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IN MEMORIAM: JUSTICE DAVID H. SOUTER

The editors of the *Harvard Law Review* respectfully dedicate this issue to Justice David H. Souter.

Chief Justice John G. Roberts, Jr.[*]

In a bench statement delivered when the Supreme Court convened on May 9, 2025, Chief Justice Roberts offered a tribute to Justice Souter. We are grateful to the Chief Justice for contributing a version of those remarks to this collection.

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Justice David Souter served our Court with great distinction for nearly twenty years. He brought uncommon wisdom and kindness to a lifetime of public service. After retiring to his beloved New Hampshire in 2009, he continued to render significant service to our branch by sitting regularly on the Court of Appeals for the First Circuit for more than a decade. He will be greatly missed.

Justice Stephen G. Breyer[*]

David Souter was my colleague, and he was my friend. Perhaps more than that, often we shared similar outlooks. Strangers would sometimes mistake one of us for the other. When I spoke to a group of Court visitors, sometimes one would ask if non-lawyers in Washington

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[*] Chief Justice of the United States.

[*] Associate Justice (Ret.), Supreme Court of the United States; Byrne Professor of Administrative Law and Process, Harvard Law School.

recognized me. I would reply, not often, but when they do, they always ask the same question. What is that? "Aren't you David Souter?" I found that flattering.

David had a good sense of humor. One summer, soon after I was confirmed and took my seat on the Court, David was having lunch with friends at Jake Wirth's restaurant in Boston. He noticed the waiter looking at him shyly. The waiter eventually came over and asked: "Aren't you that Justice on the Supreme Court — Justice Breyer?" "Yes," David replied. "What's the best thing about it?" the waiter asked. "Working with David Souter," David answered. "He's great."

The one time this routine backfired was when he was having lunch with another Justice's law clerk one day. One asked: "Is it true that you and Justice Breyer are often mixed up?" Then, noticing that that sounded critical, she quickly changed the question to: "Is it true that you and Justice Breyer are often confused?"

Legally, David was never confused. I often learned much listening to David. When facing a complex issue, say the statutory factors that help courts determine the existence in practice of racial discrimination, I would often find that David had written an earlier opinion that made the answer to the question clear. He was careful in his opinions to maintain the constitutional rights of individuals, say of speech, or religion, or privacy. He listened to others in conference or when speaking through their opinions, thereby making it easier for the Justices to reach agreement. He was careful when he wrote, taking proper account of language, record, precedent, values, and purpose.

David Souter and I served together on the Supreme Court for fifteen years. For me that was a great privilege. He was a great judge. He was intelligent. As I said, he had a good sense of humor. He was a thoroughly decent person. He thought mostly not of himself, but of the people the Constitution will serve. The judges will miss him, the lawyers will miss him, the country will miss him, and I will miss him very much indeed. He was my friend — my very good friend.

Judge Kevin Newsom[*]

This *In Memoriam* tribute comes far too early. Justice Souter wasn't supposed to die — certainly not yet. Yes, he was 85. But if ever there were someone built to live forever — eating his yogurts and cores-and-all apples, running his country roads, and hiking his beloved White

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Mountains — it was David Souter. The man had a lot of virtue and not much vice. He did things the right way, and he deserved longer. Life is unfair — in this case, heartbreakingly so.

In the limited space I have, I don't intend to evaluate Justice Souter's jurisprudence or legacy. My co-authors — esteemed scholars and historians, as well as two of his longtime peers — are all better suited to that task than I am. Rather than focus on the Justice's impact on the law, I want to say a few words about his impact on *me*. Fair warning: I can't even pretend to be an unbiased observer. Justice Souter gave me the biggest break of my professional life when, for reasons I still don't quite understand — I was, let's just say, a marginal candidate — he hired me to be one of his law clerks.

I well and truly revered David Souter. And not just because he rolled the dice on me as a 27-year-old nobody, but for who he was, what he stood for, and the lessons he lived. It's tough to distill so profound a figure, but I'll try. To my mind, four key characteristics defined the man: his towering intellect, his ruthless independence, his authentic modesty, and his bottomless generosity.

First, Justice Souter was brilliant. And not just in a yeah-yeah-of-course-he-was-smart kind of way. He possessed a sixth intellectual gear that very few do — and that I most certainly don't. He had all the tickets — Harvard College, a Rhodes Scholarship to Oxford, Harvard Law School, etc. To be clear, though, I'm not really talking about credentials — I'm talking about raw intellectual firepower. His mind just worked at a speed, and with a capacity, that I hadn't seen before — and, frankly, haven't seen since. My co-clerks and I used to say, only half-jokingly, that the Boss (as we called him) could have done the job without us. And he basically did: The Justice famously forbade his clerks to write bench memos any longer than *two* single-spaced pages. We were well-paid (er, overpaid) gut checks.

Second, Justice Souter was fiercely independent. He surely knew, for instance, that many of the Republicans who had urged his appointment to the Supreme Court were disappointed that he wasn't more reliably "conservative." And yet, he stuck to his guns. Perhaps most famously, in only his second year on the Court, the Justice co-authored the controlling opinion in *Casey*, which reaffirmed *Roe*'s central holding that the Constitution protects a woman's right to have an abortion.[1] Now, to be clear, Justice Souter's guns weren't my guns. He was a pragmatic, common-law judge; I'm a confirmed formalist.[2] I happen to believe it's pretty hard (which is to say essentially impossible) to square *Roe* with a proper understanding of the Constitution's text and history,

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[1] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860–69 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (reaffirming the "central holding" of Roe v. Wade, 410 U.S. 113 (1973)).

[2] *See generally* Kevin Newsom & Alana Frederick, *Snails, Trains, and Pragmatist Claims*, 138 HARV. L. REV. 1055 (2025) (book review).

and I think the Court rightly overruled it in *Dobbs*.[3] But it took guts — independence of mind — for Justice Souter to cast a decisive vote to uphold *Roe*'s essence, especially so early in his tenure. And although over the course of his career the Justice increasingly voted with the Court's "liberal" bloc, he wasn't dogmatic about it — he cut his own path when his reading of the law required it. From my own clerkship year, two instances stand out. First, in *Bush v. Gore*,[4] Justice Souter penned a separate opinion carefully explaining his middle-ground position — namely, that (1) just as the per curiam opinion held, the haphazard vote-counting method sanctioned by the Florida Supreme Court violated the U.S. Constitution,[5] but (2) contra the per curiam, the state should have been given an opportunity to cure the violation.[6] (He also conspicuously declined to join Justice Stevens's lead dissent, which pointedly accused his colleagues in the majority of having undermined "the Nation's confidence in the judge as an impartial guardian of the rule of law."[7]) Second, in *Atwater v. City of Lago Vista*,[8] Justice Souter wrote for a bare 5-4 majority — comprising himself and the "conservatives," if you will — holding that, for good or ill, as originally and historically understood, the Fourth Amendment didn't, and thus doesn't, forbid police officers to make full-scale custodial arrests even for minor, fine-only offenses.[9] The point: Justice Souter knew who he was, and he followed the law where it led him, no matter who he annoyed in the process. I was watching.

Third, Justice Souter was humble. With all his learning, all the jewels in his academic crown, all his professional accomplishments, Justice Souter had reason to be cocky, arrogant, pretentious. And yet, he was none of those things. He lived a quiet, modest life. He didn't give speeches; he didn't do book tours; he didn't spend his summers teaching in Europe. Most notably — and today, almost unimaginably — he resigned his seat on the Supreme Court at the height of his power and (in judge years) in the prime of his career. Who does that — who walks away from that kind of clout? David Souter does. As I said in an interview shortly after the Justice's death, "he was . . . the one guy who didn't think that being on the U.S. Supreme Court was the pinnacle of one's existence."[10] I hope and pray that, along the way, I've picked up even a fraction of the Boss's humility. (Of course, I have a lot less to be

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[3] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

[4] 531 U.S. 98 (2000).

[5] *Id.* at 133–35 (Souter, J., dissenting).

[6] *Id.*

[7] *Id.* at 129 (Stevens, J., dissenting, joined by Ginsburg & Breyer, JJ.).

[8] 532 U.S. 318 (2001).

[9] *Id.* at 326–54.

[10] ADVISORY OPINIONS, *A Charge on Gettysburg*, at 09:39 (The Dispatch, May 20, 2025), https://thedispatch.com/podcast/advisoryopinions/a-charge-on-gettysburg [https://perma.cc/3CU4-JBBC].

prideful about, but still . . . .) I do think I share his basic outlook. I love my job — the legal puzzles, the contests of ideas, and, in my weaker moments, perhaps even the winning. But I love people more. Being a judge is what I do — it's not who I am. That feels pretty Souter-ish, and it feels right.

Finally, Justice Souter was unfailingly generous. The rap on lifelong bachelors, of course, is that they can get a little too set in their own ways, and if the condition worsens, *more* than a little self-absorbed. Now, let's be honest, the Boss was (adorably) a creature of habit, a man of routine. His quirks and ticks were legendary — the daily yogurt-and-apple lunches, the washed-and-reused plastic utensils, the particular (and particularly odd) weekly suit rotation, the Harvard-themed ties ("It's commencement week!"), the pocket watch, etc. But unlike so many others of his station, Justice Souter never surrendered to egoism. Quite the contrary: At least in my experience, he was always in search of ways to lift others up — to make them feel seen and special. Most conspicuously, he was the undisputed master of handwritten correspondence, a lost art. Two of his notes are among my most prized possessions, and they'll tell you a little something about his big-hearted spirit. Shortly after I was confirmed, Justice Souter sent me a short message scrawled on his official stationery: "Godspeed you on, Judge." It occupies a privileged piece of real estate in my chambers today. Even more dear, when my first son was born about a year after my clerkship ended, the Justice penned a poem — a poem! —in his honor: "Be fate and fortune ever partial/To chambers' baby/Kevin's Marshall."

What a judge — what a man. David Souter's was a life well lived. Godspeed you on, Boss.

Jeannie Suk Gersen[*]

At my interview for a clerkship with Justice David Souter, I quickly realized that he had taken the trouble to read the book that had started as my dissertation on French literature. My own mind had since moved on to preoccupations of the legal sysem, but a lot of our conversation during the interview was about poetry. Toward the end of the hour, he put to me a pointed question about how my prior studies might affect my ability to be an effective law clerk. He had observed quite a bit of abstraction in my work. But at the Court, he said, "we're trying to get

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[*] John H. Watson, Jr., Professor of Law, Harvard Law School; former clerk to Justice David H. Souter. Thanks to Alex Curylo for excellent research assistance.

some things done." I replied that that was why I had chosen to pursue a life in law.

The first merits case that I was assigned as a clerk for the Boss concerned how long the police must wait at the door after knocking.[11] Officers in Las Vegas executing a search warrant for cocaine had waited fifteen to twenty seconds before crashing open the door to a small apartment with a battering ram.[12] During oral argument, Justice Souter posed a hypothetical in which the search warrant was instead for "a stolen grand piano."[13] It caught on and the piano came up five additional times in the hour. Justice Souter's opinion for the Court held that fifteen to twenty seconds was long enough, in part because that's how long it might take someone "to rid his quarters of cocaine."[14] But Justice Souter also made the point that "[p]olice seeking a stolen piano may be able to spend more time to make sure they really need the battering ram."[15] And amidst the concern about evidence being flushed away, he never used the word "toilet," positing that "a prudent dealer" — a "prudent" dealer? — keeps the drugs near "a commode," which was a term I had to look up.[16]

The appearance of a stolen piano (rather than a more common unflushable item like a television), a commode, and prudence — in the case of a crack-cocaine conviction — were vintage Souterisms: gently rebellious insertions of old-world sensibilities within decidedly contemporary contexts. A few years later, in a different Fourth Amendment case, the police had found cocaine after a warrantless entry into a couple's home as the wife consented and the husband refused entry.[17] Justice Souter's opinion for the Court discussed the importance of "widely shared social expectations" in assessing reasonableness, and included a hypothetical in which "a caller standing at the door" has "an invitation" to enter[18] — terms from a bygone era's social codes, of gentlemen, ladies, customs, and etiquette — in a case involving police, disorderly domestic disputes, and a drug conviction.[19]

Just as the indelible traces of old-world manners were present in Justice Souter's judicial output, they were embedded in his friendship. Looking back, I can trace the events in my life by the arrival of elegant yet intimate letters, handwritten on engraved Supreme Court stationery: on the birth of a child, a new job, tenure, and others, including ones he

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[11] United States v. Banks, 540 U.S. 31 (2004).

[12] *Id.* at 39–41.

[13] *See* Trancript of Oral Argument at 9, *Banks*, 540 U.S. 31 (No. 02-473), https://www.supremecourt.gov/pdfs/transcripts/2003/02-473.pdf [https://perma.cc/BF3L-JUV5].

[14] *Banks*, 540 U.S. at 40.

[15] *Id.* at 41.

[16] *Id.* at 40.

[17] Georgia v. Randolph, 547 U.S. 103 (2006).

[18] *Id.* at 111–13.

[19] *See* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 114–16 (2009).

learned of from his alma mater's publications touting its faculty's doings. Even more touching were letters that didn't mark milestones, but rather, rememberance of a moment's company: a walk through Harvard Yard, or a conversation that inspired a chuckle or a recollection of a literary work. "I should really be sending you a very long-form thank you," he once wrote, in self-reproach for falling short of his own expectations, even while being uncommonly considerate and appreciative of others.

At a reunion of Souter clerks, my co-clerks and I poked fun at our boss's shunning of modern technology, in a performance of songs supposedly found on an iPod dropped on the path of his nightly jog. I played a Bach fugue on the Court's grand piano, my co-clerk rapped about his three-piece suits, and we all sang to the tune of "Yesterday," by the Beatles, about nostalgia for moderation. "I wanted to hear more Bach," he said plaintively afterwards. As clerks who'd knocked ourselves out trying to adjust our drafting to the Justice's style, we lobbed more than one joke about his quirky prose and defiance of common grammar. In a letter to me years later, he wrote: "If only I could write a sentence that might be mistaken for one from Henry Adams, I'd depart justified. Well, I'm not justified and not departing (not soon, I hope)."

In the same term as what I still call the grand-piano case, Justice Souter authored the plurality opinion in *Missouri v. Seibert*,[20] a case about an interrogation strategy in which the police first purposely withheld *Miranda* warnings, and only after questioning the suspect and getting a confession, gave *Miranda* warnings and got a repeat of the confession.[21] Some Justices found it straightforward, under *Oregon v. Elstad*,[22] that only the first of the two interrogations violated *Miranda* and that the second confession was admissible at trial.[23] Justice Souter saw it differently. Rather than accept the framing of the two-step police technique as two distinct interrogations — one unwarned and the other warned — Justice Souter understood that in practical terms it was one questioning session, with a "midstream recitation warnings";[24] as he put it, an insertion of *Miranda* warnings "in the midst of coordinated and continuing interrogation."[25]

The connection of concept to reality made a deep impression when the Boss asked that we listen together to the tape of the interrogation that had taken place soon after Patrice Seibert's arrest for murder at

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[20] 542 U.S. 600 (2004).

[21] *Id.* at 604.

[22] 470 U.S. 298, 318 (1984) ("[A] suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confession after he has been given the requisite *Miranda* warnings.").

[23] *Seibert*, 542 U.S. at 627–29 (O'Connor, J., dissenting).

[24] *Id.* at 604 (plurality opinion).

[25] *Id.* at 613.

three AM in Rolla, Missouri.[26] What had preceded it was that, when her severely disabled child died, she'd feared that authorities would think it was from neglect.[27] Her teenage son and his friends then set fire to her mobile home to make it look as if the child's death was caused by the fire; they also left sleeping inside the trailer a mentally disabled teenage boy who lived with the family, so that it wouldn't appear that her younger child had been left alone.[28] After the officer turned on the tape recorder, he administered the *Miranda* warnings and said: "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?"[29] When Siebert's answers were not self-incriminating as to the teenager's death, he pushed: "'Trice, didn't you tell me that he was supposed to die in his sleep?" The officer repeated the question until Siebert replied, "Yes."[30]

The words in the transcript did not capture the bleak sounds of exhaustion, abjection, and hopelessness, borne of poverty, incomprehension, and grief. They became vivid upon hearing Seibert's low, slow, and unsure yet eventually rote-seeming replies of "yes," as if hypnotized or half asleep. We listened while holding eye contact. The inflections, the pauses, and the tenor of the interaction were clues to a reality that one could easily miss on the page. I saw that, for the Boss, such a reality could point to the correct legal concept; the warnings had come in the midst of one interrogation, not at the start of a separate one. Making visible an integrated whole, not two "independent interrogations subject to independent evaluation,"[31] mattered legally. The concept of one rather than two corresponded to Justice Souter's appreciation of the realistic effect on a suspect's understanding of her rights when the warnings merely "punctuate" the questioning "in the middle."[32]

Sometimes the Boss was more explicit in his teaching, and I was deeply abashed on one occasion that demanded it. Capital punishment cases came to the Court regularly in the form of emergency stay petitions from death row prisoners, which were often decided on the day of — sometimes even minutes before — scheduled executions. A law clerk from each chambers assigned to a particular death case typically stayed late into the night and did not leave the building until the end — which was nearly always death of the petitioner in a far-away prison, followed by the "ALL CLEAR" email to the clerks from the Court employee known informally as "the death clerk." These cases took a toll on me, precipitating nausea, an inability to eat, and insomnia.

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[26] *Id.* at 604–05.
[27] *Id.* at 604.
[28] *Id.*
[29] *Id.* at 605.
[30] *Id.*
[31] *Id.* at 614.
[32] *Id.*

After months and months, though, something worse was true: The capital cases became so routine in the work flow, and the decisions were so invariably denials of petitioners' claims, that a numbness that looked like indifference could set in. There was a gruesome mundanity that Justice Harry Blackmun had captured, in 1994, stating: "From this day forward, I no longer shall tinker with the machinery of death."[33] I believe that during a conversation in which I ticked through technical legal points and likely seemed jaded at the predictability of the result, Justice Souter sensed my desire to be done. He soon made sure to speak with me about it.

The Boss told me first that he understood my weariness. That we had to resist the burnout that can come from working on executions week after week. And that we owed each person a full alertness to their humanity in considering life-and-death legal claims. He delivered a devastating talking-to in the most empathetic and graceful manner imaginable for a boss communicating the equivalent of "Pull it together." I've never forgotten the impact of his deliberate way of being kind and direct, gentle and trenchant, embracing and pointed, all at once, to render a jolt essential to the ethical life of a young legal professional. His compassionate reproach was aimed to set a mentee toward true north, a focus on human lives affected by legal process.

Soon after a fall day at Harvard, in 2009, during which Justice Souter spoke in Emerson Hall and visited with faculty and students, he wrote with gratitude for the experiences of the day, which included meeting a hero of his, Louis Menand, the author of a favorite book, *The Metaphysical Club*,[34] and "all the joys of home-coming and affection at Lowell House," his undergraduate house, where I had also lived during law school. The Boss shared that the question he kept asking on the drive home was: "How could I be so lucky?" Rereading his letters this year after his passing, I saw that his appreciation of good luck was a recurrent theme. That only underscored for me how grateful I am, and how fortunate the world was, to have known something of David Souter's mind and character.

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[33] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

[34] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA (2001).

JUSTICE SOUTER, THE READER

Heather K. Gerken[*]

It is a mistake to read a famous judge's obituaries when you are grieving him. I know I shouldn't blame reporters for offering one last recounting of the tidbits they took to be interesting about David Souter's life — his lifelong bachelorhood, the tick tock behind his nomination, the fact that he eschewed a fancy place in D.C. for a small family farmhouse in New Hampshire. But it was tough to witness the legacy of a great common law judge, and a man of enormous integrity and grace, reduced to such trivia.

If there was one detail that mattered about Justice Souter, it wasn't that he ate his apple to the core or eschewed the Washington social scene. It was that the Justice was a reader. To me, that small, human detail explains a great deal about the person he was and the judge he became.[35] And that small fact helps unlock the "mysteries" that mystified none of us who knew him.

The Justice cherished books. He owned so many that he eventually had to move out of his family farmhouse because the ancient structure couldn't bear the weight of them. We clerks used to joke that his early retirement was motivated by a New England reader's guilt for not having yet read all of the books he'd purchased. He once told me that he planned to become a bookbinder upon retirement. It was as wildly implausible as his plan to open a "New England bank" — one where money was deposited but never withdrawn — but it captured his deep love for the written word.

Readers share many qualities, but perhaps the most important is the willingness to step outside their own experiences and immerse themselves in another's. Like all true readers, the Justice possessed that rare combination of empathy and openness that allows for genuine learning.

And the Justice did learn during his time on the bench. The vast world came to the Court's doors, and the Justice was enough of a reader to pay attention. The cert process brought forward an array of cases that would shock any judge with decency. And thus the man who had exercised his discretion with integrity as a prosecutor, attorney general, and judge encountered decisions by those who had not. Members of the "no more Souters" camp convinced themselves that the Justice had concealed his true self during his hearings, but they were just wrong about

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[35] I am grateful to Professor Alfred Mathewson for helping me frame this argument.

that.[36] Throughout his service, Justice Souter remained the same judge he was on the day he was confirmed. What changed were the facts before him.

One of the things I found most astonishing about Justice Souter was that a man who was raised in a racially homogenous community managed to carve out such a distinctive and thoughtful position on the Voting Rights Act.[37] As I've written elsewhere,[38] Justice Souter viewed majority-minority districts — whose creation was mandated by the Voting Rights Act — as the key to pulling outsiders into the political system and giving them a stake in it. He believed that majority-minority districts drawn along racial lines were similar to Boston's Italian and Irish districts or Chicago's Lithuanian and Polish wards. In his words, these districts "allowed ethnically identified voters and their preferred candidates to enter the mainstream of American politics,"[39] eventually reducing the salience of ethnic identity as these communities began to understand of themselves as part of the system, not outside of it.[40] You won't be surprised to know that he arrived at that conclusion because he read a lot of history.

Humility is also the hallmark of a reader. Those interested only in their own narrative rarely pay attention to other people's stories. The Justice, in contrast, never came to a question with an answer. In every single case he decided, he did the painstaking work of figuring out what the answer should be. And he did it himself. In preparing for the docket, the Boss read every brief and every relevant case. While some judges rely heavily on their law clerks' bench memos, Justice Souter refused even to look at the bench memo until he'd finished his own review. He treated bench memos not as a guide to the answer, but as a way to check his own, independently drawn conclusions.[41]

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[36] I recognize that I am not objective on this issue, so I'll simply invoke the great Linda Greenhouse, who wrote:

> Those who expressed such surprise, who either implicitly or directly accused Justice Souter of having portrayed himself one way and of turning out to be something else entirely, either failed to pay attention to his testimony before the Senate Judiciary Committee during his confirmation hearing in September 1990, or chose not to believe what they heard.

Linda Greenhouse, *David H. Souter, Republican Justice Who Allied With Court's Liberal Wing, Dies at 85*, N.Y. TIMES (May 9, 2025), https://www.nytimes.com/2025/05/09/us/david-souter-dead.html [https://perma.cc/5LJ5-GP24]

[37] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

[38] Heather K. Gerken, *Race, Voting Rights, and the Genius of Justice Souter*, AM. PROSPECT (May 1, 2009), https://prospect.org/article/race-voting-rights-genius-justice-souter [https://perma.cc/RE7Z-NCQP].

[39] Bush v. Vera, 517 U.S. 952, 1074 (1996) (Souter, J., dissenting).

[40] This sentence paraphrases another from Gerken, *supra* note 38.

[41] The Justice didn't just reach his own conclusions, but drafted his own opinions. I suspect that the clerks can claim credit for no more than three or four sentences that appeared in all of the opinions he published each Term. It is a testament to the clerks' deep love for Justice Souter that

The Justice's humility helps explain why he was one of the Court's great common law judges.[42] Common law judges don't see themselves at the center of the judicial narrative. They place trust not in their own answer, but in the answers developed across cases and across time. Judges interested in their own narrative, in sharp contrast, come to every question with an answer of their own — one theory to rule them all, with apologies to Tolkien. I know there were some who were disappointed that the Justice didn't leave an outsized imprint on the case law. That left me to wonder why our image of the great judge is one whose aim is to recast the law in his own image.

Common law judges certainly change the law as they build it. But they do so in a workmanlike fashion — incrementally, case by case, testing out old principles on new facts and modifying those principles in turn. Common law judges care about craft. They care about facts. They care about getting the right answer, whether their fingerprints are visible or not. Wisdom emerges from the common law, to be sure. But it accretes layer by layer, and no one takes credit for it.

The adjective "workmanlike" might seem like damning with faint praise, but to a common law judge it is high praise indeed. Craft is what knits together our profession and makes it an honorable one. The Justice revered the Court as an institution, but he never lost track of the simple values of lawyering and the elementary aims of judging. He once insisted that "the judicial paradox [is] that we have no hope of serving the most exalted without respecting the concrete."[43] In describing the work the Court does, he turned to the myth of Antaeus, "the giant who drew his strength from contact with the earth."[44] Even Hercules could not beat Antaeus until he "had the wit to hold [the giant] aloft with his feet flailing uselessly in the sky."[45]

I miss the Boss every day. And in these highly polarized times, I also miss the example he set and am grateful for every judge who upholds the values the Justice cherished.

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we all understood ourselves to be "useless appendages" and yet still counted the chance to work for him as the best job we ever had. *See* Heather Gerken, *Clerking For Justice Souter*, 35 J. SUP. CT. HIST. 4, 5 (2010).

[42] *Id.* at 6.

[43] *Id*. (quoting Justice Souter).

[44] *Id*.

[45] *Id.*

Noah Feldman[*]

As a justice of the Supreme Court, David Hackett Souter was a Burkean and a common law lawyer, committed to the gradual, stepwise, precedent-driven development of the law. He respected stare decisis while recognizing that changed circumstances demanded that the law evolve, and that judges must gently drive that evolution. Justice Souter made these views clear at his confirmation hearings, where he acknowledged the influence of the second Justice John Marshall Harlan.[46] His coauthorship of the opinion for the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[47] was plainly anticipated by his statement at the hearings that "I believe that the due process clause of the [fourteenth] amendment does recognize and does protect an unenumerated right of privacy."[48]

But Justice Souter did more than follow Justice Harlan. He offered a profound philosophical-jurisprudential justification for why judges should follow Justice Harlan's approach. To do so, he connected Justice Harlan's well-known account of living tradition drawn from history to Isaiah Berlin's influential notion of value pluralism, the idea that in the real world, values necessarily conflict.[49] Justice Souter's theory can be seen in his 1991 confirmation hearings, immediately before he commenced his career on the Supreme Court, and in his 2010 Harvard commencement address, which he delivered shortly after stepping down from the Court. In between, it can be viewed as applied in his decisions. In what follows, I shall briefly sketch the Souter theory of constitutional decisionmaking and value pluralism, and illustrate its application in one of Justice Souter's most influential opinions: *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,[50] the St. Patrick's Day parade case.

Begin with Justice Harlan's canonical formulation of substantive due process, to which Justice Souter referred repeatedly at his

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[46] *See The Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 101st Cong. 304 (1991) [hereinafter Souter Confirmation Hearings].

[47] 505 U.S. 833 (1992).

[48] Souter Confirmation Hearings, *supra* note 46, at 54. Souter went on to tell then-Senator Joe Biden: "But I understand from your question, and I think it is unmistakable, that what you were concerned about is the principal basis for deriving a right of privacy, and specifically the kind of reasoning that I would go through to do so. And in response to that question, yes, I would group myself in Justice Harlan's category." *Id.*

[49] In one of Berlin's later formulations, "the world that we encounter in ordinary experience" is one in which "we are faced with choices between ends equally ultimate, and claims equally absolute, the realization [sic] of some of which must inevitably involve the sacrifice of other." ISAIAH BERLIN, LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 213-14 (Henry Hardy ed., 2002).

[50] 515 U.S. 557 (1995).

confirmation hearings. Dissenting in *Poe v. Ullman*,[51] in which the Court declined to reach the argument that a law barring the sale of contraception violated substantive due process, Justice Harlan wrote that the doctrine of substantive due process "has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[52] Having described due process doctrine as a balance, Justice Harlan explained, roughly speaking, how that balance should be determined. "The balance of which I speak," he wrote, "is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke."[53] In a coda that drew on the metaphor of living constitutionalism first introduced into the U.S. Reports by Justice Oliver Wendell Holmes,[54] Justice Harlan concluded: "That tradition is a living thing."[55]

It is worth noting, if only in passing, that this formulation provides the *locus classicus* and origin point for various versions of "history and tradition" constitutionalism, including those being deployed by Justices today who claim to be originalists and to reject the idea of a living Constitution. For Justice Souter, who adhered to the ideal of living Constitutionalism,[56] the Harlan formulation nevertheless posed a problem, "the problem of how to keep from a totally undisciplined and totally nonobjective approach to the search for meaning."[57]

Originalists, of course, would respond that the way to avoid this problem is to reject the idea of living constitutionalism altogether and restrict interpretation of the Constitution to its history. Justice Souter, however, took a different view. In his confirmation hearings, he put it this way:

> I think that a fair reading of the Constitution of the United States . . . compels the conclusion that there were values, in the case of our discussion a value of privacy, which were intended to be protected even though they

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[51] 367 U.S. 497 (1961).

[52] *Id.* at 542 (Harlan, J., dissenting).

[53] *Id.*

[54] Missouri v. Holland, 252 U.S. 416, 433 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.").

[55] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[56] In contrast, Justice Souter's version of living constitutionalism was true to Justice Harlan's. At his confirmation hearings, Justice Souter explained that Justice Harlan had "asked us to make a search . . . quite specifically to the subject of the American tradition, and search for evidence of that understanding of what might be called a bedrock concept of liberty, which is explained and indicated and illustrated by the history and traditions of the American people in dealing with the subject of liberty." Souter Confirmation Hearings, *supra* note 46, at 140.

[57] *Id.*

> were not spelled out in blackletter detail. And the difficulty that the judges have facing that fact — if, indeed, like me they accept it as a fact — is the difficulty of finding a discipline [sic] process for giving content to what we call the unenumerated — or the category of unenumerated rights. This has been a source of great difficulty over the years. *But this is a difficulty which the judges simply cannot avoid.* If they accept the view that I espouse that a search for meaning and for content of the notion of liberty is necessary, then they have got to face this problem.[58]

Justice Souter's argument here is that the Constitution contains values that must be worked out over time. Judges have the duty to interpret the Constitution. Consequently, judges must make value determinations — there is no other way, short of denying that the Constitution contains values at all.

In his commencement address nineteen years later, Justice Souter returned to this argument, once more deploying the language of values. "The Constitution is a pantheon of values," he said:

> 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. Not even its most uncompromising and unconditional language can resolve the potential tension of one provision with another, tension the Constitution's Framers left to be resolved another day; and another day after that.[59]

Here Justice Souter goes a step beyond the claim that the Constitution contains values that judges must interpret. He applies, albeit without direct citation, Isaiah Berlin's teaching that values necessarily conflict with one another.[60] Given that values do conflict with another, it follows, for Souter, that interpretation of values in the Constitution will require choosing among values. Again, as Justice Souter told the Senate in 1991, the judicial act of choosing is inevitable. This inevitability of value choices "show[s] how egregiously it misses the point to think of judges in constitutional cases as just sitting there reading constitutional phrases fairly and looking at reported facts objectively to produce their judgments."[61]

To illustrate Justice Souter's theory in practice, consider his opinion for the Court in *Hurley*, relied on recently in *Moody v. NetChoice, LLC*.[62] The Massachusetts courts had applied an antidiscrimination public accommodations law to require the organization that controlled the Boston St. Patrick's Day parade to allow a float expressing Irish-

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[58] *Id.* (emphasis added).

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

[60] Berlin himself attributed value pluralism to James Fitzjames Stephen. *See* Letter from Isaiah Berlin to Charles Blattberg (March 19, 1996), *in An Exchange with Professor Sir Isaiah Berlin*, ISAIAH BERLIN VIRTUAL LIBR., https://berlin.wolf.ox.ac.uk/lists/onib/blattberg.pdf [https://perma.cc/FUW3-FC3Y].

[61] Souter, *supra* note 59, at 435.

[62] 144 S. Ct. 2383 (2024); *see id.* at , 2401–04.

American gay pride.[63] Justice Souter's opinion held that doing so infringed the free-speech rights of the parade organizers. Justice Souter took pains to articulate the values conflict that the case raised, even though the parties had not put it that way: "It might . . . have been argued," he wrote:

> that a broader objective [of the antidiscrimination law] is apparent: that the ultimate point of forbidding acts of discrimination toward certain classes is to produce a society free of the corresponding biases. Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction.[64]

This analysis instantiates Justice Souter's view that deciding the case required the Court to choose between competing values, namely antidiscrimination and equality on the one hand and freedom of speech on the other.

Consistent with his theoretical approach, he went on to reason that one of the values, in this case the value of liberty, must prevail: "[I]f this indeed is the point of applying the state law to expressive conduct, it is a decidedly fatal objective."[65] His reason was ultimately based in what he characterized as the free-speech tradition: "Having availed itself of the public thoroughfares 'for purposes of assembly [and] communicating thoughts between citizens,' the Council is engaged in a use of the streets that has 'from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.'"[66]

The reference to a free-speech right said to extend to "ancient times" brings us full circle to Justice Harlan's account of liberty grounded in tradition that may be gleaned from history. As Justice Souter surely knew, it is highly doubtful whether the right of public assembly for purposes of communication may be accurately characterized as ancient in the formal historical sense of the term. That is probably why he followed the reference to the ancient past with a more precise, albeit less grand, proposition: "Our tradition of free speech commands that a speaker who takes to the street corner to express his views in this way should be free from interference by the State based on the content of what he says."[67]

Justice Souter's reliance on First Amendment tradition to resolve the conflict of values between equality and liberty in *Hurley* exemplifies the method he described in his view of constitutional interpretation hearings

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[63] *See Hurley*, 515 U.S. at 559.

[64] *Id.* at 578–79.

[65] *Id.* at 579.

[66] *Id.* (citing Hague v. Comm. for Indus. Org., 307 U. S. 496, 515 (1939) (opinion of Roberts, J.)).

[67] *Id.* For this proposition, Justice Souter offered one exemplary citation from a case and two comparative citations to influential First Amendment scholars: "*See, e.g.*, Police Dept. of Chicago v. Mosley, 408 U. S. 92, 95 (1972); *cf.* H. Kalven, A Worthy Tradition 6–19 (1988); Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408–1409 (1986)." *Id.*

and his commencement address. There is a plurality of conflicting values, and the justices must choose among them. To make that choice in a way that was not "totally undisciplined and totally nonobjective," Justice Souter relied on living tradition, as did Justice Harlan.

At the end of his commencement address, Justice Souter described the difference between his view of the Constitution and that of the originalists as resting on "my 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."[68] The acknowledgment of indeterminacy and the impossibility of control is Holmesian-pragmatist.[69] But the trust — the full trust — is all Souter:

> If we cannot share every intellectual assumption that formed the minds of those who framed the charter, we can still address the constitutional uncertainties the way they must have envisioned, by relying on reason that respects the words the Framers wrote, by facing facts, and by seeking to understand their meaning for the living. That is how a judge lives in a state of trust, and I know of no other way to make good on the aspirations that tell us who we are, and who we mean to be, as the people of the United States.[70]

Justice Souter's trust is, and was, a form of faith. Value pluralism makes value choices inevitable for justices in our constitutional system. The justices must make those choices on the basis of the best reading of our living history and our living traditions. Whether this "experiment," as Justice Holmes called it, will succeed in an indeterminate world we cannot control is by necessity unknowable, Justice Souter intimated. But Justice Souter also wanted us to know that, with regard to this central question of our constitutional tradition, he lived "in a state of trust."

That trust will stay with me. The day after he died, I wrote:

> Clerking for Souter was the privilege of a lifetime. His kindness, his charm and his elegance of character were all palpable beneath the formidable facade of New England reserve. Sitting in his office exchanging ideas and stories with him, as the light faltered, I knew, as I have rarely known anything before or since, that I was in a chain of transmission that went

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[68] Souter, *supra* note 59, at 436.

[69] *Cf.* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.").

[70] Souter, *supra* note 59, at 436.

back to the Puritan fathers who were his literal ancestors and my metaphorical ones. He was the best and wisest man I have ever known.[71]

[71] Noah Feldman, Opinion, *David Souter Set an Example for the Supreme Cour*t, BLOOMBERG (May 9, 2025, at 14:24 ET), https://www.bloomberg.com/opinion/articles/2025-05-09/david-souter-set-an-example-for-the-supreme-court [https://perma.cc/6Z5Z-TQXV] .