrey Rosen:** Well, our friends have submitted some great questions in advance, and several of them have to do with how much of this compromise and deliberation you saw on the court. One of our students asked, "Can you be friends with people you disagree with? Do you debate civilly? Give a sense of what it's like, how you're able to have a civil dialogue on the court among people you disagree with."

[00:16:48] **Justice Stephen Breyer:** Well, it's not... It's not... In a way, it's easier to be friends with people you disagree with on the court because what you do on the Supreme Court, there are nine of us, and we're trying to decide a case.

[00:17:00] Do I have a minute? I can tell them what a case is like in an appeals court.

[00:17:03] **Jeffrey Rosen:** Please do.

[00:17:04] **Justice Stephen Breyer:** Okay. Are you listening, are you ready to listen to this? You see what the job of an appellate judge is? Okay. I read this in a French newspaper, all right? This biology teacher is traveling from Niort to Paris, where he's teaching his class.

[00:17:21] And he has in a basket 20 live snails. So, the conductor comes along and says, "What's in the basket?" And he shows him 20 live snails. The conductor says, "Did you buy a

ticket for the snails?" He said, "What are you talking about? They're snails. You don't have to buy a ticket for snails."

[00:17:43] The conductor says, "Read the rule book. Right here, it says no animals allowed in the train unless they're in a basket, and then you have to buy a half-priced ticket." So, the teacher says, "But that's... They are talking about dogs and cats, they're not talking about snails."

[00:18:06] And then the conductor says, "It says animal, doesn't it?" Okay, so how many of you, if you want to vote, just [inaudible 00:18:13] how many of you think the snails should have to pay the fair, 'cause he's an animal? Yeah, some do, right? Okay.

[00:18:20] How many think he shouldn't? Yeah, more think he shouldn't, but some think he should. Some think he shouldn't. And you know, my job as a judge, does he have to pay the fare? I have to decide that.

[00:18:31] Now that isn't true that that's the kind of case we have, but the idea is the same. You'll have some words. These words might mean snails too, animal, or they might not. They might just mean certain animals. Okay, you say, that's what I do. Yeah, that's what I do as a judge.

[00:18:51] I told my son that when he was growing up. I said I spend my time listening, I read the brief, I read the arguments. This one says the snail's an animal, this one says it isn't an animal. I read all that stuff, all right? And then what I do is I listen to them argue, and then I write an opinion. I write an opinion about what I thought.

[00:19:09] So I thought if you, you know... If you do your homework really well, you can get a job where you do homework the whole rest of your life. [laughter] Okay. Now, do you see what we do? Well, we discuss these cases, the nine of us, around a table, and after we hear the case, within a day or two, we are sitting at the table, and we go around the nine.

[00:19:36] First Chief Justice Roberts, and then Clarence Thomas, and then me, and then Sam Alito, and then, Sonia Sotomayor, or Elena Kagan, and Justice Gorsuch, and Justice Kavanaugh, and Justice Barrett, and did I leave anybody else? I don't think so. I don't think I did. That's it, the nine of us, and we each talk in turn.

[00:19:59] Nobody speaks twice 'til everybody speaks once. Okay? It's very helpful. Then after everybody has finished saying what they want, usually takes three or four minutes for each person, we then discuss it back and forth. That's the legal issue, and we will, at the end, know how the court breaks down.

[00:20:20] Most of the time we agree, it's nine to nothing, but that's probably 40% of the time usually, 30%, 40%, sometimes more. It breaks apart five to four different opinions or something, maybe 15, 20% of the time. Um, and then we write. We write opinions, and we write our reasons, and that's what we do in our job.

[00:20:45] So when we're doing our job, we do our job. And then, when we go to lunch, we talk about the latest basketball game, or what we've read in some kind of mystery story, or... So, we're perfectly good friends, no reason not to be. No reason not to be.

[00:21:06] You don't have to disagree personally with people you disagree with on their ideas about politics, and I think that's... I certainly [inaudible 00:21:18] people who are not in the eighth grade. I just add something that I think really illustrates this well, and I think it's a true story but I'm not positive.

[00:21:26] When a Senator you now know, but I won't say his name 'cause I'm not positive of the story. When he first came to the Senate, he was on the floor of the Senate, and Senator Helms, who's a very conservative Senator, was giving a talk in which, he made some rather unpleasant remarks about Senator Kennedy, which he really went a little too far, 'cause they should be polite about each other, and particularly on the floor of the Senate.

[00:21:54] So this [new] Senator got up and made some remarks about Senator Helms which weren't too nice either. So, he got back to his office. He was new, he'd just been there a month or two, and there was a note which said that he should go to see Senator Mike Mansfield, who was the head of the Democrats. He was the leader of the Democrats at that time.

[00:22:16] Well, he came in, and Mansfield said, "I don't want you ever, please, to use language like that about another Senator in this chamber." He said, "But," He said [inaudible 00:22:32] "Well," He said, "You may not know this, but two weeks ago, Senator Helms' wife was diagnosed with a very, very virulent, and bad form of cancer, and the first thing Helms did was call Senator Kennedy from Massachusetts, and said, "Is there anything you can do?"

[00:22:51] And what Kennedy did he found excellent care, probably up at Dana-Farber, and for Senator Helms' wife. He said, "Politics is one thing and personal relations is another." I heard this from Senator [inaudible 00:23:06] kept that in mind throughout the rest of his career.

[00:23:09] What's important is you can disagree, but don't do it in a disagreeable way. Listen to people, talk to them, find out what they're thinking, and the benefit of that is they're much more likely to come along and understand what you are thinking too, so that's what I really learned, I think, in the Senate, that's stood me in good stead throughout the rest of my career.

[00:23:35] **Jeffrey Rosen:** One of our students says that, um, "How is it possible that you on the court were able to be such good friends with Justice Thomas, who you disagree with?"

[00:23:43] **Justice Stephen Breyer:** I sat next to him for 28 years, and we had a good... He has a great sense of humor. I think he's a very decent person. I think he's an honest person. I think, and he knew what these cases were about, I promise you, and we were friends, and we are friends.

[00:24:01] People who think we shouldn't be friends, in my opinion, are just wrong because you can be friends with people you really disagree with politically, or professionally, or in some other way. That's not just a... It's not just a saying, it's...It's true.

[00:24:21] I remember one time, I was having lunch with... We lunch after our conferences, and we're all having lunch upstairs, and just before that, we'd been in a conference, and it had been... We'd split 5-4 in two different cases, [laughs] and I said to Judge Rehnquist who was a Chief Justice then, I said, "You know, it's amazing. Here we are actually having a fairly good time talking to each other. It's perfectly pleasant, and so forth, and just half an hour ago..."

[00:24:49] He said, "I know. Half an hour ago, each half of the court thought the other half was totally out of its mind." Well, that's what it is. People can get on personally and they do, and deciding cases, we don't have to agree, and very often we don't. We try to agree.

[00:25:11] **Jeffrey Rosen:** Are there ever hard feelings after the really tough cases? Tell the story of *Bush v. Gore*, which you've said was one of your toughest times on the court.

[00:25:19] **Justice Breyer:** Well, you see, [inaudible 00:25:20] mm-hmm, yeah. I didn't like the result because I thought we shouldn't take this case of *Bush v. Gore*, and there have been plenty of others I've thought that way too.

[00:25:30] And of course it's annoying when somebody doesn't agree with you, so you feel annoyed, I can go and tell Joanna, my wife. [laughs] I don't have to be rude to my colleagues. I mean, my colleagues will not have the impression after we've discussed the case that I'm ready to say that their point of view is completely right.

[00:25:53] They know I don't agree with them, and they know I'll... I might write something... When I write something on the opposite side and dissent, I try to write in a way that a child of six will understand that the majority's made a big mistake. Well, they might or not might not. Nobody's gonna be under a false impression, I don't think, of what I think about it, but that doesn't mean I have to scream, rant, or rave, or be rude personally to people.

[00:26:20] And that is an important, important distinction, and if you can really do it, and it isn't so easy to do, you can get people to say maybe you aren't so bad as they thought you were, [laughs] and you can get people to agree. So, of course, I make a big point of that because I think that's true in this country at the moment.

[00:26:40] I think one of the things that would be much better is if you could listen to each other, even if you don't agree with them.

[00:26:48] **Jeffrey Rosen:** Well, that is precisely what we're trying to do here at the Constitution Center, what you are modeling so well. There were, of course, a series of hotly contested decisions that just came down, and several of our friends have asked about them, um, beginning with the gun case, which was the *Bruen* case from New York.

[00:27:08] You had a memorable line in that case in your dissent, which one of our students picked out, "Laws addressing repeating crossbows, [inaudible 00:27:17] dirks, daggers, skeins, [inaudible 00:27:19] and other ancient weapons will be of little help to courts confronting modern problems."

[00:27:23] Tell us about why you think the majority there was wrong to focus on the original understanding of the Second Amendment, and what you think the better approach would have been.

[00:27:32] **Justice Stephen Breyer:** Well, I think what they got on the Second Amendment is more technical, but I don't... I think they misread the history, but that was all written by Justice Stephens and Heller about why they were wrong, and I joined it, okay.

[00:27:43] But in this more recent case, the, the court put a lot more weight on what they thought was the history, and, and, in dissent, I said... I made a number of points. I mean usually a dissenting opinion is about 10 pages long, or 15. I try for 10. I end up with 15 or 20, and this was 40, so I don't expect anyone in the world to read it, but nonetheless, if you have nothing better to do...

[00:28:10] The point was, how do we decide from the majority what weapons fall within the protection of the Second Amendment and which don't, because there were a lot of weapons that we have now they didn't have then, like rocket launchers. I mean, the founders didn't have rocket launchers, so can everyone carry around a rocket launcher?

[00:28:34] That's in sort of an exaggeration, what I said, but I, I got this rather weird idea that I'm gonna go look up weapons that they had in the Middle Ages and thereafter, and just say what's... I found the perfect thing, and my law clerks wouldn't let me put it in.

[00:28:49] But [inaudible 00:28:50] thing, there was something called, agent fire, and in the 15th Century, there used to be these catapults, and they would put this stuff called agent fire, I don't know why it's called that, in the catapult, and catapult it into the city there, besieging.

[00:29:09] And it really was bad. I mean, it set fire to the city, and it made everybody sick, and it was very bad. But what I liked about the example was in Wikipedia, where I found it, [laughs] it said the agent fire was the early precursor of the modern rocket launcher. So, I wanted to put in... Uh-huh. Okay, if they had in the time of the writing the Constitution, do we have rocket launchers.

[00:29:38] They thought that was ridiculous, my law clerks. "Don't put it in." And they were right, I was right not to put it in, but I put in all those things about how birds, and whatever the things they were used to have then, I think a howl bird or something was some kind of a... It was interesting, it was a kind of a...A hatchet on a long pole.

[00:29:57] And what did it have to do with the opinion, and it said, "What's the modern descendant of the howl bird." Since I didn't even know what a howl bird was, but in any case, [laughs] you see the point. That's why I put all those things in, 'cause I set arguments by

analogy to what was around in the, um, 1787 are not necessarily so useful to a judge who has to judge a case that affects people today.

[00:30:25] Jeffrey Rosen: Then we have, of course, several questions about the Dobbs case, from last term, and several students noted your comments about the court's legitimacy, and there's a sentence in the, the last paragraph you say, that this eliminates a 50-year-old Constitutional right that safeguard's women's freedom and equal station. It breaches a core rule of law principle designed to promote constancy in the law and doing all of that in places in jeopardy otherwise, from contraception to same sex intimacy and marriage, and finally, it undermines the court's legitimacy."

[00:30:59] Tell us about how you think the opinion might undermine the court's legitimacy.

[00:31:04] Justice Stephen Breyer: Well, it's a problem of law. I mean one of the basic rules of, of law is a principle in Latin called *stare decisis*, that once you decide a thing, you don't just overturn the principle of that case because if you overturned in a later case, the principle in an earlier case, well, people won't know what the law is.

[00:31:29] They'll all go to their lawyers if they're in business, or wherever, and they'll say, "Let's overturn these cases that are against it." And they'll have a hard time planning their lives. They'll have a hard time knowing what kind of house they can buy, they'll have a hard time knowing, where... What they can do in their business, they will have a hard time if they're engineer, knowing what kinds of... They'll just have a hard time.

[00:31:50] So don't change cases even though the cases might, in your opinion, be wrong. Now, you can't say that 100% because sometimes there's a case that's just so wrong that you just can't live with it, and the country, it turns out, can't live with it.

[00:32:10] Now, there was a case, which you will read about if you haven't, called *Plessy v. Ferguson*, and that case was a case which said Black people and white people can be required... The law can be such a state that they have to be segregated, and they have to ride in different parts of a train.

[00:32:31] Well, that was decided in the last part of the 19th Century. By the time 1954 came around, that year, people who thought about this in the United States though that was very wrong. It had led to something called *Jim Crow*. And by the way, you didn't even have to think about it. All you had to do was go to a southern state where they practiced racial segregation, and open your eyes, and look.

[00:33:00] And the case... And well, you at least have to have the same good schools and facilities for Black people as white people, anyone who saw a picture of what the schools used to be then for Black people compared to white people, [laughs] it wasn't close. I mean, they were no more equal than fly

[00:33:17] Okay, but that's beside the point. The court got the case, and it said in 1954 that old case was wrong, and now we're not going to have segregation by race anymore. We are going to, in fact, have integration, and that's a long story, and you ought to read about that,

and you ought to see how difficult it was to try to get the country on what I think most of us, or all of us might now say was the right track.

[00:33:49] And, so sometimes you do overrule a case, but most of the time, don't. Even if you don't agree with it. So, what I was saying there is I thought the subject of that case was abortion rights, the right of woman to have an abortion. And I said, "That is not one of these cases that needs overruling. In fact, it needs staying the same, so don't overrule it."

[00:34:20] But I was dissent, I was not in the majority, and I'm sorry I wasn't. So, I thought a lot of the United States who follow these things would say this is very unfortunate that this case, you may have heard of it. The Roe case, you've heard of that?

[00:34:40] *Casey v. Palino*, you've n-... Probably didn't hear of that, but it's a good case, very unfortunate that's being overruled. So here we are, that's why I wrote that. But did I mean that people shouldn't follow the law, and follow the courts? No, I didn't mean that. I didn't mean that.

[00:34:58] And that's one of the many problems that you will have to begin to solve in 10 years, how do you have people in a country who will go along with cases they disagree with? Yes, and they should, unless maybe it's Adolf Hitler or something, which it was not Adolf Hitler.

[00:35:17] Okay, but still, you don't want the Supreme Court to overrule cases too often. They really have to call for it, and the courts can't do things that are just... No, [laughs] in terms of the people of the country. That's a long story, and that's a story that has no clear end, and no clear, analysis. All that's in that. What did I say?

[00:35:47] I said legitimately, who knows what they'll think? Did I go too far in saying that? Was I undercutting my own job? [laughs] Was I undercutting the rule of law? Did this case call for it? A true answer. I'm not sure, but I said it.

[00:36:05] **Jeffrey Rosen:** Very powerful. By legitimacy, then, I hear you saying, um, people should follow decisions that they disagree with, but what, what happens when court... When people think the court is not legitimate, might they not follow the opinions?

[00:36:28] **Justice Stephen Breyer:** No. They have to follow the opinions. I mean... Well, I don't know about legitimate, you see, that's a great word 'cause it sounds intelligent, learned, but no one's too sure just exactly what it is, and sometimes, I admit that words like that creep into my opinions.

[00:36:47] But one of the toughest things in the world is, um, following the law when you think it's wrong. And maybe it is wrong. If the decision is 5-4, somebody's wrong, but suppose everybody just made up his own mind, suppose you didn't like the rules about you have to be in five minutes before recess ends. That seems so unfair. What's the point of recess if you have to be in the classroom five minutes before?

[00:37:16] Don't call it recess, call it something, this isn't really recess 'cause we have to be in the classroom five minutes before, okay? So, you're really annoyed about it, but there it is, it's the rule. Well, you'd better follow it. Why? I'll tell you asked that question.

[00:37:33] There was a woman who was the Supreme Court President in Ghana, and she's in my office, and she is improving the legal situation, from my point of view. She wants to bring civil rights, more civil rights, and democracy, and so forth. And she asked this question, "Why do people do what you say?"

[00:37:55] You can say, "Well, 'cause it's the law." That's the question, that's not the answer. Why? We're nine people. Go look at *Cooper v. Aaron*, that's a great case. The governor of Arkansas says, "If the Supreme Court really makes us integrate Central High School in Little Rock, we're gonna not do it. I control the state militia."

[00:38:18] Then he told President Eisenhower, "Oh, I'll do it." Then he told the press, "No, I won't do it." And Eisenhower got pretty angry, but they wouldn't let the Black kids in the white school, and you ought to know about that one, 'cause I was up at Harvard when they had several of the Little Rock Nine there, and there were an awful lot of students who didn't know who they were, and that really depressed me.

[00:38:41] And Eisenhower said, "I will send troops." I told you this story. He sent the 101st airborne division from Fort Bragg over to Little Rock, and they took those children in the school. And Eisenhower took a risk there because he was told by the Governor of South Carolina that if he sends in troops, he'll have to reoccupy the entire south. He will have to have a second Reconstruction.

[00:39:16] But his attorney general said, "You better do it because it is, after all, the rule of law." And he did do it, and Governor Faubus closed the school a few months later, and schools were closed in the south. Read about that, you'll see what happened because there's a very good book, by David Margolick, I think, about what happened during that year when there was supposed to be integration at Central High School.

[00:39:44] And it started out okay, and then it really got mucked up because the school board tried to wreck it, and they, they rather succeeded, but they went back to the Supreme Court, that's *Cooper v. Aaron*, and in the Supreme Court, all nine of the Justices signed an opinion, very unusual, saying "you integrate now."

[00:40:01] Hey, nine! Do you know how many people there are in Little Rock? I mean, there are a lot more nine, and you could have 9,000 judges, and no, they weren't gonna open the school. So, what happened? Then people began to wake up, that's what happened. They began to think, and we had Martin Luther King, and read about that, and we had the Bus Boycott, and read about that, and we had the Freedom Riders coming in from the north, and they had to begun to understand in this country that a very unfortunate and bad thing is going on with this word, *Jim Crow*.

[00:40:45] So, all those people, those Freedom Riders, they weren't judges, and they weren't lawyers, either, but ordinary people began to wake up to what was going on, and enough of them supported the court that the court ended up getting its opinion enforced. And what I

wanted to tell this woman from Ghana is the people have to be convinced that they have to follow a decision that they think is wrong, that they don't like one little bit, and that may be wrong, for all they know.

[00:41:15] They think it's wrong, anyway. And hey, you'd better have a country where they'll do it. And you convince people. Who? Not the judges, they already believe it. The lawyers? They make money out of it. Who do you convince, convince in America? There are 330 million people who aren't lawyers. They're the ones you have to convince.

[00:41:36] Go to the villages, go to the towns, go to the cities, go to the people who aren't the lawyers, and you make them understand that it is helpful to a country, even when you don't agree, to follow the law. So, what do you do? You try to get the law changed if you don't like it.

[00:41:57] And how do you get the law changed? There are many, many ways, but one of the ways to try to get it changed is remember that guy, or that girl, who was disagreeing with you? You go talk to her, and don't scream, [laughs] and listen to what she says. And then, you have a discussion, and then you deliberate, and then maybe you compromise, I don't know. It depends on what the question is, but it's convincing people. That's the hope of those words there.

[00:42:26] The hope of those words is we will have a country where we solve our differences by convincing each other, or at least letting them tolerate us, or at least letting them to find a compromise, that is what I've learned in the Senate, working there, and certainly on the courts, is our hope, and sometimes we even do it.

[00:42:51] **Jeffrey Rosen:** Tell our friends why you think it is important for citizens to follow decisions that they disagree with. This is a time of great anxiety about the future of democracy.

[00:43:02] **Justice Stephen Breyer:** I know.

[00:43:03] **Jeffrey Rosen:** What will happen if people do not converge around the Constitution, and the laws?

[00:43:08] **Justice Breyer:** Well, I [inaudible 00:43:10] Well, I do it, but I knew, I talked about some of these cases with audience in Stanford, and students, and I said... When I say it, I think it's a good thing is I heard Senator Reed say that in *Bush v. Gore*, people followed it without throwing stones, and guns, and riots, and so forth.

[00:43:26] I thought it was wrong, a lot of people did, but they followed it, and Reed thought that's a very good thing. I think it's a good thing. So, I know I say the audience, students... college students, law school students, about 20% of you think, "Too bad there weren't a few riots." They think, "Too bad there weren't a few sticks, and stones, and things thrown, and so."

[00:43:47] I say, "Before you reach that conclusion, you turn on your television set, and you look at how people decide things in countries that don't follow a rule of law." And well, I quote a lot, maybe I'll do it, 'cause I have, I've said this so many times that it made a big impression on me.

[00:44:05] There's a French writer whom I like very much whose name is Albert Camus, and if you have a French class, or even an English class, or a Literature class, you might try and get them to read this. He wrote a very good book called *The Plague*, which is good in times of COVID.

[00:44:18] And it was about a plague that came to his native town in Algeria and how people behaved, and at the end of the book, he describes how some people behaved well, and some people behaved badly, and he's thinking of the Nazis, and the occupation of France he's thinking of.

[00:44:37] And some people behaved well, and some people behaved badly, and he said, "I wanted to describe that." But he said... There's another reason, if any of you are thinking of being doctors, a doctor's a person who helps other people, and he does it without a philosophy, without a theory. He just does it. And if you're gonna be a doctor, you'll do it, you'll understand it.

[00:44:58] But the real reason he says he wrote this book, and this got to me. The real reason, he says, is because the plague germ, in French, it's the [inaudible 00:45:11] *de la peste* the plague germ, the germ that gives the people that disease, the plague germ never dies. It goes into remission, and it lurks.

[00:45:25] It lurks in the attics. It lurks in the hallways. It lurks in the file cabinets waiting for one day to reemerge and to the misfortune, or the education, of mankind once again sends its rats who carry the germ into a once happy city.

[00:45:57] And that's what people are like, you're not immune from it. In everybody, there is something bad, and there are a whole lot of things that are good, and so the hard part for us is keeping those bad things down, [laughs] and letting the good things emerge.

[00:46:14] And when I talk about that passage, which meant something to me, I say the rule of law is a weapon. It's one weapon, not the only one, but it is one weapon that human beings have developed, have invented, have in order to keep that plague germ in its place, in remission, suppressed, and that's a very hard taste.

[00:46:44] Look around the world, what happens. You think, "My God, it is a hard task." But there it is, and so if you decide to be lawyers, and not doctors, you will sometimes do good, even as a lawyer. And I don't really mean sometimes, I'm just being funny.

[00:47:00] But you... And that's what you're trying to do. And so, yeah. That's one of the weapons. That's one of the weapons that you'll have.

[00:47:12] Jeffrey Rosen: Well in this shining space, your optimism, and positivity after your long service on the Court is so striking. I heard you a few months ago, deliver a very optimistic speech about the future of the rule of law to British judges at the Supreme Court, and you said despite the grave challenges to democracy and the rule of law, in America, and around the world, and in the Soviet Union, and... You were optimistic that the rule of law would triumph. Tell our friends why you are optimistic and what you think will make it triumph.

[00:47:46] Justice Stephen Breyer: [laughs] I don't have a good reason for being optimistic, my optimism is just what's the choice. We, we'd better work for that 'cause the alternatives are pretty bad. And Senator Kennedy, again, he said the country swings. It swings, you know. Goes from one thing to another thing, and sometimes they're opposites and so forth, but people come around.

[00:48:07] Most Americans come around. They, they want to work together. They're pretty good at working together, not so bad. It's nothing more than that. I had to deal last year with some opinions I really disagreed with.

[00:48:19] So, I was a law clerk for Arthur Goldberg, and we had some instances where we were in dissent, and the other side won, and I'd feel... I'd say, "I don't understand how we could lose that case, we're so right." And he'd say, "Well, what do you want me to do, cry?"

[00:48:32] I mean, okay. What you do, you go onto the next case and win that one, and, um, do your best at the next one, and keep going, and you just keep going, and that's just what it is. I mean, you know, I can't say anything, but that's just what it is, you just keep going.

[00:48:52] Jeffrey Rosen: Well maybe to close, I hear you saying... And your work is fused with faith in the Constitution as creating a structure of government, a platform for deliberation where people can respectfully debate, and disagree without being disagreeable, slowing down deliberation to av-... To ensure the rule of reason, rather than passion.

[00:49:14] Tell us why you think the Constitution, as a frame of deliberation, will carry us through.

[00:49:20] Justice Stephen Breyer: No, we don't know about the future. We just have to hope about the future. Here it is, I have it all the pockets of my suit in case somebody asks me about it, and I don't know the answer, I look it up. [laughs]

[00:49:31] But... There, there we are. But sure. This has worked fairly well. It's fairly well. It has not worked perfectly. And, um, that's it. It has that part; you see that's an important part in respect to democracy but stay with that for a minute.

[00:49:49] This document, it has worked with its ups and downs, and plenty of downs. And so, we keep going with it. I told Jeff... I mean, I found a letter from George Washington, where he wrote to a friend of his, and he said, "You know," He said, "This is an experiment. He said this system we've developed is an experiment. We're copying the French [inaudible

00:50:16], we're putting a lot of human rights in this, and democracy, and it wasn't perfect then by any means, so they changed it later.

[00:50:25] And it's an experiment. And, which you may or may not have done. My wife said our grandchildren would each get \$20 if they memorized The Gettysburg Address. Mm-hmm. And two of them did. [laughs] The first one thinks somehow, he's gonna win the lottery.

[00:50:46] But they did it all right. Now, why? Why? 'Cause the first lines of Lincoln, which are worth memorizing of Gettysburg Address, he says, "Four score and seven years ago..." And why did he say that? That did not bring him back to the Constitution. It brought him back to the Declaration of Independence, and the Declaration of Independence used the words, "All men are created equal." And they meant women too, I would say, but the Constitution doesn't.

[00:51:18] And he goes back to that, and he says, "Four score and seven years ago, our fathers set forth upon this continent a new nation founded..." What's the word? See, I'm gonna lose the \$20. "Created..."

[00:51:30] [inaudible 00:51:32]

[00:51:32] Conceived, that's the word, in liberty, and dedicated to the prop-... Thank you. [laughs] Dedicated to the proposition, all men are created equal. We are now fighting a great war to see whether that nation or any nation so conceived, and so dedicated. Conceived in liberty, dedicated to that proposition, that all men are created equal, whether that nation or any nation so conceived, or so dedicated, can long endure.

[00:52:06] What does he mean, an experiment? It's an experiment. And read what Frederick Douglass said about him. He said Doug-... That's his first and foremost wish, to keep this country together, and Douglass understood it. He understood President Lincoln's point. When you read those essays, you'll see.

[00:52:25] Slavery was his first problem, but he understood Lincoln's point. And, can it long endure? It's an experiment. Do we have the answer? No. And who is it up to get the right answer? Yeah, that's right. You want to look at that set 'cause you've been watching too much of those screens. That's what I say to my grandchildren.

[00:52:52] They're up in there in their room. I know when...why they're quiet. They're quiet 'cause they're watching those video games, that's why they're quiet, [laughs] and I say, "No, no, that's too much of that." And they...

[00:53:01] But in any case... In any case, it's up to you, and it will be whether the experiment succeeds or not. And so, my hope is you remember that. My hope is when the time is there, you learn enough. You've learned enough about the documents, and this Center, and everything, and you've learned enough so you really can take on... It's a responsibility to see the, the experiment does not fail.

[00:53:28] There we are. So, good. It's up to you.

[00:53:32] Jeffrey Rosen: Justice Breyer, we are so honored that you will be working with us in the years leading up to the 250th Anniversary of the Declaration drafted in that spot. We're so looking forward to working with you, and on behalf of all of us at the Constitution Center, thank you for your service to America, and dear friends, please join me in thanking Justice Breyer.

[00:54:01] Today's show was produced by Melody Rowell and engineered by David Stotz. Research was provided by Sam Desai. Homework of the week? Well, it's obvious. Check out our *Constitution 101* class. You can find it on the web at ConstitutionCenter.org. Check out the self-guided version or the version for high school students, and make sure to read the documents in the *Founders' Library*.

[00:54:25] Each of the 15 modules has recommended reading from our new *Founders' Library* of historic primary texts, and it's so exciting to read those texts, and to imbue all of the learning and light that they contain. Please rate, and review, and subscribe to *We The People* on Apple podcasts. Recommend this show to friends, colleagues, or anyone anywhere who's looking for learning and light, and always remember that the Constitution Center is a private nonprofit.

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[00:55:14] On behalf of the National Constitution Center, I'm Jeffrey Rosen.