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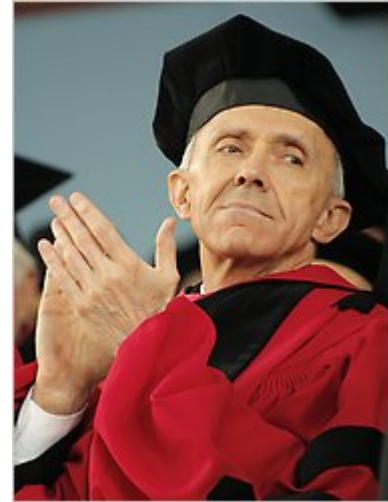
Justice Souter's Class

By Linda Greenhouse

Justice David H. Souter left the Supreme Court nearly a year ago without really saying goodbye. There were no pre-retirement interviews of the sort that Justice John Paul Stevens gave to several journalists this spring. There were no farewell press conferences like those that several justices who retired during the 1980's and 1990's were willing to endure for the sake of placing their own codas on their Supreme Court careers.

And since Justice Souter has decided [to keep his papers closed to the public for 50 years](#), few people in a position actually to remember his Supreme Court tenure (1990-2009) will be able to explore the archive and learn what conclusions this most private of public figures drew from his part in two decades of profound debate about the role of the court and the meaning of the Constitution.

So it was with a mixture of relief and something close to joy that I listened last week to [David Souter's commencement address](#) at Harvard, his undergraduate and law school alma mater, which awarded him an honorary degree. (I was in the audience as a member of Harvard's Board of Overseers; like the thousands of others seated at the outdoor gathering, I had no idea what to expect.)



As a matter of immediate impact, this was not a speech to rival Secretary of State George C. Marshall's announcement, [in his Harvard commencement address in 1947](#), of his plan for the reconstruction of postwar Europe. Nor is it likely to attain the resonance of Winston Churchill's declaration the previous year, upon receiving an honorary degree at Westminster College in Fulton, Mo., that the cold war had begun and that ["an iron curtain has descended"](#) across Europe.

But for those who care about the Supreme Court, Justice Souter served up some rich fare: his own vision of the craft of constitutional interpretation and a defense of the need for judges to go beyond the plain text — what he called the “fair-reading model” — and make choices among the competing values embedded in the Constitution. Doing this was neither judicial activism nor “making up the law,” he said; rather, it was the unavoidable “stuff of judging,” and to suppose otherwise was to “egregiously” miss the point of what constitutional law is about.

His stance was modest — “Over the course of 19 years on the Supreme Court, I learned some lessons about the Constitution of the United States,” he began — but the prose was muscular, in contrast to the writing style in many of his opinions. The “notion that all of constitutional law lies there in the Constitution waiting for a judge to read it fairly” is not only “simplistic,” he said; it “diminishes us” by failing to acknowledge that the Constitution is not just a set of aphorisms for the country to live by but a “pantheon of

values” inevitably in tension with one another. The Supreme Court may serve no higher function than to help society resolve the “conflict between the good and the good,” he suggested:

A choice may have to be made, not because language is 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. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice.

Justice Souter named no contemporary names. He did not mention Justice Antonin Scalia, whose “originalist” doctrine of constitutional interpretation made inroads in recent years, most notably in the 2008 decision, from which Justice Souter dissented, [declaring an individual right to gun ownership under the Second Amendment](#). But I have to think he had Justice Scalia in mind when he observed that “behind most dreams of a simpler Constitution there lies a basic human hunger for the certainty and control that the fair-reading model seems to promise.”

Justice Scalia has acknowledged as much himself, in a famous law review article he published in 1989, three years after he joined the court. Titled “The Rule of Law as a Law of Rules,” the article in The University of Chicago Law Review asserted that judges need clear rules, rather than malleable balancing tests of the sort favored in modern constitutional law, in order to avoid straying into the realm of personal preference. By announcing a clear rule of decision, Justice Scalia wrote, [“I not only constrain lower courts; I constrain myself as well.”](#) He added, “Only by announcing rules do we hedge ourselves in.”

Justice Souter said he well understood, and indeed had shared, that “longing for a world without ambiguity, and for the stability of something unchanging in human institutions.” But he said he had come to accept and even embrace the “indeterminate world” in which a judge’s duty was to respect the words of the Constitution’s framers “by facing facts, and by seeking to understand their meaning for the living.”

Neither did he refer to his own successor, Justice Sonia Sotomayor, who during her Senate confirmation hearing last summer professed her [“rigorous commitment to interpreting the Constitution according to its terms.”](#) and to deciding cases “with the law always commanding the result in every case.” But he did note that with another confirmation season approaching, “we will as a consequence be hearing and discussing a particular sort of criticism that is frequently aimed at the more controversial Supreme Court decisions: criticism that the court is making up the law, that the court is announcing constitutional rules that cannot be found in the Constitution, and that the court is engaging in activism to extend civil liberties.”

He framed the speech as a rebuttal to those criticisms and he discussed in some detail two historic cases, both from decades before his own tenure. One was [the Pentagon Papers](#)

[case from 1971](#), which required the court to weigh “a conflict of approved values”: the government’s claim that national security required publication to be suppressed versus the claims of The New York Times and The Washington Post that the First Amendment gave them the right to publish the government’s secret history of the war in Vietnam. The First Amendment prevailed.

The other decision was [Brown v. Board of Education](#), the 1954 school desegregation case, which Justice Souter invoked for a different point. Contrasting Brown with [Plessy v. Ferguson](#), the 1896 decision that interpreted the 14th Amendment’s guarantee of equal protection as permitting “separate but equal” public facilities for blacks and whites, Justice Souter said the difference between the two was not one of competing constitutional values but of “the subtlety of constitutional facts.”

The justices in both cases intended to uphold the guarantee of equal protection, he said, but diverged in how they understood the meaning of legally mandated separation. To the post-Civil War generation that upheld segregated railroad cars, “the formal equality of an identical railroad car meant progress” in light of how recently slavery had been abolished, he noted, while by 1954, a court that was still composed entirely of white men understood that enforced segregation “carried only one possible meaning,” a constitutionally unacceptable judgment that blacks were inferior to whites.

In other words, Justice Souter continued, the meaning to the justices of the fact of segregation had changed. “The meaning of facts arises elsewhere and its judicial perception turns on the experience of the judges, and on their ability to think from a point of view different from their own,” he said, providing a pretty good working definition of empathy. “Meaning comes from the capacity to see what is not in some simple, objective sense there on the printed page.”

“Was it activism to act based on the current meaning of facts that at a purely objective level were about the same as Plessy’s facts 60 years before?” he asked. “So much for the assumption that facts just lie there waiting for an objective judge to view them.”

Justice Souter could, of course, have gone on to say more — to leave the safe zone of *Brown v. Board of Education* and, for example, to offer some thoughts on how a changed judicial appreciation of facts led the court seven years ago, [in Lawrence v. Texas](#), to repudiate a recent precedent and to begin to build a constitutional framework for gay rights. There are obviously many current controversies, from abortion to criminal sentencing to the war on terrorism, that fit Justice Souter’s construct and on which a more adventurous retired justice might have been tempted to comment.

I wrote earlier in this column that I responded to Justice Souter’s speech with feelings of relief and joy. The relief came from seeing that this thoughtful man, a young 70, has not retreated fully into the privacy he cherishes, but was willing after all to share his wisdom. The joy came from supposing that he might keep on doing it.

PHOTO CREDIT: Adam Hunger/Reuters David Souter at Harvard’s commencement on May 27.