

THE YALE LAW JOURNAL

JUDGE JESSE M. FURMAN

Humility in Life and Law

I had the distinct privilege of clerking for Associate Justice David H. Souter during the October 2002 Term, an experience that shaped not only how I approach the law and my work as a judge, but also how I view the world and treat the people around me. Justice Souter exemplified judicial excellence, not because he claimed to have all the answers, but because he understood—at the deepest level—that judging is about wrestling with the hardest questions, and doing so with rigor, care, and humility. And while he certainly would not have known the term as a young man growing up in Weare, New Hampshire, he was the paradigm of a mensch.

These qualities were apparent to me even before I started my year in his chambers. When Justice Souter called me to extend the job offer, he invited me to clerk during a Term different from the one for which I had applied. When I told him that I needed to check first with my spouse, he did not bat an eye. (By contrast, my spouse was incredulous: “You did what!?!”) When he thereafter wrote to confirm my acceptance of the clerkship, he encouraged me to speak with his then-present clerks and noted: “I hope they will not lead you to regret your decision.” And when, thereafter, I shared with him that I was a Sabbath observer and, thus, would not work from Friday evening to Saturday night, he wrote to assure me:

I have no concern about your Sabbatarian observances. As you know, I have not found this uncommon among my clerks, and over the years it has struck me that the practice might be one that I should enforce on all

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clerks. You've probably heard Justice Brandeis's remark that he could do twelve months' work in eleven, but he couldn't do twelve months' work in twelve.

That combination of charm and decency marked all of the Justice's dealings with us—before, during, and after our clerkships. And it inspired fierce devotion among his clerks.

Justice Souter's law clerks learned from his example that there are no shortcuts in law, as in life. He came to chambers seven days a week and often stayed late into the night. He insisted on reviewing every death-penalty case himself and on reaching his own conclusions. In these and other cases, he instructed his clerks not to tell him how the other Justices had voted, even if that meant his vote could not change the outcome. And in preparing for oral argument, Justice Souter spent countless hours reading every brief and case.

While most judges have their clerks prepare comprehensive bench memos totaling dozens of pages, Justice Souter mandated that we limit our bench memos to two pages (though thankfully, he did not prescribe font or margin size). This mandate sharpened not only our writing but also our thinking. And lest he allow us to unduly influence his own analysis of a case, he did not review our memos or discuss the issues with us until he had completed his own preparations. That is, he used our work as a check against his own thinking, not as a substitute for it.

At bottom, Justice Souter's exhaustive preparation for every case was rooted in his humility. And as anyone who had the opportunity to observe him up close knows, that humility, both personal and intellectual, was a guiding value that informed all aspects of his life and work. Despite ascending to the very pinnacle of his profession, Justice Souter never carried himself as though he stood above anyone else. He insisted on introducing himself simply as "David." He knew the names and backgrounds of every employee at the Court. He answered every letter that reached him with as much charm as wit. And he extended the same unfailing courtesy and respect to everyone he encountered—colleagues, clerks, litigants, and staff alike.

His personal modesty was also reflected in his many distinctive habits. He wore the same suits for decades. His Sunday "casual" attire was a two-piece (rather than his usual three-piece) suit. He would not turn on the lights in his office until the last rays of the sun had faded. He rarely flew, preferring to drive himself to and from his home in Weare, New Hampshire—the very home in which his grandparents had lived—in his unassuming Volkswagen. When he was appointed to the Court, he famously moved himself from New Hampshire to Washington by U-Haul.

Books were one of his only indulgences. He ordered them relentlessly from catalogs, stacking them in towering piles in his chambers. By the time he retired,

he owned so many that he had to move out of his lifelong home because the house, quite literally, could not bear their weight.

Justice Souter's ascetic habits reflected a New England reserve that could seem off-putting, if not forbidding, at first—especially to someone like me, a more voluble and perhaps slightly neurotic New York City Jew. But beneath it was a kindness, a dry humor, and an elegance of character that inspired a deep loyalty among his clerks and others in his orbit.

That same deep-seated humility and modesty animated Justice Souter's approach to legal craftsmanship and judicial decision-making. Justice Souter believed that the quest for rhetorical flourish was dangerous to the enterprise of judging. As early as my clerkship interview, when I asked him about the first sentence of the joint opinion in *Planned Parenthood v. Casey*,¹ which I had (perhaps mistakenly) believed he had authored, he acknowledged the tension between precision and the temptation to write a sentence for the ages. He resisted that temptation at every turn and, instead, wrote with deliberate care and restraint, crafting opinions that were precise rather than poetic—even if they were written in his own distinctive prose.

Justice Souter's style mirrored his substance: thoughtful, restrained, unwilling to claim more than reason allowed. He rejected the false comforts of certainty. He embraced complexity, aware that the law often presents genuinely difficult questions about which reasonable minds can, and will, disagree and that it must evolve with “the accumulation of new empirical knowledge.”² Rather than retreat into rigid formalism or results-driven reasoning, he engaged with text, history, and precedent—and admitted, without embarrassment, when these materials pointed in different directions. His opinions reflected this intellectual honesty. They grappled openly with competing arguments, acknowledged the strongest points made on all sides of an issue, and explained, with painstaking clarity, why he ultimately reached the conclusion he reached.

That appreciation of law's complexity—and openness to its uncertainty—is what made Justice Souter the model common-law judge. On the one hand, he revered history and believed deeply that “the beginning of wisdom is to go slow.”³ Quoting his judicial hero, the second Justice John Marshall Harlan, he emphasized the importance of tradition in constitutional interpretation: “A decision of this Court which radically departs from [that tradition],” Justice Souter

1. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Liberty finds no refuge in a jurisprudence of doubt.”).

2. *Dist. Att’y’s Off. v. Osborne*, 557 U.S. 52, 104 (2009) (Souter, J., dissenting).

3. *Id.*

observed, “could not long survive, while a decision which builds on what has survived is likely to be sound.”⁴

At the same time, Justice Souter understood that traditions—and the values that underlie them—evolve and that the law has to evolve with them for it to be accepted as legitimate. “The usual thinking of the common law,” he wrote, “is suspicious of the all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles.”⁵ The law, he said, was “‘a living thing,’ . . . albeit one that moves by moderate steps carefully taken.”⁶

Justice Souter’s search for the equilibrium between these two competing forces—tradition on the one hand and social change on the other—is what led him to embrace an incrementalist approach to judging. That approach was guided by his understanding that the Court’s legitimacy and authority ultimately rest not on power, but on the trust of We the People. As the Court wrote in *Casey* (in a famous passage that was reportedly penned by Justice Souter⁷): “The Court’s power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”⁸ That legitimacy, for Justice Souter, could never be earned by force of personality or sweeping pronouncements. Such legitimacy came only from a judicial method that was honest about its own uncertainty.

For Justice Souter, the absence of a simple or unified theory of constitutional law was fundamental. As he put it in a justly celebrated commencement address at his alma mater, Harvard University, after his retirement from the Court, “The Constitution is a pantheon of values, and a lot of hard cases are hard because the Constitution gives no simple rule of decision for the cases in which one of the values is truly at odds with another.”⁹ The judge’s role, he continued, is to embrace the tensions that “the Constitution’s Framers left to be resolved another day; and another day after that, for our cases can give no answers that fit all

4. *Washington v. Glucksberg*, 521 U.S. 702, 765 (1997) (Souter, J., concurring) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

5. *Id.* at 770.

6. *Id.* (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

7. See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 54 (2007).

8. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

9. David H. Souter, Harvard University’s 359th Commencement Address (May 27, 2010), in 124 *HARV. L. REV.* 429, 435 (2010).

conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world.”¹⁰

This candor, humility, and care are the attributes that enshrine Justice Souter in the pantheon of great Supreme Court Justices. The irony, however, is that they are also the attributes that tempered his influence in life and may well do the same in death.

For one thing, they are the attributes that led him to do something almost unheard of in modern American life: walk away from one of the most powerful and prestigious posts in the country well before age or health demanded it. Justice Souter loved the Court, but he did not let being a Supreme Court Justice define who he was or prevent him from pursuing his other passions, from reading the precious books that he had accumulated to hiking in his beloved New Hampshire. He relinquished the trappings of the Court, the halls of power in D.C. (in which he never found comfort), and the daily proximity to history-making decisions to return to a simpler life that he found deeply satisfying but which others might have found mundane. To be sure, he did not fully give up the craft of judging that he held so dear: he sat regularly on the First Circuit. But it is hard not to wonder what additional marks he would have left had he spent his last sixteen years on the High Court.

Justice Souter’s modesty and humility, not to mention his innate reserve, also led him to eschew public life and celebrity. Don’t get me wrong: Justice Souter was a remarkable public speaker. He was full of erudition and wit. He displayed as much annually at our clerk reunions, when he would hold the floor for nearly an hour and speak without notes about history, the Court, and other issues of the day. And he certainly had important messages for the American people, as when he decried—in one of his few media appearances—“the pervasive civic ignorance of the Constitution of the United States and the structure of government.”¹¹

But such performances seemed to take their toll. He largely avoided them, purportedly “once telling a colleague that ‘in a perfect world, I would never give

10. *Id.*

11. See PBS NEWSHOUR, *Former Supreme Court Justice Souter on the Danger of America’s ‘Pervasive Civic Ignorance,’* at 00:40 (YouTube, Sep. 17, 2012), <https://www.youtube.com/watch?v=rWcVtWennro> [<https://perma.cc/85PQ-QNBU>] (“I don’t believe there is any problem of American politics and American public life which is more significant today than the pervasive civic ignorance of the Constitution of the United States and the structure of government.”); see also *id.* at 07:13 (“The support of civic education in the United States . . . is a public problem and a public responsibility which is second to none.”).

another speech, address, talk, lecture or whatever as long as I live.”¹² He did not author books. He never accepted awards. And he declined the teaching invitations that regularly came his way. Instead, he devoted himself to the bread-and-butter craft of judging. The net result is that he and his jurisprudence were comparatively unknown to most of the American public.

Most fundamentally, Justice Souter’s commitment to incrementalism and his refusal to foist a grand, unifying theory onto the Constitution – rooted as much in his deep-seated New England temperament as in his jurisprudence – meant that he would never be the hero of a movement or the standard-bearer of an “-ism.” His willingness to grapple with the law’s difficulties meant that, as much as Court watchers tried, he could not be pigeonholed, and his votes often defied expectations. It is precisely for that reason that some partisans found his jurisprudence so disappointing. For years, “no more Souters” was the rallying cry of certain commentators – as if his refusal to force every case through an ideological filter were a flaw, not a strength.

More Souters, however, are exactly what we need. We live in an era when judicial nominees are increasingly subject to ideological purity tests; when political leaders of all stripes and members of the public expect judges to fall in line with partisan politics or face consequences; and when too many judges write opinions as much for social media (judicial clickbait, if you will) as for the Federal Reporter.

Not so Justice Souter. Throughout his career, he remained committed to resolving legal questions carefully, but with measured, rather than thunderous, pronouncements. He was mindful of how his opinions were received, but not for the sake of generating publicity for himself; instead, he strove to ensure that his opinions contributed to the legitimacy of the law and the Court in the eyes of the American people. And he was committed to treating all who appeared before him, and all who crossed his path, with decency and respect.

All of these traits were evident in advice that Justice Souter imparted to me when, on the eve of my taking the judicial oath, he addressed me “as ‘Esquire’” for “the last time.” With respect to the law, he reminded me that “Learned Hand’s advice will always be the best, to give no quarter to absolutes.” And with respect to “the individuals who will appear before” me, he continued, “the obligation is always to honor all people; impossible to do some days, but one has to try. Making the attempt is a worthy way to spend a life.” In the nearly fourteen years since, I have tried hard to live by his words – and his example.

12. Adam Liptak, *A Warning from Justice Souter: Democracy Is in Peril*, N.Y. TIMES (May 12, 2025), <https://www.nytimes.com/2025/05/12/us/justice-david-souter-democracy-warning.html> [https://perma.cc/M222-Q97E].

In his 2010 Harvard address, Justice Souter spoke of his “belief that in an indeterminate world I cannot control it is possible to live fully in the trust that a way will be found leading through the uncertain future.”¹³ That was not just his view of life. It was his view of the Constitution. For those of us fortunate enough to have spent a year clerking in Justice Souter’s chambers, that trust became our inheritance and our guiding light. And for the Nation, it remains his legacy: the paradigm of a judge who showed that humility, patience, and intellectual honesty are not just judicial virtues but also the foundations of the rule of law itself.

Boss, rest in peace.

13. Souter, *supra* note 9, at 436.

THE YALE LAW JOURNAL

HEATHER K. GERKEN

“Better Than We Were”

It will be fifty years before historians dust off Justice Souter’s papers and bear witness to his judicial legacy. For the Justice’s clerks, none of this matters as we mourn the remarkable human being we loved.

The trope that clerks constitute a judge’s second family is not the truth. The truth is that there are judges whom only a family could love, and then there are judges whom clerks love like family. Justice Souter was of the latter sort.

Ironies abound. The man sometimes ridiculed for his solitary status—the rare male Justice who never had children—was revered like a father by his clerks. We all called him “the Boss,” as if we would never have another. The Boss never asked or expected us to stay late or work weekends, but we were there around the clock, just to be sure we gave him work that was worthy of him. We basked in the glow of his kindness and always tried to catch a little more time with him. The clerks who occupied the upstairs office would even invent reasons to come downstairs and linger at the coffee maker during the time when the Justice would typically refresh his cup.

The Justice looked after us outside of work as well. He once organized a car-pool—and served as one of its drivers—to ensure that all the clerks at the Court could attend the funeral of his clerk’s brother in Charlottesville. He watched the clock alongside my co-clerk, Ernie Young, while Ernie’s son was going through an operation.

Given how much we loved him, it’s not surprising that the Souter clerks were famous for fiercely protecting his privacy. When a journalist reported that he ate the same lunch each day—yogurt and an apple, down to the core—the clerks were ready to banish whatever idiot had spoken to the reporter. (Luckily, the idiot turned out to be a clerk from another chambers.)

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Our love for the Justice stemmed from who he was, not what he was. It was impossible not to be in awe of him. He possessed a deep moral clarity and yet had a clear-eyed view of the world. He was a judge’s judge whose aim was to resolve the case in front of him, not to use the case to change what he disliked. He was so dazzling and witty that we half convinced ourselves that he devised in advance the charming asides or humorous stories that would leave us laughing as he headed back to his office. He was unfailingly kind to everyone – patient even with the people who tried his introvert’s soul. He was deeply intellectual, insanely well read, and invariably wise; we all felt like pipsqueaks around him. And yet he would routinely praise our work and treat us as if we were his equals. It was practically a clerk parlor game to describe the way the Justice would take our incoherent ramblings, reframe them into an elegant idea, and then credit us for generating it in the first place. (His generosity had its limits, however, as the clerks never saw more than a few scraps of their draft text slip past his editing pen.)

Luckily for us, the Justice’s New England quirks made him less intimidating than he was. I may have been the only clerk of our Term who understood what he meant when he said he was thinking of establishing a “New England bank” (one where money was deposited but never withdrawn). But his accent, his hyperbolic disdain for travel outside of the Boston-New Hampshire corridor, the way he teased my co-clerk about paying \$11 for his son’s first haircut? His quirks let us imagine that he was a mere mortal like the rest of us.

Looking back across the years, I realize that the Justice’s fame and power nonetheless shaped my relationship with him. That’s unexpected given that the Boss cared not a whit for either, and we all loved the man, not his robe. But the backdrop of his position meant that modesty and kindness sometimes got in the way of my saying what should be said.

Because Justice Souter was such a genuinely humble person, I’m not sure he fully understood the unspoken love we had for him. The Justice loathed the trappings of power, the ways that he was treated by virtue of his status. Washington practically gave him hives, and the friendships he trusted were those formed before he stepped onto the national stage. That’s why he always seemed a bit surprised when we all showed up at every clerk reunion. After he retired, he was absolutely sure most of us would stop coming. It was one of the very rare instances when he got something flatly wrong.

The Justice’s modesty was why we needed to tell him how much he mattered. But for me, his kindness – another of the qualities I admired in him – somehow made it harder to say that out loud. Having witnessed his astonishing decency and graciousness to everyone, I found it hard to believe that he returned the full measure of affection I held for him. Every clerk had watched him deal gently with the many people who wanted to claim a relationship, even a small

interaction, with him because of his status. Those people annoyed the hell out of us. In public, we lurched around the Boss to buffer him, treating even well-meaning people as intruders.

And yet the moment we left chambers, most of us worried we might be taking more of his time than we deserved. I don't know how many times my co-clerks and I talked about whether it was okay to call or visit. After all, we would tell ourselves, there were more than a hundred of us. Was it okay to take up his attention just because he mattered so much to us? Given that he was kind to everyone, how would we know if we had become the intruders? No one wanted to be *that* clerk.

I recognize that it may seem strange that the Justice's virtues got in the way of my saying what needed to be said, but it's the truth. It took me a long, long time just to call him out of the blue and bask in the glow of his conversation. Eventually, I built up the courage to call him more often and even ring him at home. After a while, I even dared to call him on his birthday despite the Justice's rule against it, and I'd make him laugh by telling him what a terrible clerk I was to do so.

I feel both lucky and guilty about it all. But when I finally stopped worrying about taking up his time, our relationship shifted. I was able to feel the fatherly love that he had for all of his clerks. I was able to tell him how much I loved and admired him, how profoundly he'd affected how I thought and what I did. We even managed to get past our New England formality, and I always ended the phone calls with an "I love you, Boss." That was the last thing I ever said to him. My only regret is that I should have told him that the moment I left the job.

Like every one of his clerks, I always wanted to do the Justice proud. What I discovered was that I didn't have to do anything to make him proud. He loved all of us for who we were, not what we would become. The clerks had always loved him like a father, and it turns out that he loved us like a father as well. He saw in us more than we could see in ourselves.

As the clerks have grieved together across the last few months, we've swapped stories and photos and jokes. A number of us went back to listen to his eulogy for Justice Brennan. Bill Clinton spoke that day, and one would have expected the former president's oratorical skills to steal the show. But it was the Boss who made the Brennan clerks cry. Our Justice refused to speak of William Brennan, the Supreme Court Justice. Instead, he spoke of Billy Brennan, the man, and talked about what it was like to spend time with him:

“BETTER THAN WE WERE”

You remember how it was. We all remember. That’s why the good-bye comes so hard. How do we say farewell to the man who made us out to be better than we were . . . ?¹

I wish I knew the answer.

1. Justice Souter, Justice William Joseph Brennan, Jr., 1906-1997 – Eulogy at the Funeral Mass of Justice Brennan (July 29, 1997), *in* 7 B.U. PUB. INT. L.J. 1, 2 (1998).

THE YALE LAW JOURNAL

JEANNIE SUK GERSEN

Principles Don't Change

When I was clerking on the Supreme Court, the law clerks continued the end-of-term tradition in which we wrote and performed a parody show for all the Justices. Ours included a song-and-dance number in which factions of law clerks faced off as Jets and Sharks, ready to rumble.¹ One of our sketches was a video that was a send-up of my boss David Souter's reclusive reputation. We portrayed him as haplessly hiding from admiring throngs of women chasing him through the streets as he desperately sought to read—alone. And in a satire on how each of the Justices spent their retirement, Justice Souter was said to have become “a highly-regarded Hollywood event planner” and Elizabeth Taylor's tenth husband.

A person of uncommon elegance and decency, Justice Souter was easy for his law clerks to revere and to parody. Clerks have recounted incidents in which the boss might have casually assumed that, say, Dryden or Horace would be top of mind.² In his flinty New England accent, “Linda” sounded like “Linder,” “waistcoat” became “weskit,” and “computer” was “computah.” Of course, he didn't use a computer. He wrote only by hand in beautiful, but often indecipherable, penmanship and communicated with no electronic means whatsoever. I recall he once told me about the time he was forced into contact with the dreaded

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1. See LEONARD BERNSTEIN & STEPHEN SONDHEIM, *Jet Song, on West Side Story* (Columbia Recs. Sep. 29, 1957).
2. SUPREME COURT HISTORICAL SOCIETY, *Justice David H. Souter Remembered: A Tribute Conversation with Former Law Clerks*, at 22:45 (YouTube, July 17, 2025), <https://www.youtube.com/watch?v=iLvK2rPBKQ> [<https://perma.cc/ZYH5-GEFR>] (statement of Newsom, J., 11th Cir.).

internet—when the Court heard its first case about online pornography.³ He needed a crash course on what websites were. Seated between two librarians as his instructors, the unsuspecting Justice was told to type into the search bar a (deceptively) harmless-sounding web address. He was so appalled at what appeared onscreen—and mortified in the presence of those librarians—that he resolved not to go on the internet ever again.

The boss's unrepentant bibliophilia, his aversion to social life, his inordinate frugality, his disapproval of excess (to call something “rococo” was to damn it), his abhorrence of waste, and his old-timey rectitude (he compared New York City to Sodom) were the well-trod grounds of his clerks' affectionate ribbing. These qualities were also the source of his own self-aware humor about his reluctance to catch up with popular culture. He was quite serious, however, when he went to the Capitol to tell Congress that the judiciary is not “part of the entertainment industry.”⁴ “[T]he day you see a camera come into our courtroom,” he said, “it's going to roll over my dead body.”⁵

Several years into his tenure on the Supreme Court, Justice Souter authored *Campbell v. Acuff-Rose Music, Inc.*, a copyright opinion about parody.⁶ When I interviewed to be his law clerk eight years later, I was writing a student note about the case,⁷ and I was, of course, eager to discuss it with him. But until we were face-to-face in his chambers, I had missed the funniest aspect of the case: Justice Souter was quite possibly the person least likely to have otherwise encountered the rap song by 2 Live Crew, which the case concerned. “Big hairy woman you need to shave that stuff / Big hairy woman you know I bet it's tough / Big hairy woman all that hair it ain't legit,” and so on.⁸ Picturing the Justice at the desk writing in fountain-pen ink as the song played on repeat made me giggle.

In *Campbell*, Justice Souter found that 2 Live Crew's song could reasonably be perceived as commenting on, or criticizing, the original—Roy Orbison's “Oh Pretty Woman.”⁹ In the opinion for the Court, he wrote that 2 Live Crew's *Pretty Woman* “juxtapose[d] the romantic musings of a man whose fantasy comes true,

3. *Reno v. ACLU*, 521 U.S. 844 (1997).

4. *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body,'* N.Y. TIMES (Mar. 30, 1996), <https://www.nytimes.com/1996/03/30/us/on-cameras-in-supreme-court-souter-says-over-my-dead-body.html> [<https://perma.cc/4PJ6-7MUG>].

5. *Id.*

6. 510 U.S. 569 (1994).

7. Note, *Originality*, 115 HARV. L. REV. 1988 (2002).

8. *Campbell*, 510 U.S. at 595 (quoting 2 LIVE CREW, *Pretty Woman*, on As Clean as They Wanna Be (Atl. Recs. June 15, 1989)).

9. *Id.* at 583.

with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility.”¹⁰ Justice Souter interpreted the later song as “a comment on the naiveté of the original of an earlier day” and “a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies.”¹¹ (He slipped in that whether the work “is in good taste or bad does not and should not matter to fair use.”¹²) Whether or not he nailed the song’s purpose, I found it poignant that a man who so favored the aesthetics and manners of a bygone era had made an interpretation that associated an earlier day with naive and sentimental fantasy and the present one with a perception of ugly and debased reality.

Justice Souter’s idea that a later work was “shedding light on an earlier work, and, in the process, creating a new one”¹³ went beyond fair-use doctrine and opened a broader reflection on the relation between past and present in the process of interpretation. The Justice wrote that a key question to ask about the “purpose and character of the use” of the original is whether the later work “adds something new . . . altering the first with new expression, meaning, or message” and in that sense is “transformative.”¹⁴ In fair use, an author’s transformation of the original rendered his copying of the original permissible. But in law, judges must deny that their work is transforming past legal texts and precedents. And indeed, Souter is known as a Justice who particularly valued *stare decisis*. He famously wrote the part of the *Planned Parenthood v. Casey* plurality opinion explaining why it was important for the Court to preserve the core of *Roe v. Wade* rather than overrule it.¹⁵ But it was no secret that *Casey* significantly transformed *Roe* by retaining it. The Justice’s sensibilities regarding legal interpretation may not have been all that far off from his description, in *Campbell*, of work that was “altering the first with new expression, meaning, or message.”¹⁶

During his confirmation hearings in 1990, then-Judge Souter expressed to senators his own “interpretive position”: that “original meaning is controlling,” but not “original intent.”¹⁷ He repeatedly rejected the idea that the “specific

10. *Id.*

11. *Id.*

12. *Id.* at 582.

13. *Id.* at 579.

14. *Id.* at 578-79.

15. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-69 (1992).

16. *Campbell*, 510 U.S. at 579.

17. *The Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 161 (1990) (statement of Souter, J., 1st Cir.).

intent” of the text’s authors was the touchstone.¹⁸ He criticized the idea that “you may never apply a provision to any subject except the subject specifically intended by the people who adopted it.”¹⁹ Instead, in his “original meaning” approach, Souter said, one looks for “the principle that was intended to be applied”—a principle that the original text may reveal to be broader than the “applications which were originally and specifically intended by the framers.”²⁰ Pointing to how the Court’s interpretation of the Equal Protection Clause was transformed between *Plessy v. Ferguson* in 1896 and *Brown v. Board of Education* in 1954, Souter explained, “Principles don’t change, but our perceptions of the world around us and the need for those principles do.”²¹ He added that “[t]he experience of 58 years had allowed the Court in 1954” to perceive “something which they did not see in 1896.”²² Yet, it was still true that “the principle of equal protection was there,” unchanged in the Fourteenth Amendment, and “in the time intervening, we have gotten better at seeing what is before our noses.”²³ It turns out, constitutional interpretation was a bit like the 2 Live Crew song’s transformed perception of street-life realities precisely through a retention of the principles of Orbison’s original work.

Justice Souter understood that sometimes massive changes in perceptions of the world that come with the experience of time could mean that the interpretation of the original can consist of both a transformation and an unchanging principle. In a commencement speech at Harvard in 2010, Justice Souter observed that “[t]he Constitution embodies the desire of the American people, like most people, to have things both ways”—for instance, both security and liberty, and both liberty and equality.²⁴ Souter took a dim view of absolute rules and simple either/or binaries. Over the years, at times when it was easy to evince alarm over a debased reality in the present that seemed to break with the past, I have heard in my head the Souterian refrain (in his old Yankee accent), “We’ve been here before.”

Justice Souter, in his own way, embodied a principle of having things “both ways.” He was often seen as preferring to have lived in a past century and resisting transformations that modernity had wrought. But his pared-down way of life also represented “a minimalist discipline,” which struck me as “essentially

18. *Id.* at 129, 330.

19. *Id.* at 129.

20. *Id.* at 129, 161.

21. *Id.* at 303.

22. *Id.*

23. *Id.*

24. David H. Souter, Harvard University’s 359th Commencement Address (May 27, 2010), in 124 HARV. L. REV. 429, 433 (2010).

modern,” as I wrote, upon his retirement, in the *Harvard Law Bulletin*.²⁵ I elaborated:

It begins with his form of life, which is simplicity itself: reading; a spare lunch; work; time alone; a run; more reading. Great pleasure in the lack of excess or frill. Its deeper manifestation resides in his form of reasoning. The approach is to get things done while taking up the minimal space required within the realm of doctrine. In narrow passages between the rationales and principles of precedent, Justice Souter finds the room for assigning rights and remedies, getting from one place to another without wasted movement.²⁶

Within days of my publishing these words, a handwritten letter arrived from the Justice: “I’m at a loss to thank you, when a grateful disclaimer seems all I can honestly write. But I’ll just admit to loving your appreciation of the minimalism I do esteem; *Festina Lente* seems a good rule for judging.” I took his reference to the Latin paradox of urgent slowness as a nod to a two-sided balance of tensions in his way of being, which manifested in his judicial style.

At Harvard’s commencement in 2010, I sat behind Justice Souter on stage with fellow faculty, all bedecked in colorful robes, as he received an honorary degree. He was seated next to his co-honoree Meryl Streep, and their apparent rapport that morning had him smiling as widely as anything I’d seen. Just days later, the boss shared, in a letter written from New Hampshire, that when he was asked beforehand for his list of guests to invite, he’d said there were none. “I wasn’t going to ask anyone to come listen while others said nice things about me or while I talked,” he explained. “But now I realize that a day of such joy in one’s life should be shared, and it turned out to be my good luck, once again, to share it with you.”

For someone who was avowedly not one for socializing, Justice Souter certainly had the gift of the gab, in a most learned, witty, and graceful form. In conversation, he raised everything from the Korean War to George Balanchine to nineteenth-century French poetry to Bach—because he knew that my life had been touched by them. I have seen him do the same for others, with his encyclopedic ability for connection. And for all his bookishness and joy in spending time by himself, his humane and empathetic connection with the people who knew him—and laughed with him—inspired a pure and genuine love. Those were principles that didn’t change.

25. Harvard L. News Staff, *Striving Always to Get It Right: Reflections on David Souter*, HARV. L. BULL. (Jan. 1, 2010), <https://hls.harvard.edu/today/striving-always-to-get-it-right> [<https://perma.cc/KDB8-QC9H>].

26. *Id.*