THE INCONSPICUOUS DHS: THE SUPREME COURT, CELEBRITY CULTURE, AND JUSTICE DAVID H. SOUTER

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INTRODUCTION

On July 23, 1990, President George H. W. Bush announced his nomination of Judge David H. Souter to the Supreme Court of the United States. Souter would replace Justice William Brennan, who had submitted his resignation only three days earlier. The press conference took place in the late afternoon, and Judge Souter, tired from the whirlwind of events that led to his selection and sporting a dark five o'clock shadow, stood awkwardly by as the President made the announcement. Souter—who later described himself as having been "in a state of virtual shock"[1]—

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[1] Neil A. Lewis, *Sworn In As 105th Justice, Souter Says Shock Recedes*, N.Y. TIMES, Oct. 9, 1990, at A22.

made only brief remarks, in which he spoke of the difficulty of expressing "the realization that I have of the honor which the President has just done me."[2] He appeared, in the words of one observer, like "a dazed and gray-faced gnome."[3]

The media's questions turned directly to *Roe v. Wade*.[4] Had the President discussed it with Judge Souter? Did the President know Souter's views? Did he at least anticipate that replacing Justice Brennan with Judge Souter would move the Court to the right? Was it a move to appease conservatives upset with Bush for violating his "no new taxes" pledge? Bush denied all of it, asserting that there were "no politics of this nature in this kind of an appointment," claiming instead that "we are talking about excellence, judicial excellence, and the highest degree of qualification based on excellence to be on the Court"[5] and concluding that "I have too much respect for the Supreme Court than to look at one specific issue and one alone."[6]

Efforts to tease out answers to these questions via other sources netted little, or at least little that fit into a standard narrative. Apart from what was required in his jobs, Judge Souter had done almost no speaking or writing of any kind, let alone the sort taking stands on contentious issues. His past work, most prominently as the New Hampshire Attorney General and as a Justice on the New Hampshire Supreme Court, had not required that he grapple with the significant questions of constitutional law he would face as a justice.[7] Although he was a judge on the United States Court of Appeals for the First Circuit, he had not been in

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[2] U.S. Nat'l Archives and Records Admin., *Remarks Announcing the Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States and a Question-and-Answer Session with Reporters*, 26 WKLY. COMPILATION OF PRESIDENTIAL DOCUMENTS 1143, 1145 (July 23, 1990), *reprinted in* 16 ROY M. MERSKY ET AL., THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE 1916-1990, at 1145 (1992).

[3] Margaret Carlson, *An 18th Century Man*, TIME (June 24, 2001), http://content.time.com/time/magazine/article/0,9171,155166,00.html [https://perma.cc/7JX6-4QUU].

[4] *See* MERSKY ET AL., *supra* note 2, at 1144.

[5] *Id.* at 1145.

[6] *Id.* at 1148.

[7] *See* JAN CRAWFORD GREENBURG, SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT 99-100 (2007).

the position long enough to have written even one opinion. He quickly became known as the "stealth nominee."

Judge Souter's personal life likewise presented a puzzle. He lived alone in the ramshackle farmhouse in which he had grown up and drove a beat-up Volkswagen.[8] He owned a lot of books and did not watch TV.[9] Even in the pre-internet age this was an existence well outside the norm, especially among the crowd that pays close attention to the Supreme Court. Writing in *Time* magazine, Margaret Carlson said, "[n]o one knows quite what to make of a man who has a life, not a life-style, who lives modestly, works hard, spends inconspicuously, attends church, enjoys solitude, honors his mother, and helps his neighbors."[10]

Even so, Judge Souter was easily confirmed by the Senate and served as an associate justice until June 2009, when he left the stage as idiosyncratically as he walked onto it.[11] Supreme Court justices typically take full advantage of their life tenure, usually retiring only when forced by failing health.[12] Justice Souter left the Court at age sixty-nine, opting "to try living a more normal life for whatever time might remain[,]" to do the sort of "serious reading" his work at the Supreme Court had denied him the chance to pursue, and "to resume an interrupted education and follow out some lines of interest suppressed as far back as college."[13]

Justice Souter inhabited the intervening nineteen years in as distinct a fashion as they began and ended. He shunned the celebrity and perks of being a justice, the invitations to attend functions, give lectures, and teach classes in exotic locations during the Court's summer recess. Instead he worked, and he ran, and he left DC for New Hampshire as soon as he was able to.[14] As

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[8] Carlson, *supra* note 3.

[9] *Id.*

[10] *Id.*

[11] *See* Primus V, *The Tug of History*, HARV. MAG., Sept.-Oct. 2011, https://www.harvardmagazine.com/2011/09/the-tug-of-history [https://perma.cc/ZEV2-2CMV].

[12] *See generally* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).

[13] *See* Primus V, *supra* note 11.

[14] TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT 257 (2005).

Professor Mark Tushnet put it, in a book published a few years before Souter retired, "[o]bservers disagree about whether David Souter is a man of the eighteenth century set down in the twenty-first or merely a man of the nineteenth century."[15]

Jurisprudentially speaking, the man initially characterized as the "stealth nominee" became, in the crude scheme that has come to characterize discourse about the Court, a member of its "liberal" wing, someone whose positions were soon characterized as "almost indistinguishable from those of his predecessor, Justice William Brennan . . . ."[16] Later commentators have described the nomination as "one of the most inept political decisions of any modern-day president"[17] and "the most extraordinary of own goals."[18] Along the way, "No More Souters" became a refrain surrounding Republican appointments to the Court.[19]

Whatever else might be said of his approach to the job of a justice, Souter certainly did not feel obliged to act as an agent of the President who appointed him, the Senators who voted to confirm him, or the various other political actors who supported his appointment. In this sense, at the very least, he was the model of an independent jurist. Those focused simply on results can find much to love or much to hate in Souter's legacy.[20] But to focus on results is to plumb far too-shallow depths. There is considerably

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[15] MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 56 (2005).

[16] Jeremy Rabkin, *The Sorry Tale of David Souter, Stealth Justice*, WKLY. STANDARD (Nov. 6, 1995, 12:00 AM), https://www.washingtonexaminer.com/weekly-standard/the-sorry-tale-of-david-souter-stealth-justice [https://perma.cc/3LJY-NJZC].

[17] GREENBURG, *supra* note 7, at 265.

[18] Ross Douthat, *David Souter Killed the Filibuster*, N.Y. TIMES (Apr. 12, 2017), https://www.nytimes.com/2017/04/12/opinion/david-souter-killed-the-filibuster.html [https://perma.cc/L27F-NKGD].

[19] *See, e.g.*, *No More Souters,* WALL STREET J. (July 19, 2005), https://www.wsj.com/articles/SB112173866457289093 [https://perma.cc/S53T-AGMZ]; David G. Savage, *Justice Souter: Liberal or Conservative?*, L.A. TIMES (May 4, 2009, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-may-04-na-souter4-story.html [https://perma.cc/B37Y-WBXJ] ("Among conservatives, he was seen as a betrayer. In recent years, when President George W. Bush had vacancies to fill, their slogan was: 'No More Souters.'").

[20] *See* Charles L. Barzun, *Justice Souter's Common Law*, 104 VA. L. REV. 655, 725-26 (2018) (footnote omitted) ("Souter famously disappointed conservative activists by siding with the liberal Justices on a range of controversial issues during his tenure on the Court. At the same time, though, he has also come under fire from liberal law professors, who see his judicial temperament as too cautious and even 'defensive.'").

more to judging, and Justice Souter provides one model—a model I will confess I find quite congenial—of what a justice should be.

Save for his educational background, Justice Souter stands in marked contrast to the justices with whom he served, and those who have joined the Court since his resignation. Indeed, for as much as he was out of step with the world of thirty years ago, he is almost inconceivably so today. This is true with respect to his lifestyle, with respect to his resolutely apolitical professional style, and with respect to his complete lack of interest in, indeed disdain for, the trappings of celebrity that have come to accompany a seat on the Court.

There are many facets to the role of Supreme Court justice, and many ways in which one can approach the job. The variables include such diverse matters as interpretive methodology, views relating to prudential considerations regarding the role and institutional capital of the Court, and operational concerns including matters like the use of law clerks. Justice Souter's example, and the contrasts it presents, provide food for thought concerning all of these, and this essay will touch on some as it progresses. Its focus, though, is on the aspect of the role as to which the contrast between Justice Souter and his colleagues and successors on the Court is perhaps the greatest—their embrace of the celebrity culture that has increasingly surrounded the Court.

Several recent commentators have noted and decried the emergence and effects of the justices-as-celebrities phenomenon. Distilled to its essence, the concern is that the felt need to build and maintain a brand tends to work contrary to the dispassionate orientation to which a jurist should aspire. The solutions offered to date have been process-based, including most prominently the suggestion that opinions be anonymously authored. Justice Souter's example, including his wholesale rejection of celebrity, suggests a different approach, and invites consideration of whether the identity and characteristics of the decisionmaker might matter as much as the processes by which decisions are made. The problem, perhaps, is in part a product of the type of person who tends to be appointed to the Court.

The remainder of this essay proceeds as follows. Part I provides a brief biography of Justice Souter. Part II surveys the literature relation to the Supreme Court and celebrity culture.

Part III returns to the example of Justice Souter, using it to explore the question of celebrity from another angle.

I. THE INCONSPICUOUS DHS

Understanding Souter's appointment requires understanding the history of Supreme Court nominations preceding it. In 1986, President Reagan nominated then-Justice William Rehnquist to replace Warren Burger as Chief Justice, and in turn nominated Antonin Scalia to fill the resulting associate justice vacancy.[21] The elevation of Rehnquist generated some controversy,[22] but did not significantly affect the perceived ideological balance of the Court.[23] Moreover, Republicans controlled the Senate, and thus both nominations were successful, in the case of Scalia by a vote of 98-0.[24]

Things unfolded quite differently in the wake of Justice Lewis Powell's retirement the following year. Not only had Powell served as a swing vote, such that his replacement would affect the Court's balance, but the Democrats controlled the Senate.[25] President Reagan nominated Judge Robert Bork, whose career as a law professor and a lawyer in the Justice Department had left an extensive, deeply conservative record.[26] The attacks on Bork commenced almost immediately following the announcement of

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[21] Ronald Reagan, *Remarks on the Resignation of Supreme Court Chief Justice Warren E. Burger and the Nominations of Williams H. Rehnquist to be Chief Justice and Antonin Scalia to be an Associate Justice*, U.S. NAT'L ARCHIVES (June 17, 1986), https://www.reaganlibrary.gov/archives/speech/remarks-resignation-supreme-court-chief-justice-warren-e-burger-and-nominations [https://perma.cc/VM8L-B8ZR].

[22] *See* Al Kamen, *Rehnquist Confirmed in 65-33 Senate Vote*, WASH. POST (Sept. 18, 1986), https://www.washingtonpost.com/archive/politics/1986/09/18/rehnquist-confirmed-in-65-33-senate-vote/a1d9c510-e342-4452-a18c-52aa34689b96/ [https://perma.cc/6UZP-WDEH].

[23] *Id.*

[24] *See Supreme Court Nominations (1789-Present*), U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/X2ZB-B4QL] (last viewed Dec. 13, 2020).

[25] *See id.*

[26] For a general account of the nomination, *see generally* ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (2007). The scholarly work that drew the most fire was Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

his nomination.[27] The resulting hearings, and the defeat of Bork's nomination, arguably worked a fundamental change in Supreme Court nominations.[28] Reagan followed up by nominating Judge Douglas Ginsburg, who almost immediately withdrew himself from consideration following revelations that he had smoked marijuana with students while on the faculty at Harvard Law School.[29] Reagan's third nominee was Judge Anthony Kennedy, who seemed to be more moderate than Bork, and who was confirmed 97-0.[30]

Three years later the Senate remained in Democratic hands, and the retiring justice was not a reliable conservative or consistent swing vote but rather William Brennan, a liberal legend.[31] President George H. W. Bush considered potential nominees with established conservative track records, but wanted to avoid a confirmation fight.[32] By the Sunday following Brennan's Friday night resignation, Bush had narrowed the field down to Judge Souter and Fifth Circuit Judge Edith Jones, both of whom he interviewed in the White House the next day.[33] Jones, who had established herself as an outspoken conservative, would have been an "in your face" choice and would have invited a battle with the

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[27] Senator Edward Kennedy led the charge, almost immediately delivering his famous speech about "Robert Bork's America." To view the speech, see RXB, Senator Kennedy Opposes Bork Nomination, C-SPAN (May 12, 2016), https://www.c-span.org/video/?c4594844/senator-kennedy-opposes-bork-nomination [https://perma.cc/B6FJ-YQWJ].

[28] *See generally* Lee Epstein, René Lindstädt, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296 (2006).

[29] For an overview of the Ginsburg nomination, *see* John M. Broder, *Collapse of the Ginsburg Nomination: At the End, Ginsburg Stood Alone—-and Still a Puzzle*, L.A. TIMES (Nov. 8, 1987, 12:00 AM), https://www.latimes.com/archives/la-xpm-1987-11-08-mn-21569-story.html [https://perma.cc/M649-RDMH].

[30] *See Supreme Court Nominations (1789-Present*), U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm [https://perma.cc/48TX-G5WF] (last viewed Dec. 13, 2020).

[31] *See id.*

[32] *See* GREENBURG, *supra* note 7, at 97.

[33] *See* David Lauter & Ronald J. Ostrow, *And Then There Were 2 and Finally 1—Souter: Court: Nominee Selected Over Texas Woman Primarily for His Lack of 'Paper Trail' on Controversial Issues*, L.A. TIMES (July 25, 1990, 12:00), https://www.latimes.com/archives/la-xpm-1990-07-25-mn-972-story.html [https://perma.cc/95GE-W9NK].

Senate.[34] By contrast, Souter's track record was sparse and inscrutable, but he had the backing of two very influential people—White House Chief of Staff John Sununu, a former governor of New Hampshire, and Senator Warren Rudman,[35] both of whom provided assurances that Souter would be a solid pick. Rudman advised Bush that Souter would be easily confirmed and guaranteed "that he has no skeletons in his closet, and he's one of the most extraordinary human beings I've ever known."[36]

White House Counsel C. Boyden Gray and President Bush were likewise impressed, and after mulling the matter over, including listing his assessment of the pros and cons of both Souter and Jones, Bush decided to nominate Souter.[37] Bush's note to himself read, "I like his manner—scholarly, serious approach—right age—temperament = A OK."[38]

A. Souter's Background

Judge Souter proved to be a puzzling choice to nearly every audience. It was not that Souter lacked an impressive resume. He had graduated *magna cum laude* from Harvard College, studied at Oxford as a Rhodes Scholar, then returned to Harvard for law school.[39] Nor did he lack for public service. He had spent a decade as a lawyer in the New Hampshire Attorney General's office, occupying the top spot for the last two of those years.[40] This was followed by five years as a trial judge and seven years on the state supreme court, and, for just a few months, service on the United States Court of Appeals for the First Circuit, where he had yet to write an opinion.[41] None of this past work, however, was of a high profile except in a local sense. The roles required him to address difficult questions, to be sure, but they were questions concerning what a member of the Bush justice department derisively called "cow law"[42] rather than the hot-button issues of national concern

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[34] *Id.*
[35] *See* GREENBURG, *supra* note 7, at 94-97.
[36] *Id.* at 97.
[37] *Id.* at 101.
[38] *See* TUSHNET, *supra* note 15, at 58.
[39] *See* YARBROUGH, *supra* note 14, at 10-17.
[40] *Id.* at vii.
[41] *See id.* at 62-98.
[42] *See* Rabkin, *supra* note 16.

that draw the attention of, and draw attention to, the Supreme Court.

Souter's rise was attributable not to networking and self-promotion but rather to factors that are more often celebrated than rewarded—hard work, dedication, and the fact that he appears to have impressed every person he met along the way.[43] Those who worked under him when he served as attorney general characterized him as a leader who took blame when things went wrong and gave credit to others when things went well,[44] and who was so unassuming that he chose to remain in the smaller, deputy's office when he was promoted to attorney general.[45] He was a stickler for propriety, always on the alert for things that might be perceived as conflicts of interest.[46] His decisions were not influenced by partisan considerations because he was resolutely apolitical. Rudman asserted, "[w]e don't discuss politics because he doesn't know about politics."[47] He further characterized Souter as "the single most brilliant intellectual mind I have ever met."[48]

Souter was also the beneficiary of simple good fortune. Two of the people he had most impressed—Senator Warren Rudman and former New Hampshire Governor John Sununu—had risen to positions of great influence, and both played significant roles in convincing President Bush to nominate Souter.[49] Rudman was closest to Souter and began his campaign on the judge's behalf during the Reagan administration.[50] Sununu, who was White

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[43] *See* David Margolick, *Bush's Court Choice; Ascetic at Home but Vigorous on Bench*, N.Y. TIMES (July 25, 1990), https://www.nytimes.com/1990/07/25/us/bush-s-court-choice-ascetic-at-home-but-vigorous-on-bench.html [https://perma.cc/9ZAQ-49V5].

[44] *See* YARBROUGH, *supra* note 14, at 26.

[45] *See* Ruth Marcus & Joe Pichirallo, *Seeking Out the Essential David Souter*, WASH. POST (Sept. 9, 1990) https://www.washingtonpost.com/archive/politics/1990/09/09/seeking-out-the-essential-david-souter/230d0090-f228-4418-8d81-a86cd859d28a/ [https://perma.cc/HE2D-MRBZ].

[46] *See infra* notes 106-107 (McAuliffe testimony).

[47] Linda Greenhouse, *Man in the News; An 'Intellectual Mind': David Hackett Souter*, N.Y. TIMES (July 24, 1990), https://www.nytimes.com/1990/07/24/us/man-in-the-news-an-intellectual-mind-david-hackett-souter.html [https://perma.cc/JS6Z-WPE3].

[48] *Id.*

[49] *See* GREENBURG, *supra* note 7, at 94-97.

[50] *See* R.W. Apple, Jr., *Bush's Court Choice; Sununu Tells How and Why He Pushed Souter for Court*, N.Y. TIMES (July 25, 1990),

House Chief of Staff, assured Bush that Souter "would be a strict constructionist, consistent with basic conservative attitudes."[51]

B. Souter the Nominee

Perhaps unsurprisingly, Souter was a puzzle to the national media. Rather than following a more typical path out of Harvard Law School to a large firm in New York, DC, or Boston, Souter returned to New Hampshire.[52] He worked for two years at the state's largest law firm—Orr and Reno, with "fewer than a dozen lawyers"[53] at the time—before taking a job in the state attorney general's office. His lifestyle, in the later words of his only biographer to date, suggested that he "seemingly preferred books and solitary mountain hikes to people . . . ."[54] He drove an old car, ate the same lunch every day, and was interpersonally reticent "[e]ven by the laconic standards of this community."[55]

Souter's nomination came during the summer before I started law school, and the sense I recall is of the media being frustrated, and perhaps even disappointed, with the lack of available information about the judge. Revisiting the coverage three decades later confirms that sense. Nina Totenberg's initial report from New Hampshire reads like the account of an anthropologist irked because the remote society she traveled far to study failed to provide the anticipated colorful accounts of strange practices:

> I have no confidence that I will have more than the most generic sense of this person by the time I leave. I mean, he's a very private person and by most modern standards, a peculiar person. He's so solitary . . . . This is one man I don't think we're going to very successfully intrude on, unless there is some horrible skeleton in his closet, which I frankly doubt.[56]

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https://www.nytimes.com/1990/07/25/us/bush-s-court-choice-sununu-tells-how-and-why-he-pushed-souter-for-court.html [https://perma.cc/MEH5-BK8X].

[51] *Id.*

[52] *See* YARBROUGH, *supra* note 14, at 17.

[53] *Id.* at 18.

[54] *Id.* at viii.

[55] Margolick, *supra* note 43.

[56] YARBROUGH, *supra* note 14, at 116 (alteration in original).

A narrative emerged in which David Souter was an eccentric loner. There was speculation about whether he might be gay, and in the words of the New York Times's David Margolick, "whether his solitary style has limited his empathy or level of human understanding."[57] Senator Orrin Hatch observed "that he would feel more comfortable if Souter were a family man[,]"[58] though he quickly retracted the statement.

Despite assurances from those who knew and had worked with him that Souter was apolitical,[59] the prevailing interpretation of events was that Souter's lack of a paper trail concealed a committed conservative who would, among other things, surely provide the final vote necessary to overturn *Roe v. Wade*.[60] Congressman James Traficant put the point bluntly, stating, "[t]he truth is you could bet your booty that David Souter's personal legal philosophy is right out of Robert Bork's personal writings and memos."[61] Indeed, conservatives hoped it was true, and behind the scenes John Sununu assured them that Souter would be "a home run . . . ."[62]

Yet, at least when viewed with the benefit of hindsight, the news coverage of the time provides some clues that the result might be otherwise. Those familiar with Souter's work in New Hampshire described him as largely apolitical, someone who was thoughtful and independent, without ideological precommitments.[63] A lawyer named Jim Duggan, then the head public defender in New Hampshire and later himself a justice on the state supreme court, offered an especially prescient

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[57] Margolick, *supra* note 43. *See also* Marcus & Pichirallo, *supra* note 45 ("The insular nature of Souter's life in New Hampshire, and the narrowness of his life experiences, have prompted some observers to question whether the little-known judge has the range of human understanding necessary for a justice.").

[58] Marcus & Pichirallo, *supra* note 45.

[59] *See* Margolick, *supra* note 43. *See also* Marcus & Pichirallo, *supra* note 45 ("By all available accounts, Souter is apolitical. He has never worked in an election or made a campaign contribution, and does not even read the local newspaper.").

[60] *See, e.g.*, 3 NEAL DEVINS & WENDY L. WATSON, *Judicial Nominations*, *in* FEDERAL ABORTION POLITICS 265, 265-66 (1995).

[61] MERSKY ET AL., *supra* note 2, at 30.

[62] Philip Shenon, *Conservative Says Sununu Assured Him on Souter*, N.Y. TIMES (Aug. 24, 1990), https://www.nytimes.com/1990/08/24/us/conservative-says-sununu-assured-him-on-souter.html [https://perma.cc/9GH2-4LRB].

[63] *See* Marcus & Pichirallo, *supra* note 45.

observation: "He's against abortion, and I'm sure that he thinks *Roe v. Wade* was wrongly decided. What is impossible to measure is whether he's prepared to overturn a Supreme Court precedent. I think his thinking would be that he would not, unless he felt it was egregiously wrong."[64] Another old friend contended that Souter was not a "crusader[,]" and might turn out to be the sort of conservative who would fool those who appointed him.[65] Among journalists, Anthony Lewis seems to have read the signs most accurately, noting that Souter's identification of Justice Holmes and the second Justice Harlan as those he most admired "gives intriguing insight into how he may see the job."[66] Holmes, Lewis explained, "generally believed in judicial deference to legislative choices."[67] Harlan was "a model of what a Supreme Court justice should be."[68] "He had no agenda. He did not go into a case with certainty about how it should come out. He struggled to be disinterested. That did not mean unconcerned; he cared deeply. It meant that he tried genuinely to understand both sides of the argument."[69] Lewis saw these as hopeful signs, indications that Souter "comes to this great appointment with no ideological agenda: no list of legal wrongs he is determined to right."[70]

Souter, at the request of the White House, spent the week following his nomination paying visits to members of Congress and preparing for the confirmation process.[71] Because he had not anticipated the need to remain in Washington, he wore the same suit every day.[72] As the process continued, he worried that, because he had made so little past use of a credit card, he would not have enough credit to continue to travel between New Hampshire and Washington.[73] Meanwhile, the media continued its scrutiny of his entire life, a process the judge found to be

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[64] Margolick, *supra* note 43.

[65] *See id.*

[66] Anthony Lewis, *Abroad at Home; Models for a Justice*, N.Y. Times (July 27, 1990), https://www.nytimes.com/1990/07/27/opinion/abroad-at-home-models-for-a-justice.html [https://perma.cc/SZ56-7TJD].

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] YARBROUGH, *supra* note 14, at 107.

[72] *Id.*

[73] *See* Marcus & Pichirallo, *supra* note 45.

incredibly distasteful. He told Warren Rudman that "if I had known how vicious this process is, I wouldn't have let you propose my nomination."[74] At one point, Rudman had to talk Souter out of withdrawing.[75]

Despite whatever misgivings he might have had, Souter performed impressively at his confirmation hearings. Several senators relayed the impression that Souter was "a good listener,"[76] and Senator Paul Simon further observed that "there is one kind of amorphous quality I will simply call stability that I see in you, and I like that."[77] As Janet Malcolm characterized it, in contrasting the Souter hearings with those for Justices Roberts and Alito, "one felt as if one were seeing a well-wrought play rather than witnessing a piece of left-to-chance reality."[78] We have come to expect these hearings to be a kind of theater, in which the various players follow a set script. On this understanding, the Senators are there to grandstand, and the nominee is there to say as little as possible but as much as necessary, including a healthy portion of platitudes about the job of a justice as consisting simply of applying the Constitution.[79] And so, we have become conditioned to regard a nominee's statements as a species of puffery, a ritual they must go through in order to grab one of the ultimate brass rings.

But everyone—*everyone*—who knew David Souter before he was nominated provided assurances that his testimony could be trusted.[80] And indeed, writing twenty years later, Adam Chandler noted just how candid and accurate Souter's testimony was: "To anyone listening carefully—as the abortion rights protestors rallying outside the Capitol were not—the Justice whom David Souter would become was communicated fully and eloquently by

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[74] YARBROUGH, *supra* note 14, at 125.

[75] *Id.*

[76] *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearing on the Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 101st Cong. 126, 133, 179 (1990), *reprinted in* MERSKY ET AL., *supra* note 2, at 260, 267, 313 (Senators Simpson, DeConcini, and Simon, respectively).

[77] *Id.* at 313.

[78] Janet Malcolm, *The Art of Testifying*, NEW YORKER, Mar. 13, 2006, at 77.

[79] *See, e.g.*, Richard Brust, *No More Kabuki Confirmations*, 95 ABA J. 39, 39 (2009).

[80] *See infra* notes 103-106 and accompanying text.

the nominee himself."[81] Hindsight, of course, allows us to see things that were not so clear in real time, and it may only be because we know now that we could trust the David Souter who testified before the judiciary committee that it seems apparent that he clearly outlined the justice he would become.[82]

A consistent refrain of Souter's testimony concerned the necessity of judges locating sources for their decisions outside their own values and preferences. What the Senate ought to be looking for, he asserted, is:

> [S]omeone who, in seeking the very difficult or in going through the very difficult process sometimes of seeking constitutional meaning, would seek for something outside that judge's personal views for that moment, who would seek to infuse into the Constitution a sense of enduring value, not of ephemeral value, and who would try to rest that process on as objective an inquiry as can be possible, given the great breadth that is necessary when we do search for value, for these massive generalities and magnificent generalities that are committed to us.[83]

Judicial activism, on this view, entails "a sense of the judge as embodying pure personal preferences and value choices, however sincerely they may be felt, as opposed to embodying values which are found and based upon some kind of an objective search for meaning . . . ."[84] He acknowledged the difficulty of removing one's personal feelings from the process of judging, but insisted that self-awareness is the key to coming as close as

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[81] Adam D. Chandler, *Slow and Steady: David Souter's Life in the Law*, 120 YALE L.J. ONLINE 37, 42 (2010) (footnotes omitted).

[82] As Janet Malcom put it in discussing the various feminist witnesses who opposed Souter's confirmation:

> Had these angry witnesses been able to see into the future, would they have testified as they did? Of course not. And had I *not* known how things turned out with Souter would I have watched the tape of his confirmation hearing with the same charmed delight? Of course not. We read what we can into reality's impassive face.

Malcolm, *supra* note 78, at 78.

[83] MERSKY ET AL., *supra* note 2, at 311.

[84] *Id.* at 338-39; *see also id.* at 266 ("I think probably a fair bedrock of activism is at least—or example of bedrock activism is ignoring any clear and positive source, objective source of law.").

possible to doing so: "We have no guarantee of success, but we know that the best chance of success comes from being conscious of the fact that we will be tempted to do otherwise."[85]

Souter described himself as an originalist, but disclaimed adherence to any version of the methodology that merely entails a search for specific intent or original expected application.[86] To go beyond these things, he asserted in an exchange with Senator Arlen Specter, is not to conclude that the meaning of the constitutional provision has changed, but rather, "that its application was not restricted and cannot be restricted to just those specific instances that the drafters intended to deal with at the time they drafted it."[87] That is, "when they drafted a provision which was broader than necessary to perform the specific functions they had in mind, they really meant what they said and we have a broader principle."[88] While the principles remain the same, "our perceptions of the world around us and the need for those principles do" change.[89] The shift from *Plessy v. Ferguson* to *Brown v. Board of Education* did not result in a change in the idea of equal protection. Instead:

> In 1954 they saw something which they did not see in 1896 . . . . I would like to think, and I do believe, that the principle of equal protection was there and that in the time intervening we have gotten better at seeing what is before our noses.[90]

Judge Souter also heaped praise on the second Justice Harlan and articulated an approach to the identification and application of unenumerated rights that parallels Harlan's. Giving content to the right of privacy, he observed, does not involve "looking for something new, as opposed to something which the constitution[ ] assumed."[91] "The difference between the creation of

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[85] *Id.* at 422.

[86] *Id.* at 369 ("We are looking, when we look for the original meaning, we are looking for meaning and for principle. We are not confining ourselves simply to immediately intended application.").

[87] *Id.* at 465.

[88] *Id.* at 466. Specter, for his part, was not buying it, concluding that what Souter described is "a fair distance from original meaning . . . ." *Id.* at 470.

[89] *Id.* at 437.

[90] *Id.*

[91] *Id.* at 411.

rights and the recognition of rights is the difference between unbridled personal preference, that knight errant that Cardozo was speaking of, and a disciplined approach to constitutional meaning, on the other hand."[92] Notably, he contended that this does not entail adhering to the restrictive approach championed by Justice Scalia in *Michael H. v. Gerald D.*,[93] pursuant to which the inquiry would focus on "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[94] The search is not for the most narrow evidence, but rather "has got to be a quest for reliable evidence, and there may be reliable evidence of great generality."[95]

For all his candor, Souter consistently evaded requests to directly address *Roe v. Wade*. He disclaimed having an agenda with respect to the case, and characterized questions relating to *Roe* as presenting an ethical problem. He contended that to state a position would undercut his obligation as a judge to provide the parties with a fair hearing, which entails not only a willingness to listen to, but also to allow the parties' arguments to force genuine reexamination of any prior inclinations a judge may have brought to a case.[96] On this point, Souter further elaborated "it is much easier to modify an opinion if one has not already stated it convincingly to someone else."[97] Yet, in retrospect, it is not difficult to see the pieces of his testimony pointing the way to Souter's vote in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[98] to uphold *Roe*. He assured Senator Kennedy that "whether I do or do not find it moral or immoral, will play absolutely no role in any decision which I make . . . ."[99] To Senator Kohl, he noted that "the issue that arises when an established and existing precedent is attacked is a very complex issue. It involves not only the correctness or the incorrectness by whatever lights we judge it of a given decision. It can also involve extremely

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[92] *Id.* at 278.
[93] 491 U.S. 110 (1989).
[94] *Id.* at 128 n.6.
[95] MERSKY ET AL., *supra* note 2, at 336.
[96] *Id.* at 328.
[97] *Id.*
[98] 505 U.S. 833 (1992).
[99] MERSKY ET AL., *supra* note 2, at 345.

significant issues of precedent."[100] As for the notion of stare decisis, he emphasized that it "is a bedrock necessity if we are going to have in our judicial systems anything that can be called the rule of law as opposed simply to random decisions on a case-by-case basis[,]"[101] and noted that it does not apply "unless we are starting with the assumption that there is something inappropriate about the prior decision."[102] All of this left open the possibility that he might be inclined to uphold *Roe* even though he would have dissented from the decision as a member of the Court that decided the case.

The hearings featured two other types of witnesses. Those who knew Judge Souter and testified in support of his character, and those who represented interest groups concerned about the nomination. The character witnesses amplified the praise provided by his friends and acquaintances in the time between the nomination and the hearings. Governor Judd Gregg of New Hampshire offered that "there has not been a negative note expressed by anyone in our State, neither Republican nor Democrat nor conservative nor liberal . . . ."[103] Others emphasized his integrity, humility, and open-mindedness.[104] The strongest praise came from former New Hampshire Attorney General Steven McAuliffe:

> The New Hampshire Attorney General's Office under David Souter was an extraordinary place. He demanded only three things: practice of law [at] the highest level; as apolitical an

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[100] *Id.* at 323.

[101] *Id.* at 201.

[102] *Id.*

[103] *Id.* at 492.

[104] Former Vermont Attorney General Jerome Diamond offered two conclusions:

> First, there is an honesty and an integrity to him and to his thought processes that is a rare commodity today. And, second, he is an individual that is about as prejudice-free as any person I have ever met in my life." *Id.* at 553. John Broderick, president of the New Hampshire bar, noted his "enormous sense of humility." *Id.* at 694. Wesley Williams, a partner at Covington & Burling who knew Souter from Harvard, contended "that if one thing is clear to me about David Souter, it is that he is not an ideologue and that he comes to this with no political agenda.

Id. at 907.

> office as was humanly possible, both in fact and appearance; and absolute integrity.
>
> . . . .
>
> To know and to have worked for David Souter is to know both honor and frustration. Frustration, because the standards of character and integrity he sets finds the rest of us so often wanting in its pursuit.[105]

Would he, or anyone, be able to answer questions concerning how David Souter would vote? No.

> No one knows how David Souter will vote—no one. David Souter does not know. David Souter does not know, and those of us who know David Souter know he does not know. David Souter, the judge, simply does not prejudge cases. He never has. David Souter, the judge, is scrupulous about process and thought and consequences and human impact and precedent and integrity.[106]

There were, however, witnesses who were confident that they did know how Judge Souter would vote. On the left, representatives of the National Abortion Rights Action League ("NARAL"), Planned Parenthood, and the National Organization of Women ("NOW") criticized what they perceived as Souter's evasiveness and lack of candor with respect to questions of reproductive freedom, which they interpreted as merely an effort to camouflage his intentions.[107] NOW president Molly Yard put the point most forcefully: "[W]e listened very carefully. We hoped we were wrong, but we are not wrong. He will be the fifth vote to overturn *Roe v. Wade*."[108] The sole resistance on the right came from Howard Phillips, chair of The Conservative Caucus, who opposed Souter based primarily on the judge's vote, while a member of the board of Concord Hospital, to allow abortions to be performed there.[109] This, Phillips reasoned, meant that Souter did

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[105] *Id.* at 685.

[106] *Id.* at 686.

[107] *Id.* at 496-97, 525 (Kate Michelman, NARAL); *id.* at 516 (Faye Wattleton, Planned Parenthood); *id.* at 704 (Helen Neuborne, NOW).

[108] *Id.* at 800-01.

[109] *Id.* at 1028.

not accept the personhood of unborn children, such that "his decisions about when and whether abortions might be performed would be based on entirely pragmatic considerations."[110]

At least two Republican senators suggested that Souter's responses in the hearing left them somewhat skeptical. Senator Charles Grassley observed that, to his ear, some of what Souter said "seems to me more [like] the terminology likely to come from a judicial activist."[111] In his questioning of the panel of advocates for reproductive choice, Grassley expressed concern that Souter might be inclined to uphold *Roe v. Wade* as a matter of stare decisis.[112] Senator Arlen Specter interpreted Souter's testimony as embracing a more expansive jurisprudential approach than that suggested by his earlier opinions, and as taking a position "a fair distance from original meaning . . . ."[113] Indeed, Senator Joseph Biden, who chaired the hearing, likewise took from the testimony the conclusion that Souter understood there to be as-yet undiscovered rights among those not enumerated in the Constitution, and noted his agreement with Senator Specter that Souter sounded "just like a man who admitted that there was [a] good deal of subjectivity in application of the Constitution."[114]

The Judiciary Committee's hearings concluded on September 19.[115] Though Souter's testimony left both liberals and conservatives with questions and concerns, the reaction was generally positive, and only Senator Edward Kennedy voted against sending the nomination to the full Senate.[116] The Senate debated for a mere four hours on October 2 before confirming Souter by a 90-9 vote.[117] Chief Justice Rehnquist administered the oath of office on October 8.[118]

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110 *Id.*
111 *Id.* at 374.
112 *Id.* at 539.
113 *Id.* at 470.
114 *Id.* at 689.
115 YARBROUGH, *supra* note 14, at 141.
116 *Id.* at 141-42.
117 *Id.* at 143-44.
118 *Id.* at 145.

C. Souter the Justice

It's traditional, or at least one hears the story often enough for it to seem that way, for new members of the Court to be told by an older justice that they will spend the first couple years wondering how they got there, and the remainder of their time wondering how everyone else did.[119] Regardless of whether the latter part is true of Justice Souter, the former seems to have been, at least in the sense that his first year on the Court followed a typically tentative pattern. He worked slowly,[120] voted largely with the conservative justices, and seemed, on the whole, to be the solid conservative vote that Rudman and Sununu had promised.[121] One scholarly assessment of his first term concluded that he apparently had difficulty managing the workload, resulting in his taking longer to produce fewer opinions relative to the other justices.[122]

His time in the conservative camp did not last long—at least if one defines "conservative" in terms of the results in cases. In just his second year, the Court took the case *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[123] At that point the writing appeared to be on the wall for the pro-choice movement. On April 22, the day of oral argument, Ruth Marcus began an article in the *Washington Post* with this: "After two decades of battling over the constitutional right to abortion, the two warring camps have finally found something on which they can agree: The abortion-rights side is about to lose."[124] Jeffrey Toobin suggests that the justices themselves believed this, and that they were concerned about the decision's potential to impact the 1992 presidential

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[119] *See, e.g.*, LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 99 (2006) (quoting Justice Thomas for the proposition that "[i]n your first five years you wonder how you got there. After that you wonder how your colleagues got there.").

[120] *See* GREENBURG, *supra* note 7, at 129.

[121] *See id.* at 143.

[122] *See* Christopher E. Smith & Scott P. Johnson, *Newcomer on the High Court: Justice David Souter and the Supreme Court's 1990 Term*, 37 S.D. L. REV. 21, 27-28 (1992).

[123] 505 U.S. 833 (1992).

[124] Ruth Marcus, *Abortion-Rights Groups Expect to Lose*, WASH. POST (Apr. 22, 1992), https://www.washingtonpost.com/archive/politics/1992/04/22/abortion-rights-groups-expect-to-lose/20093aee-cc20-4e4d-9dcc-ffc7add85d13/ [https://perma.cc/W6DU-48Y5].

election.[125] Chief Justice Rehnquist pushed to move the case into the next term, but ultimately relented in the face of a threat by Justice Stevens to file a dissent to the relisting of the case.[126] Justice Souter was also a brief source of delay.[127] Not because he was thinking about the political implications of the decision, but because he wanted to hear from the parties on the question of stare decisis.[128]

The source of Souter's delay was telling, as he teamed with Justices Kennedy and O'Connor to author a joint opinion in which they provided three of the five votes necessary to uphold "the essential holding of *Roe v. Wade* . . . ."[129] Justice Souter is understood to have written the portion of the joint opinion devoted to a discussion of stare decisis,[130] and its analysis both tracks the contours of his confirmation-hearing testimony[131] and vindicates those who predicted that Souter would likely vote to uphold *Roe*.[132] *Casey*'s discussion of stare decisis begins with the familiar observation that the doctrine's roots are "prudential and pragmatic," and that rather than an "inexorable command," it requires a judgment "designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[133] Among the factors to be considered are the workability of the prior decision's holding, the existence of reliance interests, the stability of the prior case's doctrinal underpinnings, and any changed assessment of its factual premises.[134] As articulated and applied, the approach creates a strong presumption against overruling: "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as

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[125] *See* JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 40-41 (2007).

[126] *Id.* at 41-42.

[127] *See id.* at 51-52.

[128] *See id.*

[129] Planned Parenthood v. Casey, 505 U.S. 833, 846 (1992).

[130] *See* TOOBIN, *supra* note 125, at 54.

[131] *See* notes 86-91 and accompanying text, *supra*.

[132] *See* notes 60-65 and accompanying text, *supra*.

[133] 505 U.S. at 854.

[134] *Id.* at 854-55.

to render the commitment obsolete."[135] On this view, it was inappropriate to overrule *Roe* because there had been no fundamental shift in understanding with respect to its legal or factual bases.[136] It was not that there had become any sort of settled understanding regarding *Roe*'s premises, which the joint opinion acknowledged remained as contested as ever, but rather that there was an evident *lack* of the sort of sufficiently settled understanding necessary to support overruling.[137] It is only when understandings have shifted and settled to such a degree that a court can conclude with confidence that a prior decision was wrong that it should do so.[138]

Five years later, in *Washington v. Glucksberg*,[139] which involved a substantive due process challenge to laws banning assisted suicide, Justice Souter filed a concurring opinion detailing and defending his approach to the question of unenumerated rights.[140] Here, too, he remained consistent with his confirmation-hearing testimony, articulating a position that echoed the second Justice Harlan's.[141] The opinion typifies the common-law judge in action, opening by outlining the arguments made by the parties[142] and next acknowledging the challenges presented by unenumerated rights.[143] It justifies its reliance on the approach outlined in Justice Harlan's dissent in *Poe v. Ullman*, but only after establishing *Poe* as authoritative both by reference to the Court's own subsequent decisions[144] and via consideration of legal history back through early state constitutional law decisions and their antecedents in English

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[135] *Id.* at 868.

[136] *Id.* at 868-89.

[137] *Id.*

[138] *See id.* This provides a response to Scalia's complaint in *Lawrence v. Texas* that the same justices who felt compelled to uphold *Roe* did not do the same for *Bowers v. Hardwick*. *See* Lawrence v. Texas, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting). In *Lawrence*, the justices in the majority concluded that the tide had shifted to a sufficient degree with respect to the underpinnings of *Bowers* that overruling was appropriate. *Id.* at 576 (majority opinion). Scalia did not think so himself, of course, but subsequent developments appear to have vindicated the majority's assessment.

[139] 521 U.S. 702 (1997).

[140] *Id.* at 752-89 (Souter, J., concurring).

[141] *See id.*

[142] *Id.* at 754-55.

[143] *Id.* at 755-56.

[144] *Id.* at 756 n.4.

law.[145] It is a plodding, painstaking analysis, and it emphasizes the need for more of the same, for "explicit attention to detail that is no less essential to the intellectual discipline of substantive due process review than [is] an understanding of the basic need to account for the two sides in the controversy and to respect legislation within the zone of reasonableness."[146] This calls for use of the common-law method, which is valuable because it "is suspicious of the [sort of] all-or-nothing analysis that tends to produce legal petrification instead of an evolving boundary between the domains of old principles."[147] "Exact analysis and characterization of any due process claim are critical to the method and to the result."[148] Having established the analytical framework, the opinion proceeds to a detailed recounting and analysis of the arguments and interests on both sides of the dispute, concluding that the state's interests were sufficiently strong to justify the prohibitions under consideration,[149] but taking care to note that there might come a time when he would conclude that it has become appropriate to recognize the claimed right.[150]

Together, these opinions provide the core of Souter's jurisprudence. His candid, detail-driven opinions appear to reflect a vigilant effort to remain mindful of Justice Jackson's injunction not to let personal inclinations regarding the facts of a case improperly affect legal analysis,[151] and instead to "honor the distinction between personal and judicially cognizable values."[152]

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[145] *Id.* at 756-65.

[146] *Id.* at 765; *see also id.* at 769 (characterizing Harlan's approach in *Poe* as requiring "close criticism going to the details of the opposing interests and to their relationships with the historically recognized principles that lend them weight or value.").

[147] *Id.* at 770.

[148] *Id.*

[149] *Id.* at 782.

[150] *Id.* at 789.

[151] *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote . . . .").

[152] Greenhouse, *supra* note 47. The quote comes from a response to a question about judicial activism that Souter provided to the Senate Judiciary Committee in connection with his nomination to the First Circuit:

The emphasis on stare decisis reflects the bargain that the common-law judge of the present enters into with the judges of the past and future. The bargain with the judges of the past demands humility and respect for the accumulated wisdom embodied in the doctrines past judges have collectively formulated. The bargain with the judges of the future compels the judge of the present not to decide too much, to leave room for the judges of the future to respect and shape their predecessors' handiwork. Hence *Glucksberg*'s exacting consideration of the parties' claims in light of past decisions, and *Casey*'s strong presumption of doctrinal continuity. The associated humility pervades Souter's opinions. His concurring opinion in *Nixon v. United States*,[153] a case from his third term involving application of the political question doctrine to the form of an impeachment trial in the Senate, emphasizes the need for precise, case-by-case analysis of situations involving potential invocation of the doctrine.[154] In one of his last opinions as a justice, a dissent in *District Attorney's Office v. Osborne*,[155] he noted, in again outlining his preferred approach to substantive due process claims, "that the beginning of wisdom is to go slow."[156] Even in *Vieth v. Jubelirer*,[157] a case in which he proposed a novel framework for consideration of claims challenging political gerrymandering, he advocated for incrementalism, noting "[i]t is common sense . . . to break down a large and intractable issue into discrete fragments as a way to get a handle on the larger one . . . ."[158]

Souter provided a summary of his jurisprudential outlook in one of the rare public appearances he made as a justice. He spoke

> The obligation of any judge is to decide the case before the court, and the nature of the issue presented will largely determine the appropriate scope of the principle on which its decision should rest. Where that principle is not provided and controlled by black letter authority or existing precedent . . . the decision must honor the distinction between personal and judicially cognizable values.

Id.

153 506 U.S. 224 (1993).

154 *Id.* at 252 (Souter, J., concurring).

155 557 U.S. 52 (2009).

156 *Id.* at 104 (Souter, J., dissenting).

157 541 U.S. 267 (2004).

158 *Id.* at 353 (Souter, J., dissenting).

at a memorial for Professor Gerald Gunther held at Stanford Law School in 2002.[159] Souter opened by noting that he "found in [Gunther's] writing the validation of a certain approach to deciding cases that my own instincts and judicial experience had pointed toward."[160] He spoke especially about Gunther's biography of Judge Learned Hand, noting that the book "gives good counsel to judges of all times and places, and particularly to appellate judges like me, in the place where I am sitting at this very time."[161] What is that counsel? "[T]hat Learned Hand's necessities are every judge's common obligations: suspicion of easy cases, skepticism about clear-edged categories, modesty in the face of precedent, candor in playing one worthy principle against another, and the nerve to do it in concrete circumstances on an open page."[162]

Off the bench, Souter's lifestyle as a justice remained consistent with his past. Not long after being confirmed, he admitted that he was "not a very sociable individual except among a fairly close circle of friends," and that "I'm not going to change my personality as a result of getting a new job."[163] He did not use a computer, generally refused to use artificial lights, and continued his habit of eating the same lunch—yogurt and an apple, core and all—every day.[164] He distanced himself as much as possible from the social aspects of life in Washington,[165] traveled

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159 *See* David H. Souter, *Gerald Gunther*, 55 STAN. L. REV. 635 (2002).

160 *Id.* at 635.

161 *Id.*

162 *Id.* at 636.

163 David J. Garrow, *Justice Souter Emerges*, N.Y. TIMES MAG. (Sept. 25, 1994), https://www.nytimes.com/1994/09/25/magazine/justice-souter-emerges.html [https://perma.cc/9HGG-8L46].

164 For depictions of Souter's habits, *see Following Souter*, THE ECONOMIST, May 7, 2009, at 31-32; *Supreme Court Justice Souter to Retire*, CBS NEWS (May 1, 2009, 3:16 PM), https://www.cbsnews.com/news/supreme-court-justice-souter-to-retire/ [https://perma.cc/PLZ8-N2MH]; Gina Holland, *Reclusive Justice Still a Mystery After 14 Years*, ASSOCIATED PRESS (May 6, 2004, 1:14 AM), https://www.goupstate.com/article/NC/20040506/News/605160462/SJ [https://perma.cc/CZN2-CA7P]; Peter Schworm, *Home is Where His Heart is: Souter Eschews Power for a Small N.H. Town*, BOS. GLOBE (May 2, 2009), http://archive.boston.com/news/local/new_hampshire/articles/2009/05/02/home_is_where_his_heart_is/ [https://perma.cc/N636-ZB5R].

165 *See* Robert Draper, *The Pariah*, GQ (May 1, 2009), https://www.gq.com/story/david-souter-supreme-court-robert-draper [https://perma.cc/4R9M-AE5Z].

reluctantly at best,[166] and disliked being recognized in public.[167] Early in his tenure, in declining an invitation to join Justice Blackmun on his annual trip to Aspen, Souter responded, "I have wanted as much as possible to be alone to come to terms in my own heart with what has been happening to me. . . . I need some period of the year when I can make a close approach to solitude."[168] Indeed, at a rare speech delivered a few months before his retirement, Souter characterized the Court's term as "an annual intellectual lobotomy[,]" to be remedied only through his summer reading.[169] He later wrote to Blackmun that, "[i]n a perfect world, I would never give another speech, address, talk, lecture or whatever as long as I live . . . . you have to realize that God gave you an element of sociability, and I think he gave you the share otherwise reserved for me."[170] Long-time Supreme Court journalist Lyle Denniston described Souter as the most private justice he ever covered.[171] Souter's lack of fit with the role and the city was such that he never completely unpacked. As his friend Thomas Rath related the story, "[a] few years ago, he said, 'I figured I'd take the pictures out of the boxes and hang them up, but I figured in a few years I'd be coming back to New Hampshire and I'd have to pack them back up, so I might as well leave them in the boxes.'"[172]

D. Souter the Retiree

Justices tend to take maximum advantage of life tenure, often serving well beyond the time when their abilities begin to

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[166] *See* Ryan C. Black, Ryan J. Owens & Miles T. Armaly, *A Well-Traveled Lot: A Research Note on Judicial Travel by U.S. Supreme Court Justices*, 37 JUST. SYS. J. 367, 369 (2016) (presenting comprehensive data on the travel of the justices); Joan Biskupic, *From Moscow to Missoula, Justices' Jaunts Span the Globe*, WASH. POST, Aug. 5, 1996, at A17.

[167] *See* Garrow, *supra* note 163.

[168] TOOBIN, *supra* note 123, at 44.

[169] *See Souter Will Leave a City He Never Liked*, CBS NEWS (May 1, 2009; 7:06 AM), https://www.cbsnews.com/news/souter-will-leave-a-city-he-never-liked [https://perma.cc/Y7FW-YH5A].

[170] Philip Rucker, *Souter to Return to Quiet Life in Beloved New Hampshire Home Town*, WASH. POST (May 3, 2009) https://www.washingtonpost.com/wp-dyn/content/article/2009/05/02/AR2009050202248.html [https://perma.cc/LYJ9-XYFV].

[171] *See* Draper, *supra* note 165.

[172] *See* Rucker, *supra* note 170.

slip.[173] Few imagined that Justice Souter would follow the same path. David Garrow determined, as early as 1994, that Souter spoke of stepping down when he turned 65.[174] Jeffrey Toobin reported that despondency over his colleagues' handling of *Bush v. Gore*—in which the Court intervened in the 2000 presidential election—led Souter to contemplate retirement.[175] Souter's biographer, Tinsley Yarbrough, whose manuscript was likely completed in 2004, noted that some of the Justice's friends believed that he might retire in 2005, at which point he would have served 15 years and would be entitled to his full salary upon retirement.[176] Yarbrough noted that such a move would not be surprising: "[A]s a person, if not a jurist, Souter is hardly typical; he may have little difficulty deciding to leave Washington sooner rather than later."[177]

When Souter did finally announce his retirement in 2009, he did so in a befittingly unceremonious way. His letter simply stated his intent to retire at the end of the term, cited the statutory provision that entitled him to receive his full salary in retirement, and noted his plan to continue to render service as a retired justice.[178] Most everyone agreed that the experience of serving on the Court had not changed him. New York Times Supreme Court reporter Linda Greenhouse asserted that Souter had a goal when he joined the Court—"not to become a creature of Washington, a captive of the privileges and power that came with a job he was entitled to hold for the rest of his life"[179]—and that, with respect to it, he succeeded brilliantly. A neighbor from New Hampshire

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[173] *See generally* Garrow, *supra* note 12.

[174] *See* Garrow, *supra* note 163.

[175] *See* TOOBIN, *supra* note 124, at 177.

[176] *See* YARBROUGH, *supra* note 14, at 258.

[177] *Id.*

[178] *See* Letter from the Honorable David H. Souter, Associate Justice, Supreme Court of the United States, to Barack Obama, President, United States of America (May 1, 2009), https://www.supremecourt.gov/publicinfo/press/DHSLetter.pdf [https://perma.cc/GJQ4-GGZK].

[179] Linda Greenhouse, *David H. Souter: Justice Unbound*, N.Y. TIMES (May 2, 2009), https://www.nytimes.com/2009/05/03/weekinreview/03greenhouse.html [https://perma.cc/TF52-7HJX].

marveled that Souter "didn't let the experience of serving on the nation's highest court change the down to earth guy that he is."[180]

Souter has, for the most part, returned to the quiet New Hampshire life he sought, though he continues to sit on the First Circuit.[181] He has, however, made a few public appearances, primarily in connection with an effort to raise awareness of the importance of civic education.[182] And, in 2010, he spoke at Harvard's commencement exercises, reflecting on what his time on the Court taught him about the Constitution "and about what judges do when they apply it in deciding cases with constitutional issues."[183] His target, which he simply labels the "fair reading" view without attributing it to any specific proponents, is the Scalian position that "deciding constitutional cases should be a straightforward exercise of reading fairly and viewing facts objectively."[184] This, he contends, is an "unrealistic" approach to the task, and not just because the Constitution's sometimes vague language does not always allow for it. Rather, Souter explained:

> Another reason is that the Constitution contains values that may well exist in tension with each other, not in harmony. Yet another reason is that the facts that determine whether a constitutional provision applies may be very different from facts like a person's age or the amount of the grocery bill; constitutional facts may require judges to understand the meaning that the facts may bear before the judges can figure out what to make of them.[185]

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[180] Peter S. Canellos & Milton J. Valencia, *Souter Appears Set to Leave High Court*, BOS. GLOBE (May 1, 2009), http://archive.boston.com/news/nation/articles/2009/05/01/souter_appears_set_to_leave_high_court/ [https://perma.cc/PX4N-ZDYF]. *See also* Lauren Sausser, *Quiet Retirement Expected for Souter*, N.H. UNION LEADER, May 3, 2009, at 7.

[181] As of this writing, a Westlaw search reveals that Souter has authored 122 First Circuit opinions, the most recent of which was issued on April 22, 2020.

[182] *See, e.g.*, David H. Souter, *Remarks by Justice Souter*, 99 GEO. L.J. 157 (2010).

[183] *Text of Justice David Souter's Speech*, HARV. GAZETTE, May 27, 2010, https://news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech/ [https://perma.cc/F86R-FCGH].

[184] *Id.*

[185] *Id.* He expanded on the first point as follows:

> The explicit terms of the Constitution . . . can create a conflict of approved values, and the explicit terms of the Constitution do not resolve that conflict when it arises. . . . A choice may have to be made, not because language is

The entire discussion contains echoes of his confirmation-hearing testimony, particularly with respect to the second reason, where he returned once again to the transformation from *Plessy* to *Brown* and the fact that "the judges of 1954 found a meaning in segregating the races by law that the majority of their predecessors in 1896 did not see."[186]

Souter did not outline his entire judicial philosophy—there was no discussion of stare decisis—but the summary that he provides in his speech also serves as a useful partial summary of his jurisprudence:

> The fair reading model fails to account for what the Constitution actually says, and it fails just as badly to understand what judges have no choice but to do. 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. Not even its most uncompromising and unconditional language can resolve every potential tension of one provision with another, tension 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 conflicts, and no resolutions immune to rethinking when the significance of old facts may have changed in the changing world. These are reasons enough to show 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. Judges have to choose between the good things that the Constitution approves, and when they do, they have to choose, not on the basis of measurement, but of meaning.
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> The fair reading model misses that, but it has even more to answer for. Remember that the tensions that are the stuff of judging in so many hard constitutional cases are, after all, the creatures of our aspirations: to value liberty, as well as order,

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> vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well.

Id.

[186] *Id.*

> and fairness and equality, as well as liberty. And the very opportunity for conflict between one high value and another reflects our confidence that a way may be found to resolve it when a conflict arises. That is why the simplistic view of the Constitution devalues our aspirations, and attacks that our confidence, and diminishes us. It is a view of judging that means to discourage our tenacity (our sometimes reluctant tenacity) to keep the constitutional promises the nation has made.[187]

Souter sounded a slightly more rueful note in his submission to the Class Report produced in conjunction with the Harvard Class of 1961's 50th Reunion:

> As for the past, I had come to agree with something Justice Blackmun said to me years before. He remarked one day that I, like most justices, would probably have lived a happier life if I had never been appointed to the Court, but that in time I'd come to find a value in being there that was at least worth everything the Court took from me in return. He was right, and when it was time to sum up I realized that the appointment had given me the chance to do the best useful work that was in me, and the pressures always bearing on the Court had forced me to make good on what I could do. I couldn't ask for more. And while the quality of the workmanship may be pronounced good, bad, or indifferent . . . I realized long before I submitted my resignation that whatever the verdict might turn out to be, I was the luckiest guy in the world.[188]

II. THE SUPREME COURT AND CELEBRITY CULTURE

It has long been true that Supreme Court justices, and even some lower federal court and state judges, have enjoyed some renown within the legal world. A few have achieved a degree of renown more generally, such as William O. Douglas[189] and Oliver

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[187] *Id.*

[188] Primus V, *supra* note 11.

[189] *See, e.g.*, BRUCE ALLEN MURPHY, WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS 281-86 (2003) (chronicling Douglas's likely fabrication of having had polio as a child). *See also id.* at 473-80 (recounting Douglas's further efforts to burnish his

Wendell Holmes, Jr.[190] For the most part, however, justices have worked in relative obscurity, treated as honored guests when showing up to judge law-school moot court competitions or deliver lectures, but otherwise going largely unrecognized.

Things have changed over the past few decades. Judge Richard Posner suggests that the justices have more time than their predecessors because the Court's docket is smaller and the justices have access to a talented and ambitious staff of clerks.[191] Meanwhile, the internet has eased access to, and increased demand from, the media.[192] As a result of these developments, coupled with financial incentives and something of an "everyone's doing it" dynamic,[193] several members of the current Court have written books, and all make more public appearances than their predecessors.[194]

Justice Antonin Scalia seems to have been the progenitor of the modern justice-as-celebrity.[195] He initially directed his attention at lawyers, law students, and other judges, who he hoped to bring around to his view of law[196] through his acerbic separate opinions. Over time, though, he became more of a political celebrity, a man who struck conservative reporters as "more oracle than orator . . . . a purist on a court of relativists."[197] Justice Ruth Bader Ginsburg came closest to perfecting the role,

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public image); Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 299 (2013) ("And then there was Justice Douglas, the only colorful figure on the Supreme Court, who wrote a good deal about subjects unrelated to law, such as the environment, and had an irregular personal life that made him an object of some public interest.").

190 *See* David J. Seipp, *Oliver Wendell Holmes, Jr.: The Judge as Celebrity*, XXVII SUP. CT. HIST. SOC'Y Q. 1, 3-6 (2006).

191 *See* Posner, *supra* note 189, at 301.

192 *Id.* at 301-03.

193 *Id.* at 301-02.

194 *See* Richard L. Hasen, *Celebrity Justice: Supreme Court Edition*, 19 GREEN BAG 2D 157, 157 (2016).

195 Jonathan Turley, *The Price of Scalia's Political Stardom*, WASH. POST (Jan. 23, 2011), https://www.washingtonpost.com/opinions/the-price-of-scalias-political-stardom/2011/01/21/ABwmlrD_story.html [https://perma.cc/YUK6-7XTM].

196 Tal Kopan, *The Not-So-Reclusive Justices*, POLITICO (June 28, 2013; 5:40 PM), https://www.politico.com/story/2013/06/supreme-court-justices-public-appearances-093583 [https://perma.cc/VW7F-3JBY] (quoting Professor Sandy Levinson for the proposition that Scalia made a deliberate and successful choice to be "the equivalent of a Barack Obama community organizer").

197 Turley, *supra* note 195.

having been transformed in the eye of her admiring public into "The Notorious RBG," a subject of documentary films and general icon whose "face adorns T-shirts, pins, and memorabilia found at gift shops across the country."[198] "She's pursued by the media, even tabloids, and can hardly take a step without fans stopping her for a selfie."[199] Ginsburg by all accounts embraced the role,[200] aware that "the fact that she's doing this, and embracing it, means so much to young women—because she's teaching, every time she gives a speech or talks to people."[201]

Though some have touted the educational benefits of increased extrajudicial speech from the justices,[202] observers have generally decried the rise of celebrity justices. The concern, simply stated, is that a justice who seeks to build an audience, and to maintain one having built it, will face incentives to behave differently from how she otherwise might. This will manifest itself not only in terms of voting patterns, but also in terms of style. The phenomenon of the celebrity justice, some have suggested, is associated with splintered decisions, "and a certain easygoing attitude toward the precedents" driven by the incentives that the celebrity justice faces to cultivate an aura of personal consistency across opinions—so as to maintain a personal brand—which comes at the expense of institutional consistency.[203] All of this, in turn, feeds public perception of the Court as a political, rather than legal, institution.

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[198] Sabrina Siddiqui, *Ruth Bader Ginsburg: The Soft-Spoken Justice Turned Pop Culture Icon*, THE GUARDIAN (Dec. 15, 2018), https://www.theguardian.com/us-news/2018/dec/15/ruth-bader-ginsburg-film-supreme-court [https://perma.cc/V6NK-38RW].

[199] Sébastien Blanc, *At 83, US Supreme Court Judge Ginsburg is Pop Culture Icon*, AFP (Oct. 18, 2016), https://www.yahoo.com/news/83-us-supreme-court-judge-ginsburg-pop-culture-171844355.html [https://perma.cc/83LW-9Z2U].

[200] *See* Siddiqui, *supra* note 198.

[201] Melena Ryzik, *Ninja Supreme Court Justice: Ruth Bader Ginsburg Has Fun with Fame*, NY TIMES (May 9, 2018) (quoting former Solicitor General Ted Olson) https://www.nytimes.com/2018/05/09/movies/ruth-bader-ginsburg-rbg-documentary.html [https://perma.cc/4VMB-4KHW].

[202] *See, e.g.,* Christopher W. Schmidt, *Beyond the Opinion: Supreme Court Justices and Extrajudicial Speech*, 88 CHI.-KENT L. Rev. 487, 492 (2013) (contending that "extrajudicial speech allows for, even encourages, more personalized, more accessible, and potentially more effective pathways of communication with the American people.").

[203] Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255, 1268-69 (2010).

As Neal Devins and Larry Baum have persuasively argued, the underlying dynamic is not merely, or even mostly, one driven by celebrity in the broadest sense of the term.[204] The more pernicious effects stem from the justices' interactions with the elite networks from which they emerged.[205] Simply put, "prospective Republican nominees are part of a conservative-leaning elite network when nominated, and they can gain validation from that network after joining the Court. Similarly, Democratic-appointed Justices are part of a liberal-leaning network."[206] These are attentive and informed audiences, and, given the polarized state of American politics, they do not tend to be especially tolerant.

An initial set of proposed solutions focused on placing term limits on the justices' service.[207] Others have suggested modifying the almost completely discretionary nature of the Court's docket, taking away the justices' law clerks, and reinstituting the practice of circuit riding.[208] The most frequently proposed solution would do away with the practice of signed opinions.[209] Craig Lerner and Nelson Lund contend that "[t]ruly unpretentious judicial servants should have no need to put their personal stamp on the law, and the practice of doing so has contributed to unnecessary and unhealthy flamboyance in the Court's work."[210] Suzanna Sherry would go one step further, prohibiting not merely signed opinions, but also all concurring and dissenting opinions.[211] She argues that the most effective way "to reduce the Justices' grasping for celebrity is to place it out of reach. And to do that, we have to make it impossible for them to use their official authority to enhance their own reputations."[212]

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[204] NEAL DEVINS & LAWRENCE BAUM, THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT xi (2019).

[205] *Id.*

[206] *Id.*

[207] *See, e.g.*, Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1323-24 (2007).

[208] Lerner & Lund, *supra* note 203, at 1290-99.

[209] *Id.* at 1276-83; *see also*, Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3425998 [https://perma.cc/PB8A-NZG7].

[210] Lerner & Lund, *supra* note 202, at 1260.

[211] Sherry, *supra* note 209, at 13.

[212] *Id.*

III. LESSONS

Fittingly, Justice Souter's career can provide only tentative and contingent lessons for the Supreme Court, its relation to celebrity culture, and what ails it more generally. It is difficult to draw generalizable descriptive conclusions from a single example. And whether Souter's example is a usefully instructive one, and in what ways, is, to a large degree, in the eye of the beholder, depending on any number of contestable assumptions about the proper conception of the judicial role. His common-law approach to constitutional interpretation is certainly not universally admired. His open acknowledgement of the forces that might cloud judgment, and efforts to work toward the dispassionate suspension of judgment, by contrast, provides something closer to a generally accepted model for the implementation of judicial independence. It is with respect to this latter feature of Souter's jurisprudential style that the most profitable lessons for the relationship between judging and celebrity culture lie.

The standard story about Justice Souter is that his is a somewhat dramatic case of "ideological drift," a phenomenon in which a justice moves "right" or "left" over the course of his time on the Court.[213] In Souter's case, of course, the posited drift was to the left.[214] He was appointed by a Republican president with the expectation that he would be a conservative justice, but turned into a reliable liberal vote, at least when the difference between "liberal" and "conservative" is defined via a reductionist calculus that focuses simply on results characterized in political terms. Such drift might be a product of internal Court dynamics, as justices react to their colleagues' jurisprudential positions as well as their intellectual and interpersonal styles. Other potential causes of drift are adjacent to the perceived pathologies of celebrity culture. The so-called "Greenhouse Effect," for example,

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[213] *See* Lee Epstein, Andrew D. Martin, Kevin M. Quinn, & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. COLLOQUY 127, 129 (2007) ("Contrary to the received wisdom, virtually every Justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times.").

[214] *E.g.*, Lexington, *Why Republican Judges Drift to the Left*, THE ECONOMIST (Apr. 14, 2010), https://www.economist.com/lexingtons-notebook/2010/04/14/why-republican-judges-drift-to-the-left [https://perma.cc/M2FB-7NVQ].

attributes a justice's ideological migration to a desire to please and thereby secure favorable coverage in the mainstream (and presumptively liberal) media.[215]

Observers have offered both sorts of explanations for Souter's perceived leftward drift. One version of the story is that Souter's shift occurred primarily as a reaction to his exposure to the other justices, in particular the aggressive style of Justice Scalia. But although some have suggested that Justice Scalia's bluntness alienated Souter,[216] most reports indicate that Souter received Scalia's barbs with an equanimous "[t]hat's just Nino being Nino,"[217] and that Souter enjoyed a cordial relationship with all his colleagues, including Scalia.[218] No doubt Souter found little to admire in Scalia's approach to law, and much of what he wrote as a justice and after his retirement reads as a response to Scalia's certainty and fondness for bright lines. But, as we have seen, Souter was never an adherent of such an approach, and his later views are simply more refined versions of his earlier positions.

Another explanation is that Souter's change was "the response of a small-timer, dazzled and made giddy by the vastly broader challenges of the Supreme Court."[219] Jeremy Rabkin reports that a former Supreme Court clerk quotes Souter as saying "'I never had to think about these things until I came to Washington. I just never thought much about them. I had no settled views.'"[220] Such a view, one imagines, understands Souter to have been disoriented by the new legal landscape in which he found himself, and by the metaphorical bright lights focused on the Court. A third possibility is that "Souter is a master dissembler, who quite carefully hid his true views to secure his

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[215] For a thorough discussion of the concept, including its history, *see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574-79 (2010).

[216] GREENBURG, *supra* note 7, at 129-30.

[217] Draper, *supra* note 165.

[218] *Id.*; Kermit Roosevelt III, *Justice Souter and His Law Clerks*, *in* OF COURTIERS & KINGS: MORE STORIES OF SUPREME COURT LAW CLERKS AND THEIR JUSTICES 336, 337 (2015) ("I remember the experience of reading a colorful dissent circulated in response to a Souter majority opinion. My reaction was a mix of mortification and rage, but Souter seemed mildly amused and concerned primarily with deciding whether the dissent made any valid points that would justify alterations in his opinion.").

[219] Rabkin, *supra* note 6.

[220] *Id.*

appointment in an era when the key to advancement lay through a Republican White House."[221] Here Rabkin quotes a former White House aide baldly accusing Souter of having lied simply to get the nomination.[222] Whatever the precise mechanism, the lesson that conservatives took from the experience was clear: Nominate only those with an established record of reaching conservative results.[223]

There is no question that conservatives, at least on most contemporary definitions of the word, did not get the results they sought from Justice Souter, and in that sense the result-oriented among them understandably experienced buyer's remorse. But as a few commentators have recognized, another explanation of Souter's behavior on the Court is that it did not involve drift at all. It was instead the case that his was an older brand of conservatism.[224] Souter's jurisprudence could be characterized as conservative in the Burkean sense. Ernest Young has developed the point most fully, emphasizing Souter's commitment to "evolutionary development of constitutional doctrine," "ambivalence toward modern notions of judicial restraint," and "Burkean distrust of bright-line rules."[225] Burkeanism is a

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[221] *Id.*

[222] *Id.*

[223] Rabkin quotes an aide to White House counsel C. Boyden Gray: "'We may have erred by emphasizing judicial philosophy more than evidence of Souter's stands on concrete issues.'" *Id.* Rabkin himself lamented, "No one questioned Souter directly on how he would respond to a case urging that *Roe* be overruled. No one asked him directly how he would deal with contentious issues like affirmative action." *Id.* Professor John McGinnis emphasized the need for conservative presidents to identify nominees who have demonstrated "an established commitment to the conservative legal movement" and who "have been tested in Washington" so that he has "already taken positions for which he ha[s] paid a price in public attacks on his views." John O. McGinnis, *Original Thomas, Conventional Souter*, HOOVER INSTITUTION: POL'Y REV. (1995), https://www.hoover.org/research/original-thomas-conventional-souter [https://perma.cc/YD8E-XQL9].

[224] *See* TUSHNET, *supra* note 15, at 61 ("He was a Republican, but a northeastern Republican, representative of the party before its transformation by Goldwater and Reagan.").

[225] Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 718-19 (1994). *See also* Adrian Vermeule, *Does Commerce Clause Review Have Perverse Effects?*, 46 VILL. L. REV. 1325, 1326 (2001) (characterizing Justice Souter as "the most consistently Burkean member of the current Court"); Michael Dorf, *Souter the Burkean Versus Scalia the Neocon*, DORF ON LAW (May 4, 2009), http://www.dorfonlaw.org/2009/05/souter-burkean-versus-

conservative intellectual orientation, but not one that will necessarily produce ideologically conservative results according to a given historical moment's conception of conservatism, especially when the body of doctrine and tradition to be applied includes a healthy portion that had been developed by the Warren Court.[226]

In an essay discussing his experience working with the Justice, Souter's former law clerk Kermit Roosevelt emphasized the Justice's lack of ideological precommitment to results and his concern instead with "the soundness of reasoning and justification."[227] This, Roosevelt speculates, may have been part of what made the Court "an uncomfortable fit" for Souter:

> The justice believed in law as a moderating force and courts as a refuge from the tumult of partisanship. At the court of appeals level, such a philosophy can find an easy expression in right answers unaffected by politics. At the Supreme Court level, it manifests as a cautious incrementalism that resists extremes. Resisting extremism is certainly a theme of his jurisprudence, and there were some hugely important cases where his presence made all the difference. But fighting partisans is not fully satisfying for those who think the real foe is partisanship: your side may win or it may lose, but something is still wrong as long as there are sides at all.[228]

Indeed, Souter's view of his role as a justice seemed to track almost perfectly with how David Seipp depicted Justice Holmes's

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scalia-neocon.html [https://perma.cc/9YN3-EQV7] ("Souter's brand of conservatism, like Harlan's, resists the formulaic simplicity of Justice Scalia's notion that the rule of law is a law of rules. It is conservative in the Burkean sense rather than what we might justifiably call the neo-conservative or even reactionary approach of the current true believers."); *but see* Ilya Somin, *Is Justice Souter a "Burkean" Conservative?*, VOLOKH CONSPIRACY (May 8, 2009, 2:00 AM) http://volokh.com/2009/05/08/is-justice-souter-a-burkean-conservative/ [https://perma.cc/8K82-7NLB]. *Cf.* Brett H. McDonnell, *Is Incest Next?*, 10 CARDOZO WOMEN'S L.J. 337, 345 (2004) (describing Souter in *Glucksberg* as having "kept alive the liberal Burkean approach"). For a sophisticated analysis of Souter's methodology that highlights his reliance on history, *see generally* Barzun, *supra* note 20. There are assuredly other themes in and dimensions to Souter's jurisprudence. For example, Scott Dodson highlights Souter's general commitment to procedural fairness. *See* Scott Dodson, *Justice Souter and the Civil Rules*, 88 WASH. U. L. REV. 289 (2010).

[226] TUSHNET, *supra* note 15, at 61-62.

[227] Roosevelt, *supra* note 218, at 337.

[228] *Id.* at 339-40.

conception of the role of a state appellate court judge: "as that of a contributor to a collective enterprise, destined soon to be forgotten in name, and having useful effect only in the incremental improvement of judicial reasoning that he would add to what judges had done before."[229] The goal for such a jurist is not to be flashy, or to draw attention to oneself, but to serve as a careful steward of a long and deep tradition.

Thinking of Justice Souter in this way, especially when considered in light of his approach to the job and to the world more generally, provides a compelling response to the charge that Souter's behavior as a justice can be explained as a product of ideological drift. Souter simply did not pay attention to any of the forces typically viewed as causing such a drift. More than that, there is simply too much consistency over time in the depiction he provided of the judicial role, whether it's the depiction he provided in his testimony to the Senate Judiciary Committee, in his opinions, or in his few extrajudicial writings, to conclude that he engaged in some wholesale reconsideration of the role, or was somehow blinded and disoriented by the big stage.

Of course, a response to this last point is to suggest that Souter's methodology was so protean that he did not need to change frameworks in order to change the nature of the results he reached. Such a position was at the core of Justice Scalia's preference for rules over standards.[230] And it could be so. But it could also be that the critique says as much about the critic as about Justice Souter. We reveal much about ourselves in what we expect of others. Those who most vociferously claim that the Supreme Court is nothing but an ideological battlefield, and who decry Justice Souter's failure to reach consistently conservative results, may be inadvertently signaling that they are unable to conceive of deciding cases in any other way or according to any other criteria. Likewise, Senator Biden's reaction to Souter's testimony before the Senate Judiciary Committee seemed premised on the conclusion that if a methodology does not purport to provide a complete decisional template, then it is "subjective"

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[229] Seipp, *supra* note 190, at 3-4.

[230] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

and provides no constraint at all.[231] Conceiving of the Court's work in these extremes leaves no room for the dispassionate exercise of judgment, or for a judge to be guided by law even when the principles involved do not reduce to neat rule statements purporting to mechanistically generate results.[232]

If our expectations of others provide a window into our expectations of ourselves, then Justice Souter's reaction to *Bush v. Gore* provides a window into what he expected of himself. As Jeffrey Toobin tells the tale, Souter "was shattered":

> He was, fundamentally, a very different person from his colleagues. It wasn't just that they had immediate families; their lives off the bench were entirely unlike his. They went to parties and conferences; they gave speeches; they mingled in Washington, where cynicism about everything, including the work of the Supreme Court, was universal. Toughened, or coarsened, by their worldly lives, the other dissenters could shrug and move on, but Souter couldn't. His whole life was being a judge. He came from a tradition where the independence of the judiciary was the foundation of the rule of law. And Souter believed *Bush v. Gore* mocked that tradition. His colleagues' actions were so transparently, so crudely partisan that Souter thought he might not be able to serve with them anymore.
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> Souter seriously considered resigning. For many months, it was not at all clear whether he would remain as a justice. That the Court met in a city he loathed made the decision even harder. At the urging of a handful of close friends, he decided to stay on, but his attitude toward the Court was never the same. There were times when David Souter thought of *Bush v. Gore* and wept.[233]

One senses even in Toobin's generally sympathetic account a hint of the same disbelief that appeared in the reports out of New Hampshire in the immediate wake of Souter's nomination. In a world of those accustomed to climbing the ladder of success, for

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[231] *See* MERSKY ET AL., *supra* note 2, at 689.

[232] For a general consideration of this topic *see* Chad M. Oldfather, *Aesthetic Judging and the Constitution (or, Why Supreme Court Justices are Less Like Umpires and More Like Figure-Skating Judges)*, 72 FLA. L. REV. 391 (2020).

[233] TOOBIN, *supra* note 124, at 177.

whom acting out of self-interest is the most natural thing in the world, it is no surprise that Souter's habits could come across as insincere. For one accustomed to setting self-interest aside, by contrast, the default response might be to believe in the most charitable interpretation of others' behavior, which in turn would make it all the more jarring when such an interpretation simply cannot fit the facts.

There is, of course, no way to prove that Justice Souter stayed true to his word, that he consciously and consistently sought to reach beyond his personal preferences for the grounds for his decisions. And even his perceiving that he did so neither would nor could provide complete assurance. The unconscious influences on our behavior by definition do their work just beyond our ability to recognize their influence. Blind spots, by their very nature, are things we cannot see. But the same holds true for originalists, or adherents to any other methodology. All, in their application, require good faith. None ensures infallibility.

Justice Souter's example highlights the significance of the identity and character of the judge to the proper execution of the judicial function.[234] Even the best methodology provides little constraint on the improperly motivated judge. The judge with the appropriate motivations and inclinations—whether conceived in terms of virtue,[235] conscientiousness,[236] or otherwise[237]—will make good use of even the most malleable framework.

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[234] As Bruce Ackerman has observed, this is especially true for a common-law approach, which relies "on the seasoned judge with a sense of decency to sort the wheat from the chaff." Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 10 (1991). That sort of judge—or at least people who are generally recognized as that sort of judge—may be more difficult to come by in our pluralistic, meritocratic age. *Id.* at 29-31.

[235] *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178-79 (2003).

[236] *See* RYAN C. BLACK, RYAN J. OWENS, JUSTIN WEDEKING, & PATRICK C. WOHLFARTH, THE CONSCIENTIOUS JUSTICE: HOW SUPREME COURT JUSTICES' PERSONALITIES INFLUENCE THE LAW, THE HIGH COURT, AND THE CONSTITUTION (2020). Of course, as they acknowledge, the fact that Souter (and Harlan) score quite low on their measure of conscientiousness has led some to question the validity of their measure. *Id.* at 41-43. Count me among those made skeptical by that result.

[237] *See* Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. REV. 2085 (2020).

The law, of course, is skeptical of character as an evidentiary construct,[238] and psychology supports this intuition, cautioning against the existence of some constant "I" that consistently occupies all phases of our lives. There is certainly some evidence to suggest that Justice Souter, like most of us, contains multitudes.[239] He is both cosmopolitan and parochial,[240] gregarious in situations where he is comfortable, reserved in situations where he is not.[241] And yet virtually no one who has worked with or otherwise known David Souter has suggested that he is anything other than thoroughly principled. Regardless of whether one happens to like the results he reached, or the analytical path he took in reaching them, the evidence suggests he reached them because that is where his understanding of the applicable legal materials led him.

The danger of celebrity culture in the context of the Supreme Court is that it works against efforts to follow such an approach. The lure of celebrity creates obvious pressures and incentives for a justice to reach approved results and to do so in a way that will nurture that status. As Devins and Baum have persuasively argued, "the orientation of Supreme Court Justices toward elite networks whose approval is important to them . . . has . . . helped to create party-line divisions on the Court."[242] What John McGinnis, in invoking St. Augustine while urging Republican presidents to select nominees with proven conservative track records, praised as "the warmth of kindred studies"[243] is perhaps better regarded as the pathway to a pernicious echo chamber. As

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[238] *See* FED. R. EVID. 404.

[239] WALT WHITMAN, *Song of Myself*, *in* LEAVES OF GRASS (1892), https://www.poetryfoundation.org/poems/45477/song-of-myself-1892-version [https://perma.cc/ESJ8-ZDXM].

"Do I contradict myself?
Very well then I contradict myself,
(I am large, I contain multitudes.)"

[240] He was repeatedly uncomfortable touring Europe while a Rhodes scholar, in part because not everyone spoke English, , and is frequently quoted as wondering why anyone would bother with Paris over Boston. YARBROUGH, *supra* note 4, at 14-15; Greenhouse, *supra* note 178.

[241] *See, e.g.*, Apple, *supra* note 50 (characterizing Souter as uninterested in small talk).

[242] DEVINS & BAUM, *supra* note 204, at xvi.

[243] McGinnis, *supra* note 223.

conservative and liberal justices emerge from, then seek the continued adulation of, the Federalist Society and the American Constitution Society, respectively, they face not merely a temptation to play to a familiar base, but may also be less likely to pause to consider the possibility that they may be wrong.[244] Results, rather than integrity, and confidence, rather than humility, are what draw praise.

The "No More Souters" lesson that conservatives drew is the sort that magnifies this dynamic by selecting for those most likely to be susceptible to it. An emphasis on established records of reaching conservative results and other demonstrated ideological bona fides sends a clear signal to ambitious lawyers and lower-court judges: Be loud and proud. The rise of the "audition opinion," by which a judge hoping for promotion seeks to demonstrate that she will not stray from the path if elevated, should come as no surprise.

The corrosive effects of celebrity culture extend beyond the Court itself. All of the Court's audiences are affected. Justices playing to a base will tend to write opinions that engage more sharply with one another, and that will include suggestions that the other side is engaged in something disingenuous or dishonest.[245] Media coverage will tend to distill this down to mere partisan disagreement, as we see in the now-common portrayals of the justices as falling into "liberal" and "conservative" camps.[246] To lower-court judges, for whom the justices serve as a model, this behavior will expand the boundaries of what is permissible and

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[244] For Souter, such self-questioning was a cardinal virtue:

> Learned Hand said once that we would like to have posted over the door of every church and school, every courthouse and legislative hall in America, the words of Cromwell to the Scots before the battle of Dunbar, begging them to consider that they might be mistaken. Well, I will match his fancy, because if I had the power, I would see to it that no judge in America entered office without reading [Gerald Gunther's] life of Hand.

Souter, *supra* note 159, at 635.

[245] *See, e.g.*, Sherry, *supra* note 209; Carolyn Shapiro, *What Members of Congress Say About the Supreme Court and Why It Matters*, 93 CHI.-KENT L. REV. 453, 458-60 (2018) (cautioning against the use and effects of such rhetoric).

[246] *See* Barry Sullivan & Cristina Carmody Tilley, *Supreme Court Journalism: From Law to Spectacle?*, 77 WASH. & LEE L. REV. 343 (2020).

appropriate in judicial opinions.[247] Those so inclined will be encouraged by their cheering sections in the Federalist Society and American Constitution Society. All of this, eventually, may have a profound effect on the professional culture, because one of the primary audiences for judicial opinions is law students, who necessarily emulate and thus internalize what they encounter in their casebooks as they learn what it means "to think like a lawyer."

What is most admirable about Justice Souter is his resolute refusal to engage in any of this, which culminated in his decision to leave the Court at a relatively young age. He was certainly aided in this by his temperament and personal inclinations. He was also, no doubt, imperfect in his execution, as any human will necessarily be. But his avoidance of Washington's social scene and of the other trappings of celebrity served at least to minimize the pernicious effects that it and the other varieties of ideological groupthink tend to encourage. At the same time, Souter's rejection of even the most minor aspects of celebrity and continued embrace of a reflective, scholarly lifestyle perhaps allowed him more mental space in which to engage thoughtfully with the work of the Court.

We inhabit a world in which seats on the Court increasingly go to a certain sort of striver, someone who has been accumulating brass rings her entire life. That sort of person, one imagines, will likewise be inclined to build a reputation and celebrity status once she is on the Court. And if she has had only a narrow and unrepresentative range of experiences, as has also increasingly been the case, the pursuit of reputation and celebrity will leave her less time and inclination to reflect on the world as opposed to focusing on what is necessary to get ahead in it.

It is, of course, unwise to generalize based on a single example. But the case of David Souter at least suggests that character and temperament are as significant as methodology when it comes to maintaining the rule of law. If one accedes to the understanding that the Court is purely a political court, and that the justices are not constrained by law in any meaningful sense,

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[247] For a recent example of appellate court jurists acting in an unbecoming fashion, *see generally Wisconsin Legislature v. Palm*, 942 N.W.2d 900 (Wis. 2020), the footnotes of which are chock full of undignified sniping.

then such a focus would be misplaced, and a focus on results would be the appropriate one. But if we aspire to something greater, then a focus on results is the politicolegal equivalent of failing the marshmallow test.[248] The rule of law generates results that sometimes diverge from the immediate political desires of those who must uphold it.

All indications are that Souter was and remains a conservative by temperament and, at least under pre-Trump-era conceptions of conservatism, belief. His personal, moral position with respect to abortion, to take just the most salient example, seems most likely to be that of opposition. Assuming that to be the case, his behavior as a justice saw him to a considerable degree sublimating his personal views in favor of what he concluded the law required. Such a separation of personal and legal belief seems illusory to many, especially with respect to more contentious questions of constitutional law. And yet it involves precisely the sort of calculus that we expect lower-court judges to engage in all the time—to approach the current case not as an opportunity to engage in freewheeling choice, but rather as one presenting the obligation to study past cases and to discern from them, in common-law fashion, what principles they stand for, what guidance they provide into how those principles should be applied in the case before the court. It hardly seems surprising that law, so conceived, might require a result distinct from a jurist's preferences in any individual case. That, indeed, is one of the core ideas behind the notion of "a government of laws, and not of men."[249]

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[248] The marshmallow test is one of the most famous pieces of social-science research: Put a marshmallow in front of a child, tell her that she can have a second one if she can go 15 minutes without eating the first one, and then leave the room. Whether she's patient enough to double her payout is supposedly indicative of a willpower that will pay dividends down the line, at school and eventually at work. Passing the test is, to many, a promising signal of future success.
Jessica McCrory Calarco, *Why Rich Kids Are So Good at the Marshmallow Test*, THE ATLANTIC, (June 1, 2018), https://www.theatlantic.com/family/archive/2018/06/marshmallow-test/561779/ [https://perma.cc/L444-4YGC]. As Calarco discusses, the implications of the study are subject to some dispute. *Id.*

[249] Marbury v. Madison, 5 U.S. 137, 163 (1803).

CONCLUSION

That there will be no more Souters seems undoubtedly true as a predictive matter, both because Souters are rare and because they are even less likely to gain appointments in our deeply polarized era.[250] What may be the best solution to the problems of celebrity culture on the Supreme Court thus seems out of reach. If we cannot find justices who will resist the lure of celebrity, efforts to place celebrity beyond easy grasp, such as through the anonymization of opinions, may represent an achievable second-best. Either way, the phrase "No More Souters" ought to take on a new dimension, in which it resonates less as mantra and more as lament.

[250] As Charles Barzun notes, Souter "is unlikely to serve as a jurisprudential exemplar for (or vehicle of) any political movement on either side of the ideological spectrum—especially not in these hyper-partisan times." Barzun, *supra* note 20, at 726.