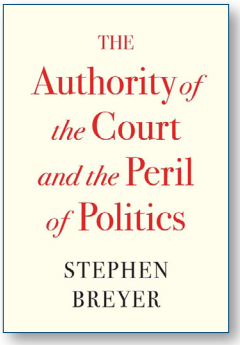
Justice Breyer on the Crisis of Confidence in the U.S. Supreme Court

BY HON. JOSEPH R. GRODIN



Stephen Breyer
The Authority of the Court and the Peril of Politics
Cambridge, Harvard Univ. Press, 2021

When a long-time institutionalist and respected jurist like Justice Stephen Breyer sets out to defend a court with which he often disagrees from charges of politicization, one is bound to listen with respect. *The Authority of the Court and the Peril of Politics* is a brief (100-page) book based on a lecture which Justice Breyer gave at Harvard Law School shortly before he announced his retirement. In it, Justice Breyer observes that the court's authority as final arbiter of what the Constitution means, first declared by Chief Justice Marshall in *Marbury v. Madison*,[1] lacks both textual support and reliable means of enforcement, and is ultimately dependent upon what he characterizes as a continuing "habit" of general public acceptance of its decisions even when they are highly controversial. He expresses concern that this habit may be fragile, and under threat from an increasing tendency to regard the court as political in nature, its justices being viewed as less like legal authorities and more like "politicians in robes." And he offers recommendations for keeping that tendency in check.

Much of what Justice Breyer has to say is beyond dispute. While the court has often been a battleground for competing views about how the Constitution should be interpreted, there was a time when public discourse surrounding presidential nominations, Senate confirmations, and the court's decisions was, on the surface at least, less political and more technocratic in nature. Nominees to the court were to be judged on the basis of their perceived "qualifications" and knowledge of "the law," rather than on the basis of how they might decide particular cases, and "politics" was a dirty word. In recent years, as Justice Breyer has observed along with many others, the rhetoric has changed, and the work of the court is increasingly viewed through a political lens. And it seems reasonable to believe, as Justice Breyer suggests, that this changing atmosphere of public discourse may erode confidence in the court and undermine its authority. But how to address this concern depends, at least to some extent, upon whether one views the changed rhetoric as representing a mistaken view about the court and the nature of its decisional process, or whether it represents recognition of a reality that has long existed but been insufficiently acknowledged.

Justice Breyer insists categorically that "it is wrong to think of the court as a political institution"[2] and that "political" is the "wrong word to describe even the more controversial court decisions"[3] — but these assertions depend, obviously, upon how the word is used. We might grant that for the most part court decisions are not and should not be determined (even though they may often be predicted) by politics in a strictly partisan sense. Justices, given their lifetime appointments, are unlikely to decide in a particular way simply to please the president who appointed them. And, for the sake of argument we can assume they only rarely if ever decide in a particular way in order to favor one party over the other, though the court's blatantly partisan decision in *Bush v. Gore*[4] and decisions by the current court majority in cases involving voting rights and gerrymandering create doubts about even that proposition.

But Justice Breyer is too sophisticated to believe, nor does he maintain, that political views in a larger sense, of different views concerning what is good for society or how competing values should be evaluated, play no role in constitutional adjudication. He is not among those who argue that objectivity can be achieved by invoking "original understanding" or "plain meaning" of constitutional text. Rather his own opinions reflect a pragmatic approach, in which competing values are openly considered and "balanced" in order to reach a conclusion.[5] Thus, he concedes that "it is sometimes difficult to separate what counts as a jurisprudential view from what counts as political philosophy," and that "given (1) the highly general language of the Constitution (2) the ambiguous connections among jurisprudence, political philosophy, and policy, and (3) the inevitable, conscious or unconscious impact of an individual's background upon his or her basic views of the world, to suggest a total and clean divorce between the court and politics is not quite right."[6]

So where does that leave us? If there cannot be a total divorce between the court and politics, is there some sort

1. (1803) 5 U.S. 137.

2. Stephen Breyer, *The Authority of the Court and the Peril of Politics*, Cambridge: Harvard Univ. Press, 2021, 62.

3. *Id.* 51.

4. *Bush v. Gore* (2000) 531 U.S. 98.

5. *See, e.g.,* Justice Breyer's dissenting opinion in *District of Columbia v. Heller* (2008) 554 U.S. 570, 681.

6. Breyer, *The Authority of the Court*, 62.

of accommodation that can be advanced as an alternative to the existing rhetoric, one that would recognize and reconcile the tension between characterizing judges as akin to referees calling "balls and strikes" and viewing them as legislators in robes? If so, Justice Breyer does not provide it, and his failure to do so is understandable. There has always existed, at least since the advent of Legal Realism in the 1920s and 1930s, a disparity between how sitting judges perceive what they are doing and how what they are doing is perceived by those outside the court, and the constraints which most judges feel when reaching for a decision are difficult to describe or to be understood by a skeptical public. I recall being annoyed, when I was on the California Supreme Court, by the charge that my judicial colleagues and I were overturning death penalty verdicts because of personal animosity toward the death penalty while we believed, and I still believe, that our death penalty reversals were required by the Constitution as interpreted by decisions of the U.S. Supreme Court. But that is a distinction that is difficult to explain to, or to be understood by, a skeptical public and, upon reflection after leaving the bench I must concede that that my views about the death penalty probably had some bearing on how I viewed the law. In 1986 the voting public chose to remove three of us — including Chief Justice Rose Bird, and Justice Cruz Reynoso along with myself — in an election that focused on retaining capital punishment.

A recent poll by the Pew Research Center[7] casts some light on how the public views the court and its decisions. Over the years the Supreme Court has enjoyed generally favorable ratings from the public, but according to the new survey conducted in January of this year, the share of adults with a favorable view of the court has declined over the preceding three years by 15 percentage points, while unfavorable ratings have increased by a like amount. This decline is accompanied by changing views regarding the court's political complexion: the share of adults who say the court is "conservative" has increased since 2020, from 30 percent to 38 percent. An overwhelming majority (84 percent) say that the justices should not bring their own political views into the cases they decide, but only 16 percent say they do a good or excellent job in doing so. These statistics suggest that Justice Breyer is right to be concerned about politicization of the court.

A closer look at the survey, however, reveals that the recent drop in the court's favorability ratings has a distinctly partisan aspect. Last year about two-third of both Republicans and Democrats expressed positive views of the court. Among Republicans that percentage remains almost the same, but among Democrats the percentage has dropped precipitously, to 46 percent, and among liberal Democrats it has dropped even further, with only 36 percent expressing a favorable view of the court. Views regarding the role of politics in relation to the court reveal a similar partisan divide: a majority of Democrats label the court as "conservative," compared to 18 percent of Republicans, and Republicans are twice as likely as Democrats to say justices are doing a good job remaining politically neutral.

Although the survey does not attempt to explain the disparity between Republican and Democratic views of the court and its ideology, the explanation seems fairly obvious: Republicans are quite content with the court's composition and decisions while Democrats, and particularly liberal Democrats, are seriously upset about both. Democrats appear to be critical, not so much with the fact that the court has become politicized as with the direction in which that has occurred. Not surprisingly, views of the court generally and views concerning the perceived role of politics seem to depend upon whose ox is being, or about to be, gored. And from a broader perspective, the deepening partisan divide concerning views about the court reflects the deepening divide among the population with respect to views concerning almost everything else.

It is apparent that those who, like Justice Breyer, see politics as a threat to the continued authority of the court and seek to do something about it confront a difficult task and Justice Breyer's recommendations, though for the most part admirable, are not particularly comforting. Judges, he says, should avoid fretting about how their opinions are viewed, and just "do the job." Their deliberations should include respect for the opinions of others, and their opinions should adopt a minimalist approach conducive to compromise and avoid unnecessary dissent. As for the general public, he advocates that we should be educating our offspring about civics and the role of an independent judiciary and among ourselves practice the skills of cooperation and compromise. Above all, judging from the number of times it is referenced in the book, we should avoid proposals for structural changes such as term limits for justices or "packing" the court with additional justices as a way of reducing politicization, since the proposals themselves are likely to add to public perception that the court is political in nature.

All these recommendations, except perhaps for the last, seem unobjectionable and in the long run probably useful because if we are to bolster understanding of the space between judges as referees and judges as legislators, people need to learn the shortcomings in both metaphors. The last recommendation, however, seems directed not so much toward removing politics from the court as toward concealing its presence, and that seems neither possible nor desirable, as Justice Breyer himself

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7. Pew Research Center, "Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement," Feb. 2022, *https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/* (as of Feb. 24, 2022).

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would probably concede. Perhaps concern over the peril of politics would be better served by increased candor, and by encouraging rather than by seeking to suppress alternative ways to minimize the variations in judicial outlook that are likely to accompany future changes within the body politic.

Justice Breyer returns in his final paragraph to the theme of eschewing proposals for structural changes such as term limits for justices or "packing" the court with additional justices in an effort to reduce politicization. He cautions that the rule of law depends on "trust that the court is guided by legal principle not politics," and so we should be wary of such proposals because "[s]tructural alteration of the court motivated by the perception of political influence among justices can only feed that perception."[8] But if, as Justice Breyer admits, the legal principles with which the court is to be guided are unavoidably imbued with what the public legitimately views as political content — if no one outside the court believes, for example, that its decisions involving *Roe v. Wade* are unaffected by attitudes of individual justices toward abortion — then Justice Breyer's stand on foreclosing discussion of structural reform looks a lot like recommending that we avoid talking about what we know to be true. ✯

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8. Breyer, *The Authority of the Court*, 100.