

## “HEY STEPHEN”

*Leah M. Litman\**

THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS. By *Stephen Breyer*. Harvard University Press. 2021. Pp. 101. \$19.95.

### INTRODUCTION

Justice Stephen Breyer<sup>1</sup> has written a book about the Supreme Court’s relationship to politics and the merits of Supreme Court reform.<sup>2</sup> The book explicitly does “not delve into such issues” as whether “the nomination and confirmation processes [are] working well,” whether “appointments too closely reflect partisan political divisions,” or whether “the Court itself has become politically partisan” (p. 21).

Well other than that, Mrs. Lincoln, how was the play?

Because of its artificially narrow scope, the book provides an incomplete picture of the Supreme Court. That makes its analysis of Supreme Court reform incomplete too. What Justice Breyer does offer in the book are two claims—one, that the Supreme Court is not engaged in politics, and two, that the rule of law requires accepting the Court’s authority to issue decisions with which people will disagree. Both claims are oversimplified, and the arguments in *The Authority of the Court and the Peril of Politics* carry their own potential rule-of-law and democracy problems.

This Review proceeds in two Parts. Part I challenges the book’s assertion that the justices’ work should not be described as political. Part II then explains why accepting all of the Court’s decisions is not necessarily good for the rule of law, which means that questioning the Court’s authority is not necessarily bad for the rule of law. Part II also addresses the book’s implicit claim that questioning the Court’s authority is among the greatest threats to the rule of law today.

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1. Associate Justice, Supreme Court of the United States.
2. The book is based on his 2021 Scalia Lecture.

I. SHOULD POLITICS BE PART OF PUBLIC CONVERSATIONS ABOUT THE COURT? (YES.)

A big part of Justice Breyer's book turns on his claim that judges, including Supreme Court justices, are doing law, not politics. He insists that "politics in th[e] elemental sense is not present at the Court" (p. 52) and that "'political' is the wrong word to describe even the more controversial court decisions" (pp. 51–52).

The book can make these claims only because it arbitrarily interprets "politics" to exclude what many people think drives judicial decisionmaking, and expansively interprets "law" to include what everyone would recognize as political judgments. Justice Breyer uses politics to mean something like "a federal judge will vote for any policy that is favored or implemented by the political party that appointed them."<sup>3</sup> He describes politics as asking questions such as "Are you a Democrat or a Republican?"; "Which position is more popular?"; and "What do 'constituents' think?" (p. 52).

But judging may still be political even if a justice does not always vote to uphold policies because they are popular or because they were enacted by the political party that appointed them. Justice Breyer does not really suggest anything to the contrary. He alludes to the idea that ideology influences judging (pp. 52–53). He acknowledges that jurisprudential views are inescapably connected to political ones, writing that "it is sometimes difficult to separate what counts as a jurisprudential view from what counts as political philosophy" (p. 57). And he even concedes that "a judge's background, experience, and personal views about the law's objectives, the Court's role, or the nation's life can make a difference" (p. 56). For these reasons, he concludes, "to suggest a total and clean divorce between the Court and politics is not quite right either" (p. 62). Yet he still insists on framing the book around the claim that judges are not engaged in politics.

Section I.A explains why Justice Breyer's reluctant admission that judging is political better reflects reality than his protestations to the contrary. Section I.B then discusses why Justice Breyer's arguments that the justices are not political are unresponsive to concerns about the political nature of the Supreme Court.

A. *Is Judging Political? (Yes.)*

In many Supreme Court cases, the law will be indeterminate in some respects. The meaning of particular phrases (like due process, appropriate, or

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3. Cf., e.g., William R. Domnarsky, *Q&A with Laurence Tribe of Harvard Law School*, DAILY J. (Aug. 12, 2021), <https://www.dailyjournal.com/articles/363844-q-a-with-laurence-tribe-of-harvard-law-school> [perma.cc/5SPZ-9LK7] ("[Domnarsky]: Is it time, or will there ever be a time, for the Supreme Court to acknowledge what so many of us think, that it is first and foremost a political court, so that the nation can move towards coming to terms with this fact? [Tribe]: I doubt it, because the very concept of a 'political court' is so easily confused with a 'partisan court' or a court that consciously advances a partisan agenda and feels unbound by law and principles of legal reasoning or lacks independence from political influence.").

equal protection) will be susceptible to different interpretations, and the relevant history, practice, and precedents will be ambiguous as well. Justice Breyer knows this.<sup>4</sup>

Because there will be several permissible interpretations of the various sources of law, judging is inevitably informed by ideas about what particular values mean, assessments of the weight those values hold, strands of political philosophy about what constitutes good government and civil society, and evaluations of the surrounding world, including what is good or bad about it.<sup>5</sup> It’s fair to call decisionmaking informed by those considerations “political,” and that’s precisely the kind of decisionmaking that judges do for any number of reasons. I’ll just discuss a few: a justice’s views about what constitutes good governance, their assessments about the meaning of various abstract constitutional values, and their experience and general worldview will affect how they resolve cases.

First, people—including the justices—interpret competing evidence and resolve ambiguity based on ideas of what good constitutional governance is. People want the world around them, and the constitutional system they are a part of, to be good rather than bad, and sensible rather than irrational.<sup>6</sup> Can you blame them? Part of the American constitutional ethos is the idea that the Founders were smart men who designed a system of government that should be celebrated.<sup>7</sup> This phenomenon is on display in Breyer’s own book: writing of the Constitution generally, and of judicial review specifically, Breyer proclaims that “[t]he Constitution’s framers had every right to admire their creation” (p. 8).

Given the tendency to believe our constitutional system is sound, it would take a lot to convince a judge that the brilliant men (and women) who made the Constitution adopted a rule that required or permitted a mode of governance that the judge believes is unsound. For example, those who believe liberty would be at grave risk if unelected bureaucrats could make rules that bind private citizens will be less likely to conclude that our system of government permits such an arrangement.<sup>8</sup> In deciding these kinds of issues, judges end up trading on political judgments about what constitutes good governance.

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4. See p. 56 (“[T]he cases that come before our Court are typically difficult calls . . . . [T]he key legal text . . . is often a constitutional text using . . . highly general words . . .”).

5. See MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5–6 (2004).

6. Dan M. Kahan, *The Supreme Court, 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7–8 (2011); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 88–92 (2012) (explaining that people are better at devising arguments to defend positions reached through intuitive judgments than impartially weighing evidence).

7. Richard A. Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. SEE ALSO 79, 81–83 (2010).

8. Compare Justice Samuel Alito, Address at the 2020 Federalist Society National Lawyers Convention (Nov. 12, 2020), <https://fedsoc.org/conferences/2020-national-lawyers-convention#agenda-item-address-8> [perma.cc/7RDL-7ZXV] (“Every year administrative agencies,

The impulse to make our constitutional system a sensible one informs other kinds of historically minded methods of interpretation, such as how to interpret past practices or how to read the Court's precedents. Consider a decision from the Court's 2020 term. *Jones v. Mississippi* held that the Eighth Amendment requires only that states consider an offender's youth before imposing life without parole as a sentence for juveniles convicted of homicide.<sup>9</sup> The conservative supermajority rejected the argument that the Court's prior cases, *Miller v. Alabama*<sup>10</sup> and *Montgomery v. Louisiana*,<sup>11</sup> required states to find (or perhaps even analyze) whether a juvenile offender was "permanently incorrigible" before imposing a sentence of life without parole.<sup>12</sup> To explain that result, Justice Kavanaugh wrote: "We . . . rely on what *Miller* and *Montgomery* said—that is, their explicit language . . ."<sup>13</sup> By contrast, the three Democratic-appointed justices in dissent invoked the opinions' reasoning and results to reach a contrary conclusion.<sup>14</sup> Focusing on different parts of the Court's prior decisions allowed the two opinions in *Jones* to read their own views about the Eighth Amendment into the Court's precedents.<sup>15</sup>

Sometimes, the impulse to interpret the constitutional system to be sensible comes out when the justices assess the implications of a legal rule, which requires the justices both to consider the likelihood that a particular event will occur and to determine what scenarios the constitutional system protects us from. Take the oral arguments in *National Federation of Independent Businesses v. Sebelius*, the constitutional challenge to the original minimum-coverage provision in the Affordable Care Act.<sup>16</sup> The government's time during oral argument was dominated by the Republican-appointed justices asking what the government might do if the Court upheld the ACA and embraced the government's theory about the scope of Congress's powers. Chief Justice Roberts asked whether the government could require people to purchase cell

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acting under broad delegations of authority, churn out huge volumes of regulations that dwarfed the statutes enacted by the people's elected representatives."), with *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (Alito, J., concurring) ("The Constitution confers on Congress certain 'legislative [p]owers,' and does not permit Congress to delegate them to another branch of the Government." (citation omitted)). As to the nondelegation doctrine in particular, the evidence is clear. See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

9. 141 S. Ct. 1307 (2021).

10. 567 U.S. 460 (2012).

11. 577 U.S. 190 (2016).

12. *Jones*, 141 S. Ct. at 1314–15.

13. *Id.* at 1322.

14. See *id.* at 1328–41 (Sotomayor, J., dissenting). In particular, the dissent explained, *Montgomery* had held that the Eighth Amendment rule announced in *Miller* was substantive and therefore retroactively applicable on collateral review. *Id.* at 1330.

15. Justice Sotomayor's dissent was still right about those prior decisions.

16. 567 U.S. 519 (2012).

phones,<sup>17</sup> Justice Alito asked whether the government could require people to get burial insurance,<sup>18</sup> and so on. For his part, Justice Breyer raised the following possibility to the lawyer who argued that Congress lacked the authority to enact the minimum-coverage provision:

[I]f it turned out there was some terrible epidemic sweeping the United States . . . you’d say the Federal Government doesn’t have the power to get people inoculated, to require them to be inoculated, because that’s just statistical.<sup>19</sup>

(The lawyer said that Congress had no such authority.<sup>20</sup>)

The justices’ assessments about what risks the constitutional system guards against are political judgments in part because they turn on an analysis about whether a particular state of affairs is a sensible way of structuring a constitutional system.<sup>21</sup> Even if a justice is sincerely trying to answer the question “What results did the Constitution’s ratifiers or Congress avoid when they adopted the relevant legal text?” that analysis allows the justice to consider whether a sensible drafter would have chosen to avoid a particular scenario.<sup>22</sup> So when the justices decide constitutional or statutory cases, they draw on political judgments about what amounts to a rational system of constitutional governance.

*Second*, as the justices decide cases, they both identify the meaning of various constitutional values and assign relative weight to competing constitutional values. This too involves making political judgments. In the book, Justice Breyer writes that “the judge or justice must seek” the answer to a “decision in a controversial case” in “the values that underlie [the Constitution] and its provisions” (p. 86). But what are those values? Justice Breyer offered one idea at his confirmation hearing, testifying that “[t]he vast array of Constitution, statutes, rules, regulations, practices and procedures, that huge vast web, has a single basic purpose. That purpose is to help the many different individuals who make up America . . . live together productively, harmoniously, and in freedom.”<sup>23</sup>

17. Transcript of Oral Argument at 6, *NFIB*, 567 U.S. 519 (No. 11-398).

18. *Id.* at 7–8.

19. *Id.* at 87.

20. *Id.* (“My answer is no, they couldn’t do it.”).

21. See also Transcript of Oral Argument at 51, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290) (Breyer, J.) (“80,000 to 100,000 people every year in the United States are either killed or wounded in gun-related homicides or crimes or accidents or suicides . . . Now, in light of that, why isn’t a ban on handguns, while allowing the use of rifles and muskets, a reasonable or a proportionate response on behalf of the District of Columbia?”).

22. See *supra* text accompanying notes 14–17; *cf.*, *e.g.*, Transcript of Oral Argument at 14, *Van Buren v. United States*, 141 S. Ct. 1648 (2021) (No. 19-873) (Alito, J.) (“Do you think that none of that was of concern when Congress enacted this statute?”).

23. *Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 20–21 (1994) [hereinafter *Breyer Nomination Hearing*] (statement of Hon. Stephen G. Breyer).

What those values mean, and when those values are implicated, will depend on a justice's views about the world. What does it mean to live together harmoniously and in freedom? Does it mean that people with religious objections to same-sex marriage can be prohibited from discriminating against LGBT customers?<sup>24</sup> Or does it mean that the government can enact antidiscrimination protections for LGBT individuals, but not enforce them against people with religious objections to same-sex equality? One person might see the former as living together "harmoniously," while another sees the latter as living together "in freedom."<sup>25</sup>

None of this depends on the overly simplistic claim that the justices decide these cases based on whether they personally favor antidiscrimination protections for LGBT individuals or personally sympathize with religious objections to same-sex equality. My claim is much more modest: Deciding these cases requires determining what things like equality, justice, freedom, liberty, and discrimination mean. And there is no world in which those determinations are not political. In part for that reason, when the justices consult the values underlying the Constitution, it is not surprising to see them place greater weight on values that align with the worldviews and political philosophy of the political party that appointed them.

A recent example of this phenomenon is the Court's decision invalidating the Center for Disease Control's moratorium on evictions during the pandemic.<sup>26</sup> The Republican-appointed justices concluded that the relevant statute did not authorize the CDC to establish an eviction moratorium.<sup>27</sup> After a mere paragraph about the statute's text, the Republican-appointed justices spent several paragraphs explaining why they thought the eviction moratorium compromised various constitutional values. The Court pointed to the "vast 'economic . . . significance'" of the moratorium,<sup>28</sup> which imposed "financial burden[s] on landlords" and "intrude[d] on one of the most fundamental elements of property ownership—the right to exclude."<sup>29</sup> It also claimed that the moratorium implicated values of federalism by imposing on

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24. *Compare* *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732–34 (2018) (Kagan, J., concurring), *and id.* at 1727 (majority opinion), *with id.* at 1734 (Gorsuch, J., concurring), *and* *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1883 (2021) (Alito, J., concurring in the judgment).

25. Still another might see the former as living together "in freedom."

26. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485 (2021). Still another is the Court's recent decision invalidating the Occupational Safety and Health Administration's rule requiring testing, masking, or vaccination in workplaces. *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022); Anita Krishnakumar, *Some Brief Thoughts on Gorsuch's Opinion in NFIB v. OSHA*, ELECTION L. BLOG (Jan. 15, 2022, 8:06 AM), <https://electionlawblog.org/?author=16> [perma.cc/4DHE-FXN2] (describing "how stunningly atextual Justice Gorsuch's concurring opinion (and for that matter, the per curiam opinion) was").

27. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The decision was a per curiam opinion issued on the shadow docket and the only three justices noting their dissents were Justices Breyer, Sotomayor, and Kagan.

28. *Id.* at 2489 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

29. *Id.*

states’ authority to regulate “the landlord-tenant relationship,”<sup>30</sup> potentially leading to expansive and limitless federal authority.<sup>31</sup> Finally, the Court noted the moratorium was “unprecedented.”<sup>32</sup> All of this reasoning involved various political judgments about what constitutional values were implicated by the moratorium. Another Court or another set of justices might have identified other plausible values that were implicated, or reasonably weighted the values differently.

Or take Justice Kavanaugh’s opinion in *Manhattan Community Access Corp. v. Halleck*.<sup>33</sup> To determine whether a corporation regulated and subsidized by the state was a state actor bound by the Constitution, Justice Kavanaugh invoked some (extremely simplistic) political philosophy that happened to align with the Republican Party’s professed preference for “small government”: “It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty.”<sup>34</sup> All of the Republican-appointed justices joined that opinion. In *Halleck*, just as in the CDC example, the Republican-appointed justices arrived at a decision that protected interests and values associated with the Republican Party.

That’s not (necessarily) *why* they reached those decisions. But to decide these cases, the justices drew on their understanding of sound constitutional governance and their assessment of various constitutional values. Unsurprisingly, the justices’ vision of sound constitutional governance and their assessment of multiple constitutional values often mirrors the political philosophy of the party that appointed them. And this holds true even when the justices are deciding what a statute means—the justices also read Congress to enact laws that cohere with the justices’ views on what constitutes a sensible approach to governance.

*Third*, the justices’ judicial determinations are political in part because they are informed by their background and experiences, which inevitably shape how they view the world. In his book, Justice Breyer acknowledges that it is impossible to set aside these things while judging: “Does it matter that I grew up in San Francisco, . . . went to a public high school, . . . led the life I have lived? Of course it matters. I cannot jump out of my own skin” (p. 56).

Many justices have relied on personal life experiences at oral argument. Justice O’Connor brought up the geography and architecture of “the area

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30. *Id.* The Court explained that “[o]ur precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property.” *Id.* (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1850 (2020)).

31. *Id.*

32. *Id.* For criticism of this antinovelty principle, see Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017). It’s not as though there has been a similar pandemic since 1944, when the statute was enacted.

33. 139 S. Ct. 1921 (2019).

34. *Manhattan Cmty. Access Corp.*, 139 S. Ct. at 1934.

where [she] grew up” in order to pose Fourth Amendment hypotheticals in *United States v. Dunn*.<sup>35</sup> In a recent First Amendment case, Justice Kavanaugh mentioned how his perspective on the case was informed by being a parent and a coach.<sup>36</sup> The justices also regularly invoke their professional backgrounds. In *Bank Markazi v. Peterson*, Justice Breyer offered hypotheticals that were drawn from when he “worked in the Senate Judiciary Committee” and “would get dozens, maybe hundreds, past dozens of private bills,” to suggest there was nothing wrong with legislation directed at particular entities.<sup>37</sup> The justices also draw on the schools of thought they were trained in, sometimes explicitly.<sup>38</sup> They rely on what they learned in “the world where [they] grew up.”<sup>39</sup> They invoke what they were told or taught.<sup>40</sup>

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35. Transcript of Oral Argument at 16, *United States v. Dunn*, 480 U.S. 294 (1987) (No. 85-998).

36. Transcript of Oral Argument at 30, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038 (2021) (No. 20-255) (“[A]s a judge and maybe as a coach and a parent too, it seems like maybe a bit of over—overreaction by the coach.”); *id.* (“And just by way of comparison about—and to show how much it means to people, you know, arguably, the greatest basketball player of all time is inducted into the Hall of Fame in 2009 and gives a speech, and what does he talk about? He talks about getting cut as a sophomore from the varsity team. And he wasn’t joking. He was critical 30 years later. It still—it still bothered him.”).

37. Transcript of Oral Argument at 10, *Bank Markazi v. Peterson*, 578 U.S. 212 (2016) (No. 14-770).

38. Transcript of Oral Argument at 37, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (No. 16-1454) (Breyer, J.) (“And my problem is that I grew up in antitrust at a time when people didn’t use phrases like platforms and two-sided markets.”).

39. *E.g.*, Transcript of Oral Argument at 50, *United States v. Playboy Ent. Grp.*, 529 U.S. 803 (2000) (No. 98-1682) (Breyer, J.) (“Unlike the world where I grew up, I think many, many thousands of children come home after school and there’s no one there and parents don’t want to say I’ll call up the program and do something because that means they lose an afternoon at work while—while they’re at home . . . .”); Transcript of Oral Argument at 33, *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (No. 02-361) (Breyer, J.) (“After all, I grew up in a world where they used to keep certain materials in a special place in the library and you had to go and ask for them.”).

40. Transcript of Oral Argument at 59, *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico ex rel. Pico*, 457 U.S. 853 (1982) (No. 80-2043) (Stevens, J.) (“I was taught that was a vulgar word.”); Transcript of Oral Argument at 20, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (No. 79-1404) (Stewart, J.) (“At least that’s the way I was taught.”); Transcript of Oral Argument at 42, *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013) (No. 11-1160) (Sotomayor, J.) (“I was embarrassed to ask the question, but I was taught to ask the question.”); Transcript of Oral Argument at 59, *Rodriguez v. Fed. Deposit Ins. Corp.*, 140 S. Ct. 713 (2020) (No. 18-1269) (Sotomayor, J.) (“I was taught as a child, even before I was a lawyer.”); Transcript of Oral Argument at 7, *Diamond v. Bradley*, 450 U.S. 381 (1981) (No. 79-855) (Stewart, J.) (“Dissenting opinions, as I was taught in law school, are subversive literature; nothing more or less.”); Transcript of Oral Argument at 73, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) (Breyer, J.) (“A few years ago, a superintendent of schools, I think in San Francisco, said, you know, schools have changed a lot, public schools, since when I went there. He said, today we don’t just teach classical subjects. We’re there to help the child have adequate health, in many cases, to see that he’s adequately fed. In quite a few cases, we become a caretaker, and we don’t want to send them home immediately because there’s nobody home, and we have to plan after-school activities.”).



The point is banal but (apparently) worth spelling out: people have beliefs, ideas, experiences, and values that inform the way they interpret the world around them, and those beliefs, ideas, experiences, and values (one might even say, politics) do not disappear when they become a justice on the Supreme Court. In his confirmation hearing to the Supreme Court, Justice Breyer recognized that justices would draw on their experiences when deciding cases: invoking Oliver Wendell Holmes, he testified that “law reflects not so much logic, as history and experience.”<sup>41</sup> But the lessons that a person draws from history and experience will depend on their assessments of what worked, what didn’t, and why. Those are political judgments, even if they are not necessarily partisan ones.

All of this helps to explain how judging can be political. And it turns out that this explanation is consistent with empirical work on judging.<sup>42</sup> Scholars have shown that measuring a justice’s ideology can predict their votes on many issues<sup>43</sup> and that public opinion can have effects on Supreme Court decisions.<sup>44</sup> Indeed, for this reason, scholars have claimed that “[a] predominant, if not *the* predominant, view of U.S. Supreme Court decision making is the attitudinal model,” which “supposes that the ideological values of jurists provide the best predictors of their votes.”<sup>45</sup> The same holds true for decisionmaking on the federal courts of appeals.<sup>46</sup> Judges track the values of the governing regime, particularly the regime that appointed them.<sup>47</sup>

41. *Breyer Nomination Hearing*, *supra* note 23, at 20 (statement of Hon. Stephen G. Breyer).

42. See, e.g., Alma Cohen & Crystal S. Yang, *Judicial Politics and Sentencing Decisions*, AM. ECON. J.: ECON. POL’Y, Feb. 2019, at 160, 175–76 (finding that, compared to judges appointed by Democrats, Republican-appointed judges sentence Black defendants to three more months than nonblacks and women to two fewer months than men for crimes of comparable type and severity); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21, 26, 30, 34, 53 (2008) (finding that federal appellate judges deciding voting rights cases differ by party and even more by race).

43. Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989); Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995); Jeff Yates & Elizabeth Coggins, *The Intersection of Judicial Attitudes and Litigant Selection Theories: Explaining U.S. Supreme Court Decision-Making*, 29 WASH. U. J.L. & POL’Y 263 (2009).

44. William Mishler & Reginald S. Sheehan, *Public Opinion, the Attitudinal Model, and Supreme Court Decision Making: A Micro-analytic Perspective*, 58 J. POL. 169 (1996).

45. Segal et al., *supra* note 43, at 812.

46. Jeffrey A. Segal, Donald R. Songer & Charles M. Cameron, *Decision Making on the U.S. Courts of Appeals*, in CONTEMPLATING COURTS 227 (Lee Epstein ed., 1995); Zalman Rothschild, *Free Exercise Partisanship*, 107 CORNELL L. REV. (forthcoming 2022) (manuscript at 17), <https://doi.org/10.2139/ssrn.3707248> [perma.cc/EX4G-LEXD] (finding that 0% of Democratic-appointed judges have sided with religious plaintiffs, the majority of Republican-appointed judges (66%) have sided with religious plaintiffs, and 82% of Trump-appointed judges have sided with religious plaintiffs); Kenny Mok & Eric A. Posner, *Constitutional Challenges to Public Health Orders in Federal Courts During the COVID-19 Pandemic*, SSRN (Aug. 1, 2021), <https://doi.org/10.2139/ssrn.3897441> [perma.cc/SGV2-TAPP] (similar findings across other areas).

47. See Michael J. Klarman, *The Supreme Court, 2019 Term—Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 178–231 (2020); TERRI JENNINGS

B. *Does Justice Breyer Address Critics' Concerns? (No.)*

It's not like Justice Breyer is unaware of this. At one point, he poses the following question: "[W]hy then are decisions of particular judges so predictable?" (p. 55). He gives several answers, none of which really address the concerns about the politics of the Supreme Court.

Justice Breyer says that judges' decisions are predictable because judges have different "judicial philosophies" (p. 55). He calls these "*jurisprudential* differences," in contrast to political differences (p. 51; emphasis added), and he means something like whether a judge subscribes to a particular method of interpretation such as originalism or textualism (pp. 34–35).

But Justice Breyer's admission that judges' decisions are predictable pretty much gives away the whole game. If a justice's "judicial philosophy" predictably leads them to believe that the administrative state is unconstitutional and that the EPA cannot regulate pollutants, the FDA cannot regulate food and drugs and vaccines, and the CDC cannot regulate the spread of diseases, then a political party can appoint justices whose judicial philosophy will predictably lead them to dismantle the administrative state and prevent agencies from making decisions with which the political party disagrees.<sup>48</sup> If a justice's jurisprudential approach leads them to believe that the federal government cannot enact robust protections for voting rights, then a political party can appoint justices whose jurisprudential approach will predictably lead them to dismantle voting rights protections and make voting harder.<sup>49</sup> It doesn't really matter why a justice is reaching those decisions—be it jurisprudential philosophy or political views. Either way, a political party will still be able to select a justice because the party can predict how they will rule on key issues.

To the extent Justice Breyer discusses this possibility, his response is that "most judges" do not "see themselves or the judiciary" as "unelected political officials or 'junior varsity' politicians."<sup>50</sup> So? Let's assume that a judge or justice is (in good faith) trying to do law rather than politics and is applying a

PERETTI, PARTISAN SUPREMACY: HOW THE GOP ENLISTED COURTS TO RIG AMERICA'S ELECTION RULES (2020); Howard L. Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 518 (2002); Ran Hirschl, *The Judicialization of Mega-politics and the Rise of Political Courts*, 11 ANN. REV. POL. SCI. 93, 97 (2008).

48. See *supra* notes 26–32 and accompanying text; cf. *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022) (concluding OSHA lacked the authority to impose a testing or vaccination requirement to address the novel coronavirus in part because OSHA had not previously imposed such a requirement when a novel pandemic did not yet exist).

49. See *infra* text accompanying notes 65–76; cf. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.) (concluding that Alabama could conduct at least one election under a new redistricting map that diluted the votes of Black Alabamians because . . . shrug emoji).

50. P. 51. Justice Breyer adds: "At least, that is what I have come to think, having worked at the Court over many years." P. 51; see also p. 53 ("[I]f I catch myself headed toward deciding a case on the basis of some general ideological commitment, I know I have gone down the wrong path, and I correct course. My colleagues think the same way . . . . And my experience is that this is true of judges . . .").

jurisprudential approach rather than following partisan or ideological motivations. If the justices have jurisprudential views that lead them to undo the administrative state, then people who believe the federal government should be able to regulate pollution and vaccines will still have concerns about a Court stacked with those justices. If the justices have jurisprudential views that lead them to vitiate voting rights, then people who believe voting rights are essential to a democracy will still have concerns about a Court dominated by those justices. The bottom-line calculus is the same whether the judge or justice identifies as a junior-varsity politician or as someone who is just doing law.

Justice Breyer’s second attempt to “address” how judges’ decisions are predictable is to acknowledge that political groups may “support, or a president appoint[], a justice whose jurisprudential philosophy will, they believe, advance some political agenda in the long run” (p. 55). To that fear, he has (largely) this to say: “[S]o be it” (p. 55). No, really; that’s a direct quote.<sup>51</sup>

I’ll return to this statement later, but for now, I just want to emphasize again that *this is the whole game*. Justice Breyer is correct that presidents appoint and senators support justices “whose jurisprudential philosophy . . . advance[s] some political agenda” (p. 55)—*their* political agenda. The 2016 Republican Party platform promised Supreme Court “appointments [that] will enable courts to begin to reverse a long line of activist decisions—including *Roe v. Wade*.”<sup>52</sup> And what do you know? Three appointments later, the Supreme Court allowed Texas to enforce a law that required abortion providers to stop performing abortions on people more than six weeks after their last period, ending most abortions in the state and nullifying the protections of *Roe*.<sup>53</sup>

There will, of course, be some counterexamples. Recall the meltdown in some conservative quarters after Justice Gorsuch wrote the majority opinion in *Bostock v. Clayton County*, the decision holding that Title VII prohibits employers from firing employees because they are attracted to persons of the same sex.<sup>54</sup> In a speech on the Senate floor, Senator Josh Hawley proclaimed that *Bostock* represented “the end of the conservative legal movement.”<sup>55</sup>

Even if a party’s predictions turn out to be wrong in some cases (as *Bostock* arguably suggests they will),<sup>56</sup> that does not change things. Imagine that

51. The full quote is: “If political groups support, or a president appoints, a justice whose jurisprudential philosophy will, they believe, advance some political agenda in the long run, so be it.” P. 55.

52. REPUBLICAN NAT’L COMM., REPUBLICAN PLATFORM 2016, at 10 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT\\_12\\_FINAL%5B1%5D-ben\\_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5B1%5D-ben_1468872234.pdf) [perma.cc/9UZK-WZR4].

53. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494 (2021).

54. 140 S. Ct. 1731 (2020). The decision also held that employers cannot fire employees because of the employee’s gender identity. *Bostock*, 140 S. Ct. at 1743.

55. Josh Hawley, *Was It All for This? The Failure of the Conservative Legal Movement*, PUB. DISCOURSE (June 16, 2020), <https://www.thepublicdiscourse.com/2020/06/65043> [perma.cc/U295-BF2P]. Lol.

56. It’s worth pointing out that it’s not clear they were wrong in *Bostock*. Despite the meltdown described above, support for marriage equality and job protections for LGBT individuals

the predictions about a justice's political philosophy turn out to be right in cases involving the administrative state (which the justice demolishes),<sup>57</sup> abortion (which the justice ends),<sup>58</sup> and voting rights (which the justice destroys),<sup>59</sup> but turn out to be wrong in *Bostock*. Still “[n]ot great, Bob” for those who favor expert and adaptable government decisionmaking, reproductive justice, voting rights, and civil rights.<sup>60</sup> At a minimum, the ease with which political parties can select judges who will advance their political agenda merits more serious consideration in an analysis of the Supreme Court, Steve.

Part of what is so maddening about the book is that Justice Breyer's fantasy story gives cover to a lie, and the most sympathetic reconstruction is that he did so unwittingly. The Republican Party and the conservative legal movement understand that political parties appoint justices to further their political agenda. When Justice Breyer says, “Well OK, but the justices are just doing law,” he obscures that reality, which provides cover for the Republican Party's successful takeover of the Supreme Court and for the Supreme Court's decisions that further the Republican Party's agenda.

Oh well, I guess. “[S]o be it.”

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is quite high, so this issue (employment protections for LGBT individuals) is not clearly one that currently divides the political parties (unlike, say, voting rights). See Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CTR. FOR AM. PROGRESS (June 2, 2011, 9:00 AM), <https://www.americanprogress.org/article/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections> [perma.cc/69KN-2TJF]; KAISER FAM. FOUND., *Poll: Large Majorities, Including Republicans, Oppose Discrimination Against Lesbian, Gay, Bisexual and Transgender People by Employers and Health Care Providers* (June 24, 2020), <https://www.kff.org/other/press-release/poll-large-majorities-including-republicans-oppose-discrimination-against-lesbian-gay-bisexual-and-transgender-people-by-employers-and-health-care-providers> [perma.cc/UU8W-Q4QK] (“9 in 10 in ten adults agree with last week's Supreme Court ruling, say it should be illegal for employers to fire or refuse to hire people because they are lesbian, gay, or bisexual (90%) or transgender (89%).”). In that sense, *Bostock* was a gift that prevented Republicans from having to own an unpopular position. *Bostock* also reserved the question of whether employers with religious objections can be bound by Title VII; the opinion strongly suggests they cannot be. See *Bostock*, 140 S. Ct. at 1754. That is the issue that now divides the parties, and that is the bigger live controversy. It also threatens to take away the significance of *Bostock*'s antidiscrimination protections. See Leah M. Litman, *Disparate Discrimination*, 121 MICH. L. REV. (forthcoming Oct. 2022).

57. *Gundy v. United States*, 139 S. Ct. 2116 (2019) (Gorsuch, J., dissenting); *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022) (Gorsuch, J., concurring).

58. *Whole Woman's Health*, 141 S. Ct. 2494.

59. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021).

60. Whitney Friedlander, ‘Not Great, Bob!’: *The Making of a Meme*, VULTURE (June 26, 2019), <https://www.vulture.com/2019/06/not-great-bob-mad-men-meme-making-of.html> [perma.cc/U4XM-3FCC].

II. DOES THE RULE OF LAW MEAN ALWAYS OBEYING JUDICIAL DECISIONS?  
(NO.)

A. *What Is the Rule of Law?*

Having rejected the idea that judges are “political” in his artificially narrow sense of the word, Justice Breyer then insists that the rule of law depends on both “a trust that the Court is guided by legal principle, not politics” (p. 100) and “the continued acceptance of a rule of law, at least insofar as judicial decisions embody” (p. 49). The last quote is perhaps the most revealing: for Justice Breyer, judicial decisions *are* the rule of law, so the rule of law means accepting whatever rules of law are laid down by the Supreme Court.

Consider me unconvinced. One major problem with the book is that there are equally plausible accounts of the rule of law that are inconsistent with accepting whatever legal rules are laid down by the Supreme Court. For example, the rule of law might mean rule by democracy—being ruled by laws made by institutions that are responsive to voters’ views and accountable via elections. Or it might mean rule by positive law—being ruled by laws that are duly enacted through the legislative or regulatory process. It could also mean being ruled by laws or principles that are (minimally) substantively just, or that are essential to the existence of a democracy. Or the rule of law could mean some combination of all these things.<sup>61</sup>

Under any of these other accounts, the rule of law will sometimes be inconsistent with Justice Breyer’s recommendation that the country be ruled by judicial decisions. Take the rule of law as rule by democracy. If that’s what the rule of law means, one might have concerns about allowing federal judges to invalidate federal statutes.<sup>62</sup> Why allow the federal courts to invalidate federal statutes enacted by a more democratically responsive and accountable branch of government?<sup>63</sup>

Even if someone does not subscribe wholesale to antidemocratic concerns about judicial review,<sup>64</sup> they might have concerns about particular judicially announced rules of law that undermine democracy. Take *Rucho v. Common Cause*, when the Court announced that the concededly undemocratic practice of partisan gerrymandering is unreviewable in federal court,<sup>65</sup> emboldening

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61. My point is not to develop or defend an alternative account of the rule of law in the limited pages of this review. For an account, see PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* (2016).

62. NIKOLAS BOWIE, WRITTEN STATEMENT TO THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 10 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony-1.pdf> [perma.cc/UJ6N-TT4H].

63. See, e.g., Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five*, 112 *YALE L.J.* 153 (2002).

64. See, e.g., Don Herzog, *Up from Individualism*, 86 *CALIF. L. REV.* 459, 467 (1998).

65. 139 S. Ct. 2484 (2019).

further gerrymandering that will make elections less responsive to voter sentiments and public opinion.<sup>66</sup> Or *Shelby County v. Holder*, in which the Court invalidated the preclearance regime of the Voting Rights Act that had safeguarded racial minorities from voter suppression.<sup>67</sup> Or *McCutcheon v. Federal Election Commission*, in which the Court invalidated limits on aggregate campaign contributions, allowing wealthy individuals to contribute unlimited (aggregate) amounts of money to candidates and political action committees.<sup>68</sup>

There is no shortage of examples of how the Court exercises its judicial power in ways that subvert democracy. I haven't even mentioned *Bush v. Gore*<sup>69</sup> and the possible emergence of the so-called "independent state legislature doctrine," under which only state legislatures may set the rules regarding federal elections.<sup>70</sup> Under that theory, federal courts could police state courts' interpretation of state laws and prevent them from expanding voting rights on the basis of state constitutions, among other things.<sup>71</sup> There is also a serious question about whether the Court will continue to allow states to use independent redistricting commissions to draw legislative districts to avoid partisan gerrymandering.<sup>72</sup> If that were to happen, accepting Justice Breyer's version of the rule of law as rule by judges would sometimes be a threat to rule by democracy.

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66. See, e.g., Philip Bump, *The Several Layers of Republican Power-Grabbing in Wisconsin*, WASH. POST (Dec. 4, 2018), <https://www.washingtonpost.com/politics/2018/12/04/several-layers-republican-power-grabbing-wisconsin/> [perma.cc/5U4V-TTJT] (noting how in the 2018 elections for the Wisconsin legislature, Democrats won 53 percent of the popular vote and 36 percent of the seats); LARRY DIAMOND, *ILL WINDS: SAVING DEMOCRACY FROM RUSSIAN RAGE, CHINESE AMBITION, AND AMERICAN COMPLACENCY* 96 (2019) (explaining how in the 2016 congressional elections in North Carolina, Democrats won roughly half of the votes cast but only three of the thirteen House seats); Christopher Ingraham, *How Pennsylvania Republicans Pulled Off Their Aggressive Gerrymander*, WASH. POST (Feb. 6, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/02/06/how-pennsylvania-republicans-pulled-off-their-aggressive-gerrymander/> [perma.cc/53LF-P5R5] (noting that in 2012, Democrats won 51 percent of the statewide vote for the House of Representatives but only five of Pennsylvania's eighteen House seats).

67. 570 U.S. 529 (2013).

68. 572 U.S. 185 (2014).

69. 531 U.S. 98 (2000) (per curiam).

70. See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 1144 (5th ed. 2016). On the possible reemergence, see *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 34 n.1 (2020) (mem.) (Kavanaugh, J., concurring.); *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021) (mem.) (Thomas, J., dissenting); *id.* (Alito, J., dissenting); and *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (noted dissents from Justices Thomas, Alito, Gorsuch, and Kavanaugh).

71. ISSACHAROFF ET AL., *supra* note 70, at 1143–44; Mark S. Krass, *Debunking the Non-delegation Doctrine for State Regulation of Federal Regulations*, 108 VA. L. REV. (forthcoming 2022), <https://doi.org/10.2139/ssrn.3902163> [perma.cc/9WPE-SS6Z]; Nathaniel Persily, Samuel Byker, William Evans & Alon Sachar, *When Is a Legislature Not a Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 715–18 (2016); Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89 (2014).

72. When Justice Kennedy was still on the Court, the Court ruled 5–4 that states could use independent redistricting commissions. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787 (2015).

*Shelby County v. Holder* also underscores how accepting the rule of law laid down by judges can undermine the rule of law as rule by positive law. In *Shelby County*, the Court declined to enforce a provision of the Voting Rights Act on the ground that it was unconstitutional.<sup>73</sup> Before that there were the *Civil Rights Cases*, when the Court declined to enforce the Civil Rights Act of 1875, which prohibited discrimination on the basis of race, on the ground that Black people had to cease being “the special favorite of the laws.”<sup>74</sup> Rule by judges can also undermine rule by positive law when judges are asked to interpret federal statutes rather than just invalidate them. Take last Term’s decision in *Brnovich v. Democratic National Committee*,<sup>75</sup> where the Court’s six Republican-appointed justices interpreted section 2 of the Voting Rights Act to mean that not *all* voting policies that “result[] in a denial or abridgement of the right . . . to vote on account of race or color” are unlawful.<sup>76</sup> Their decision effectively insulated many restrictive voting measures from section 2 challenges altogether.

Nor is it the case that rule by judicial decision ensures we are ruled by substantively just legal principles, or by principles that are essential to a healthy constitutional democracy. Many of the preceding examples illustrate how rule by judges may be inconsistent with being ruled by a set of legal principles that help ensure the continued existence of democracy. There are the *Civil Rights Cases* described above. There is also *Giles v. Harris*, in which the Court rejected an effort by Black Alabamians to challenge Alabama’s discriminatory system of voter registration.<sup>77</sup> The Court observed that “the great mass of the white population intends to keep the blacks from voting,” so why should the Court even bother trying to do something?<sup>78</sup> There is *United States v. Cruikshank*, in which the Court found that the white mob that terrorized and murdered Black citizens protesting the demise of Reconstruction in Louisiana did not violate any constitutional provisions because the mob was somehow entirely unconnected to state actors.<sup>79</sup> Then there is *Screws v. United States*, which made it more difficult to prosecute government officials who commit

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73. 570 U.S. 529 (2013). The Court held the VRA violated the nonexistent constitutional principle of equal sovereignty. *Shelby County*, 570 U.S. at 542–45; see Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016).

74. 109 U.S. 3, 25 (1883). For discussion, see Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680, 1722–26 (2006).

75. 141 S. Ct. 2321 (2021).

76. See 52 U.S.C. § 10301(a) (“No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”).

77. 189 U.S. 475 (1903).

78. *Giles*, 189 U.S. at 487–88.

79. 92 U.S. 542 (1876).

extrajudicial killings (which, at the time, involved officials killing Black people).<sup>80</sup> There is *Buck v. Bell*, when the Court upheld Virginia's forced sterilization regime because "[t]hree generations of imbeciles are enough."<sup>81</sup> And there is *Geduldig v. Aiello*, when the all-male Court concluded that discriminating on the basis of pregnancy did not amount to discriminating on the basis of sex.<sup>82</sup> These and other cases raise questions about whether being ruled by judicial decisions ensures substantively just legal principles.

There is a word limit to book reviews, or I could go on. But these examples suffice to raise questions about whether Justice Breyer's conception of the rule of law will conflict with being ruled by democracy, positive law, democratic principles, or substantively just legal principles.

### B. *The Rule of Law as Preserving Rule by Judges*

Despite these doubts, let's assume for purposes of this Section that the rule of law means (at least sometimes) accepting rules of law that are laid down by judges. Justice Breyer fails to establish that this species of the rule would be a normatively good thing, or that questioning the courts' authority would be a normatively bad thing.

#### 1. Is Rule by Judges Normatively Good? (Unclear.)

Justice Breyer uses his book to "expand on the importance of public acceptance in safeguarding the role of the judiciary" (p. 2). He writes that "[t]he Court's power . . . must depend upon the public's willingness to respect its decisions—even those with which they disagree and even when they believe a decision is seriously mistaken" (pp. 1–2). To support this point, he highlights the Court's shining moment in *Brown v. Board of Education*.<sup>83</sup> If people had thought it acceptable to reform a Court with which they disagreed, he wonders, "what, then, would have happened to all those Americans who espoused unpopular political beliefs . . . [.] to those who argued for an end to legal segregation in the South?" (p. 29). In *Brown*, Justice Breyer continues, "the Court had won a major victory . . . . And in turn, justice itself—the justice of the Court's integration decisions—helped to promote respect for the Court and increased its authority. I cannot prove this assertion. But I fervently believe it" (p. 26).

For whatever it is worth, I "fervently believe" this account is too simplistic, even if I am (still) sympathetic to the idea that we should not delegitimize courts writ large. While I won't endeavor to "prove this assertion," I will note some sources that substantiate my doubts. One is a simple point about timing and history. As with many defenses of judicial review, particularly defenses

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80. 325 U.S. 91 (1945).

81. 274 U.S. 200, 207 (1927).

82. 417 U.S. 484, 496–97 (1974) ("There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." (footnote omitted)).

83. 347 U.S. 483 (1954).



that suggest the Court’s countermajoritarian design allows it to protect righteous causes,<sup>84</sup> Justice Breyer invokes the Warren Court. But the Roberts Court is no Warren Court. In fact, for most of its 232-year history, the Supreme Court has been no Warren Court. As Professor Nikolas Bowie testified to the Presidential Commission on the U.S. Supreme Court, “If you look at the history of the judicial review of federal legislation, the principal ‘minority’ most often protected by the Court is the wealthy.”<sup>85</sup>

Even the history specific to *Brown* is more complicated than what Justice Breyer lays out. After *Brown* came all of the Supreme Court decisions that insulated de facto segregation from judicial review.<sup>86</sup> Many public schools today are not particularly racially diverse or integrated.<sup>87</sup> The Roberts Court has signaled that it believes *Brown* forbids, rather than requires, efforts to integrate schools.<sup>88</sup> But I guess the fifteen-year period of the Warren Court makes it all worth it?

Justice Breyer’s claim that challenging the Court’s authority would make it difficult for the Court to reach decisions like *Brown* seems to rest on something like a cost-benefit analysis of accepting the Court’s institutional authority.<sup>89</sup> The country, he concludes, apparently just has to tolerate some number of really bad decisions in order to allow the Court to reach some good ones.

But who will bear the costs of the bad decisions that will give the Court the authority to reach good ones? Justice Breyer never asks this question, so I’m not sure what he would say. It’s not unreasonable to wonder if the answer is historically disadvantaged and marginalized groups; they may be the ones who continue to bear the brunt of Supreme Court decisions that build up the Court’s capital vis-à-vis those who opposed *Brown*. What might that look like? We don’t have to guess. Sorry, Black and Latino voters who are crammed into a few districts and accordingly find it harder to obtain political power;<sup>90</sup> sorry, Black

84. See, e.g., NOAH FELDMAN, WRITTEN STATEMENT TO THE PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES 4 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/Feldman-Presidential-Commission-6-25-21.pdf> [perma.cc/46QV-2X9N] (“The modern case that most exemplifies this principle is *Cooper v. Aaron*.”).

85. BOWIE, *supra* note 62, at 10.

86. See *Milliken v. Bradley*, 418 U.S. 717, 722–23 (1974); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 238 (1991).

87. NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., SCHOOL COMPOSITION AND THE BLACK–WHITE ACHIEVEMENT GAP 1 (2015), [https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school\\_composition\\_and\\_the\\_bw\\_achievement\\_gap\\_2015.pdf](https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf) [perma.cc/DJ5C-ZCGU].

88. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022) (mem.).

89. He gives other examples of the same phenomenon. He notes that there were concerns about whether state officials would comply with the Court’s decision in *Worcester v. Georgia*, which held that states could not prosecute missionaries on Native lands, and that concerns about noncompliance motivated *Giles v. Harris* when the Court declined to do anything about Alabama’s racially discriminatory voter registration scheme. See pp. 14–15.

90. See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305 (2018); *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.).

women who face shockingly high maternal mortality and complication rates<sup>91</sup> and can't access various forms of reproductive health care including abortion or contraception;<sup>92</sup> sorry, Texas women who can't obtain abortions more than six weeks after their last period when many will not know they're even pregnant;<sup>93</sup> sorry, Native voters who live hours from polling locations and accordingly find it difficult to vote absentee but cannot have someone else return their ballot;<sup>94</sup> sorry, people who are about to be thrown out of their homes in the midst of a pandemic.<sup>95</sup> I guess you just have to take one (or many) for the team.

I'm not sure Neville Chamberlain would take that deal.<sup>96</sup> But that's what Justice Breyer seems to be selling—a deal that not only might be viewed as unacceptable for a country that calls itself a constitutional democracy, but a deal that also displays a stunning amount of privilege. It's not just that Justice Breyer appears unable to “jump out of [his] own skin” (p. 56), it's that he has almost no skin in this game. Justice Breyer may not be even mildly inconvenienced by the practical effect of most of his colleagues' rulings. Yet he still feels entitled to tell the people who will bear the burdens of the Court's decisions that they should basically just, in the words of a former justice, “get over it.”<sup>97</sup>

At these and other points, the book starts to read like something of a demand for the Court's authority at the expense of democracy. The book cannot help itself from talking down to the people who are bristling at the prospect of being ruled by unelected and unaccountable elites whose views do not reflect those of most Americans: “The 329 million Americans who are not lawyers or judges must understand the need to maintain th[e] habit [of accepting the Court's authority] and they must accept it” (p. 92). (I'm tempted to ask, “But what about those of us who are lawyers? Do we have to accept it too?”) The book's antidemocratic, juristocratic bent is also clear from how it describes its intended audience: “My aim is to supply background, particularly for those who are not judges or lawyers” (p. 22). (You non-lawyer folks just don't un-

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91. Elizabeth A. Howell, *Reducing Disparities in Severe Maternal Morbidity and Mortality*, 61 *CLINICAL OBSTETRICS & GYNECOLOGY* 387 (2019).

92. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 141 S. Ct. 2619 (2021) (granting certiorari to decide whether Mississippi's ban on abortions after fifteen weeks of pregnancy is constitutional).

93. *See, e.g.*, *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494 (2021). I use “women” as the group of people affected by this decision is largely women, though it also includes trans men.

94. *See, e.g.*, *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2020).

95. *See, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2145 (2021).

96. *Cf.* Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 *SUP. CT. REV.* 271 (arguing that Justice Breyer has engaged in a strategy of appeasing his conservative colleagues in Establishment Clause cases).

97. Debra Cassens Weiss, *Scalia on Bush v. Gore: Get Over It*, A.B.A. J. (Mar. 10, 2008, 11:02 AM), [https://www.abajournal.com/news/article/scalia\\_on\\_bush\\_v\\_gore\\_get\\_over\\_it](https://www.abajournal.com/news/article/scalia_on_bush_v_gore_get_over_it) [perma.cc/3VEM-A52M].

derstand!) At one point, it explicitly emphasizes the importance of “convinc[ing] people that those who govern *deserve* obedience” (p. 7). (You see, Justice Breyer’s colleagues *deserve* to be lawyer kings and queens!)

There are also smaller quibbles I have with Justice Breyer’s argument. He insists that “cases likely to provoke strong political disagreements . . . are comparatively few in number” (p. 33). But if only five out of sixty decisions undermine democracy, that would still be bad! Heck, so would fifty-nine unanimous patent decisions and one split decision that invalidated a federal prohibition on partisan gerrymandering or a new Voting Rights Act.

What Justice Breyer offers is the hollowest kind of institutionalism—respect the Court as an institution by putting aside much of what the Court does. At a high level of generality, the move is to say that, when things are bad, we should act like everything is fine and trust that the institutions that created this mess will deliver us from it. At best, the pitch is unconvincing and naïve. At worst, as the next Section explains, it will undermine our ability to confront problems that are far more serious than some people calling for the Court to be more democratic.

## 2. Is the Rule of Law Primarily Threatened by Acknowledging That the Court Is Political? (Uh . . . Really?)

Justice Breyer recognizes that the Court’s authority depends on the public’s belief that the Court makes decisions based on law, not politics. He claims that anything contributing to a “perception of political influence among justices” will “erod[e] the public’s trust” (p. 100). His preferred solution is that people should respect the Court and not reform it.<sup>98</sup>

One problem with this approach is that respect is earned: People will respect the Court when it acts respectably. They won’t respect the Court when it doesn’t. Because Justice Breyer does not really grapple with the reasons why people may not respect the Court or the reasons why people may view the Court as political, he embraces proposals that are divorced from reality. And because those proposals would lead people to ignore what is happening before their eyes, they raise far greater problems for the rule of law and constitutional democracy than the things that seem to concern Justice Breyer in the book.

Justice Breyer’s plea to continue valiantly with the status quo begins with the odd claim that people view the Court as political because “the media, along with other institutions that comment upon the law,” now “mention[] the name or political party of the president who had nominated a judge to office” (pp. 49–50). Commentators even (and brace yourselves for this affront!) “systematically label judges as conservative or liberal” (p. 50).

Come on. Those are not the only reasons why people might think that the Court is political. How about the decisions of the Court itself? Particularly the

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98. See p. 100 (“Structural alteration of the Court motivated by the perception of political influence among justices can only feed that same perception, further eroding the public’s trust.”).

ones that read something like “we have five or six votes, so QED!”<sup>99</sup> It’s not unreasonable for someone to describe a 6–3 conservative decision that hobbled the Voting Rights Act by adding a list of extratextual limits to the Act as political.<sup>100</sup> (All the more so when one of the justices, while a lawyer in the executive branch, lobbied against the passage of the provision in the Act that the Court was interpreting and argued that Voting Rights Act violations “should not be made too easy to prove.”<sup>101</sup>) It’s not unreasonable for someone to think that a 5–4 conservative decision invalidating a key piece of the Voting Rights Act on the basis of an invented constitutional principle can fairly be described as political.<sup>102</sup> And it’s not unreasonable to believe that the decision to allow “Texas’s patently unconstitutional law banning most abortions” to go into effect was political.<sup>103</sup>

What the justices themselves say may also feed perceptions that the Court is political. On the bench, the justices—often the Republican-appointed ones—routinely accuse other justices of being political. At oral argument in *Bostock v. Clayton County*, Justice Alito warned that “if the Court takes this up and interprets this 1964 statute to prohibit discrimination based on sexual orientation, we will be acting exactly like a legislature.”<sup>104</sup> In his eventual dissent, Justice Kavanaugh made the same claim.<sup>105</sup> In dissent in *Obergefell v. Hodges*, the chief justice wrote: “If I were a legislator, I would certainly consider [the majority’s] view as a matter of social policy. But as a judge, I find the majority’s position indefensible as a matter of constitutional law.”<sup>106</sup>

99. See, e.g., *Nat’l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2376–78 (2018) (invalidating a requirement that unlicensed clinics disclose that they are unlicensed because . . . abortion?); *Brnovich*, 141 S. Ct. 2321 (watering down the Voting Rights Act with extratextual factors based on an atextual analysis because . . . voting rights?); *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.) (giving Alabama one free election under an unlawful districting map because . . . the Justices want to narrow the Voting Rights Act?).

100. *Brnovich*, 141 S. Ct. 2321; see *id.* at 2361 (Kagan, J., dissenting) (“The majority’s opinion mostly inhabits a law-free zone.”).

101. Ari Berman, *Inside John Roberts’ Decades-Long Crusade Against the Voting Rights Act*, POLITICO (Aug. 10, 2015) (quoting Memorandum from John Roberts on Voting Rights Act: Section 2 to Att’y Gen. 3 (Dec. 22, 1981), <https://www.archives.gov/files/news/john-roberts/accession-60-88-0498/030-black-binder1/folder030.pdf> [perma.cc/8ALW-HUHS]), <https://www.politico.com/magazine/story/2015/08/john-roberts-voting-rights-act-121222> [perma.cc/X4JH-GLCJ].

102. *Shelby County v. Holder*, 570 U.S. 529 (2013); see Litman, *supra* note 73, at 1211.

103. *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting); see also *id.* at 2498 (Sotomayor, J., dissenting) (“Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.”).

104. Transcript of Oral Argument at 21–22, *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (No. 17-1618).

105. *Bostock*, 140 S. Ct. at 1823 (Kavanaugh, J., dissenting) (“[W]e are judges, not Members of Congress.”).

106. 576 U.S. 644, 694 (Roberts, C.J., dissenting).

Or consider, well, reality, and specifically the parts of reality that the book does not delve into, such as the nomination and confirmation process.<sup>107</sup> In the 113th Congress, when Democrats held a majority in the Senate and President Barack Obama was in office, the Senate confirmed over 88 percent of the president’s court of appeals nominees. When Republicans controlled the Senate in the 114th Congress, by contrast, they confirmed fewer than 25 percent of the president’s court of appeals nominees.<sup>108</sup> Over the course of his eight years in office, half of which were spent with a Republican-controlled Senate or a filibuster that gave Republicans greater power over judicial nominees, President Barack Obama confirmed only fifty-five court of appeals judges.<sup>109</sup> During President Donald Trump’s four years in office (with a Republican Senate), the Senate confirmed fifty-four court of appeals judges. Republican senators seem to prefer confirming Republican presidents’ judicial nominees. The political parties act as though it matters which president nominates a judge. Why can’t the rest of us say that part out loud?

The same politicization occurs for Supreme Court nominees. When Justice Lewis F. Powell, Jr., “the pivotal vote on the Supreme Court on some of the most controversial social issues facing the nation,”<sup>110</sup> announced his retirement in June 1987, President Ronald Reagan first nominated Robert Bork, then a judge on the D.C. Circuit and previously solicitor general and acting attorney general, to replace him. Various groups opposed Bork’s confirmation because of his involvement in events related to the Watergate investigation as well as his writings opposing abortion and civil rights. Then-Senator Ted Kennedy warned that Bork “should not be able to . . . impose his reactionary vision of the Constitution on the Supreme Court and the next generation of Americans.”<sup>111</sup> The Senate ultimately denied Bork’s confirmation by a vote of 58–42.<sup>112</sup>

More recent events have provided a crash course in how much politics matters to the Supreme Court nomination and confirmation process. In February 2016, Justice Antonin Scalia passed away while President Obama was in

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107. Despite bracketing the nomination and confirmation processes, the book claims that “[w]hat senators say, reported by the press to their constituents, reinforces the view that political, not legal merits, drives Supreme Court decisions.” Pp. 50–51.

108. All of these statistics are from the Congressional Research Service. BARRY J. MCMILLION, CONG. RSCH. SERV., R45622, JUDICIAL NOMINATION STATISTICS AND ANALYSIS: U.S. CIRCUIT AND DISTRICT COURTS, 1977–2020 (2021).

109. *Id.*; see also John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [perma.cc/963Q-2E4Z].

110. Al Kamen, *Justice Powell Resigns, Was Supreme Court’s Pivotal Vote*, WASH. POST (June 27, 1987), <https://www.washingtonpost.com/wp-srv/national/longterm/supcourt/stories/powell062787.htm> [perma.cc/NYE4-965B].

111. 133 CONG. REC. 18,519 (1987) (statement of Sen. Ted Kennedy).

112. Linda Greenhouse, *Bork’s Nomination Is Rejected, 58–42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), <https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html> [perma.cc/JRV3-2R63].

the White House and Republicans controlled the Senate. Then-Senate Majority Leader Mitch McConnell stated: “I believe the overwhelming view of the Republican Conference in the Senate is that this nomination should not be filled, this vacancy should not be filled by this lame duck president . . . .”<sup>113</sup> Senator Chuck Grassley (then the chair of the Senate Judiciary Committee) stated that

[a] majority of the Senate has decided to . . . withhold[] support for the nomination during a presidential election year, with millions of votes having been cast in highly charged contests. As Vice President Biden previously said, it’s a political cauldron to avoid.

. . . .

A lifetime appointment that could dramatically impact individual freedoms and change the direction of the court for at least a generation is too important to get bogged down in politics. The American people shouldn’t be denied a voice.<sup>114</sup>

But the vacancy, and President Obama’s appointment of Judge Merrick Garland, ultimately did “get bogged down in politics.” Many Republican senators explained why they would not consider the Democratic president’s nominee by explicitly invoking ideology, politics, and their concerns about how a Democratic nominee would rule. Senator John Cornyn stated that “[t]he next justice could change the ideological makeup of the Court for a generation, and fundamentally reshape American society in the process,”<sup>115</sup> and Senator James Inhofe said that “an entire generation of Americans will be impacted by the balance of the court and its rulings.”<sup>116</sup> Others even alluded to what might happen if (as expected at the time) Hillary Rodham Clinton were elected president. Senator Richard Burr proclaimed that “[i]f Hillary Clinton becomes

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113. Amita Kelly, *McConnell: Blocking Supreme Court Nomination ‘About a Principle, Not a Person,’* NPR (Mar. 16, 2016, 12:31 PM), <https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person> [perma.cc/UFF6-3PDK].

114. *Id.* The reference to Vice President Biden’s statements was to a June 1992 speech made on the Senate floor. There was no Supreme Court vacancy at the time. The remarks came after the Democratic Senate had just confirmed President Bush’s nominee, Clarence Thomas, to the Supreme Court, after Professor Anita Hill testified that Thomas had sexually harassed her while the two worked at the Civil Rights Commission and the Equal Employment Opportunity Commission. Julie Hirschfeld Davis, *Joe Biden Argued for Delaying Supreme Court Picks in 1992*, N.Y. TIMES (Feb. 22, 2016), <https://www.nytimes.com/2016/02/23/us/politics/joe-biden-argued-for-delaying-supreme-court-picks-in-1992.html> [perma.cc/N7WT-NX79]. Thomas denied the allegations. *Clarence Thomas Confirmed to the Supreme Court*, HISTORY: THIS DAY IN HISTORY (Oct. 14, 2020), <https://www.history.com/this-day-in-history/thomas-confirmed-to-the-supreme-court> [perma.cc/ED8F-LQ63].

115. Kelly, *supra* note 113.

116. *Id.*

president, I am going to do everything I can do to make sure four years from now, we still got an opening on the supreme court.”<sup>117</sup>

But Donald Trump was elected president, so Senator Mitch McConnell and the Republican Senate jettisoned the sixty-vote requirement for Supreme Court nominees and confirmed Neil Gorsuch to the Supreme Court.<sup>118</sup>

Another election-year vacancy—indeed, an election-year vacancy that arose *as an election was already underway*—came when Justice Ruth Bader Ginsburg passed away on September 18, 2020. Three days later, President Trump informed then-Judge Amy Coney Barrett that he would nominate her to the Supreme Court.<sup>119</sup> The Republican Senate quickly conducted confirmation hearings from October 12 to October 15 and confirmed Barrett to the Supreme Court on October 26 by a 52–48 vote.<sup>120</sup> By that point, more than sixty million pre-election votes had been cast in the 2020 presidential election.<sup>121</sup>

Despite Republicans’ prior insistence that they would not confirm a justice during an election year, many managed to change their minds this time around. Senator Lindsay Graham, who had previously promised that “if an opening comes in the last year of President Trump’s term, and the primary process has started, we’ll wait until the next election,” tweeted that he would “support President @realDonaldTrump in any effort to move forward regarding the recent vacancy created by the passing of Justice Ginsburg.”<sup>122</sup> Many

117. Sabrina Siddiqui, *Republican Senators Vow to Block Any Supreme Court Nominee For-ever*, GUARDIAN (Nov. 2, 2016, 9:02 AM), <https://www.theguardian.com/law/2016/nov/01/republican-senators-oppose-clinton-supreme-court-nominee> [perma.cc/8YFE-V6WB]. Others made similar remarks, such as Senator Ted Cruz’s comment that “[t]here is certainly long historical precedent for a Supreme Court with fewer justices. I would note, just recently, that Justice Breyer observed that the vacancy is not impacting the ability of the court to do its job. That’s a debate that we are going to have.” David Weigel, *Cruz Says There’s Precedent for Keeping Ninth Supreme Court Seat Empty*, WASH. POST (Oct. 26, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/10/26/cruz-says-theres-precedent-for-keeping-ninth-supreme-court-seat-empty> [perma.cc/Y62A-MP9Q].

118. Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> [perma.cc/5EG6-CHVV].

119. AMY CONEY BARRETT, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT 65 (2020), [https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20\(Public\)%20\(002\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf) [perma.cc/7HAT-LP8X].

120. *Nomination of Amy Coney Barrett for Supreme Court of the United States*, CONGRESS.GOV, <https://www.congress.gov/nomination/116th-congress/2252> [perma.cc/5UH5-7W5L]; Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [perma.cc/6NHJ-88UU].

121. Adam Levy, *More Than 60 Million Pre-election Votes Have Been Cast*, CNN (Oct. 26, 2020, 11:17 AM), [https://www.cnn.com/politics/live-news/us-election-news-10-26-2020/h\\_81895e69f852e7de3317d56d421a8abe](https://www.cnn.com/politics/live-news/us-election-news-10-26-2020/h_81895e69f852e7de3317d56d421a8abe) [perma.cc/4BNA-WP3Q].

122. Lisa Desjardins, *What Every Republican Senator Has Said About Filling a Supreme Court Vacancy in an Election Year*, PBS NEWSHOUR (Sept. 22, 2020, 3:16 PM), <https://www.pbs.org/newshour/politics/what-every-republican-senator-has-said-about-filling-a-supreme-court-vacancy-in-an-election-year> [perma.cc/68SK-4SLC].

senators made clear that what mattered to them was the political party that would select the justice. Senator Richard Shelby explained the calculus that “[w]e’re in control of the presidency, we’re in control of the Senate, why not? . . . You know, there’s a political fight in here too.”<sup>123</sup> Political parties act like it matters which political party appoints a justice. The rest of us should be able to say that, even if Justice Breyer doesn’t like hearing it.

Political fundraising and spending that targets the courts also suggest the courts are political. A *Washington Post* investigative story on Leonard Leo, who served as the Federalist Society’s executive vice president during the Trump administration’s early years, is illustrative. The investigation found that “between 2014 and 2017 alone, [Leo and his allies] collected more than \$250 million in . . . donations” and that “a nonprofit Leo launched in 2016 . . . gave \$4 million over two years to a nonprofit . . . [whose] [l]eaders . . . spoke at rallies, wrote online commentary and appeared regularly on Fox News to promote . . . Brett M. Kavanaugh[’s nomination].”<sup>124</sup> Previously, Leo “and other members of an advocacy coalition spent about \$15 million in donations from undisclosed donors on ads, telemarketing and the mobilization of ‘grass roots’ groups” to support Chief Justice Roberts and Justice Alito’s nominations.<sup>125</sup>

And it’s not just Leo. The *Post* reporting showed that the NRA ran a \$1 million ad campaign in support of Gorsuch’s nomination.<sup>126</sup> Conservative nonprofit groups announced that they “plan[ed] to spend about \$30 million” “advocating Amy Coney Barrett’s confirmation to the U.S. Supreme Court.”<sup>127</sup> The sheer amount of money that political groups spend on Supreme Court nominations provides some reasons (really, millions of reasons) for people to think that the Court is political.

Yet Justice Breyer’s book explicitly does “not delve into” whether the nomination and confirmation process create a perception—much less a reality—of political influence in and around the Court (p. 21). At this point, it seems as though a food critic has written a restaurant review without addressing whether the food or service are any good. (Hey, table settings matter too, right?)

Here I have to return to Justice Breyer’s bottom-line conclusion that “[i]f political groups support, or a president appoints, a justice whose jurisprudential philosophy will, they believe, advance some political agenda in the long run, so be it” (p. 55). As if recognizing how ridiculous this statement is, he adds, “To a judge, that would seem a recipe for frustration” (p. 55).

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123. *Id.*

124. Robert O’Harrow Jr. & Shawn Boburg, *A Conservative Activist’s Behind-the-Scenes Campaign to Remake the Nation’s Courts*, WASH. POST (May 21, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/leonard-leo-federalists-society-courts> [perma.cc/5V58-X7NS].

125. *Id.*

126. *Id.*

127. Jordan Fabian, *Trump-Allied Groups Pour \$30 Million into Barrett Confirmation*, BLOOMBERG (Oct. 22, 2020), <https://www.bloomberg.com/news/articles/2020-10-22/trump-allied-groups-pour-30-million-into-barrett-confirmation> [perma.cc/76MX-QDQA].



Not to all judges, apparently. After Justice Barrett’s hasty confirmation, she visited the White House and participated in an event waving and smiling next to President Trump.<sup>128</sup> She later gave a speech about how the Supreme Court isn’t political after being introduced by Senator Mitch McConnell, the person who has done more than anyone to make the current Supreme Court a product of politics.<sup>129</sup> When Justice Kavanaugh’s nomination was announced, he praised President Trump’s judicial selection process, which largely consisted of outsourcing the process to the Federalist Society.<sup>130</sup>

The more serious issue with Justice Breyer’s cavalier statement is that the nomination and confirmation process and political spending make clear that political parties and political advocacy groups go to great lengths to select justices. They wouldn’t do that unless they thought it was worth the time, energy, and resources. And it wouldn’t be worth the time, energy, and resources unless the groups felt pretty confident that the justices *would* in fact advance their political agenda.

The concern is not merely that in a polarized country, the judges who are appointed by one political party will tend to advance that political party’s agenda (and impede the other political party’s). The bigger concern, to me, is that because at least some important segments of the Republican Party are now hostile to democracy itself,<sup>131</sup> the Republican Party may be appointing justices whose jurisprudential views will further that part of the party’s agenda too—the anti-small-d-democracy part.

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128. Lawrence Hurley & Jeff Mason, *Trump Celebrates at White House as Supreme Court Nominee Confirmed*, REUTERS (Oct. 26, 2020), <https://www.reuters.com/article/us-usa-court-barrett/trump-celebrates-at-white-house-as-supreme-court-nominee-confirmed-idUSKBN27B143> [perma.cc/3TN8-WUMZ]; Peter Baker, *In Swearing In Barrett, Trump Defiantly Mimics ‘Super-spreader’ Rose Garden Ceremony*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/trump-barrett.html> [perma.cc/RM5W-TEAT].

129. Piper Hudspeth Blackburn, *At Event with Mitch McConnell, Amy Coney Barrett Says She’s Concerned the Supreme Court Is Being Seen as Partisan*, BOS. GLOBE (Sept. 13, 2021), <https://www.bostonglobe.com/2021/09/12/nation/barrett-concerned-about-public-perception-supreme-court> [perma.cc/9Y92-G8MH]. Justices Thomas and Alito also joined the chorus. See Adam Serwer, *By Attacking Me, Justice Alito Proved My Point*, ATLANTIC (Oct. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/alito-supreme-court-texas-abortion/620339> [perma.cc/N624-9H3G]; Kimberly Strawbridge Robinson, *Thomas Latest Justice to Insist Court Isn’t Political Entity*, BLOOMBERG L. (Sept. 17, 2021), <https://news.bloomberglaw.com/us-law-week/thomas-latest-justice-to-insist-court-isnt-political-entity> [perma.cc/RE5Y-FTTM].

130. Aaron Blake, *Brett Kavanaugh’s Remarkably Political Intro Speech*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/10/brett-kavanaughs-remarkably-political-intro-speech> [perma.cc/Z7QT-XBHN]; RUTH MARCUS, SUPREME AMBITION: BRETT KAVANAUGH AND THE CONSERVATIVE TAKEOVER 30–46, 59–77, 151–71 (2019).

131. See generally Klarman, *supra* note 47, at 11–105.

The United States has not had a perpetual commitment to democracy,<sup>132</sup> and several political elites in the Republican Party have faltered on that commitment fairly recently.<sup>133</sup> I mean, Republican senator Mike Lee pretty much *tweeted it out*, saying “We’re not a democracy”<sup>134</sup> and that “[d]emocracy isn’t the objective; liberty, peace, and prospe[r]ity are . . . Rank democracy can thwart that.”<sup>135</sup> Consider the rise and insulation of aggressive partisan gerrymandering,<sup>136</sup> the proliferation of voter identification laws (in the absence of any real evidence of in-person voter fraud);<sup>137</sup> the practice of purging voters

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132. See, e.g., ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 2, 39–70, 105–16 (2000) (explaining how Jacksonians curtailed voting for Black men and how southern officials did the same after Reconstruction); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 111–15 (2019) (describing Reconstruction-era rejection of voting rights for women).

133. See, e.g., Glenn Thrush, “We’re Not a Democracy,” Says Mike Lee, a Republican Senator. *That’s a Good Thing, He Adds*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/elections/mike-lee-democracy.html> [perma.cc/U8CB-WW8H].

134. Mike Lee (@SenMikeLee), TWITTER (Oct. 7, 2020, 9:34 PM), <https://twitter.com/SenMikeLee/status/1314016169993670656> [perma.cc/Y8YR-CH2H].

135. Mike Lee (@SenMikeLee), TWITTER (Oct. 8, 2020, 2:24 AM), <https://twitter.com/senmikelee/status/1314089207875371008> [perma.cc/UD7B-X58Z].

136. See *supra* text accompanying notes 65–66.

137. ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* 223–33 (2015); CAROL ANDERSON, *ONE PERSON, NO VOTE: HOW VOTER SUPPRESSION IS DESTROYING OUR DEMOCRACY* 60–65 (2018); Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST. (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast> [perma.cc/6YS5-NCLN]. One national study found that 37 percent of Black citizens and 27 percent of Latino citizens do not have a valid driver’s license, whereas only 16 percent of white citizens lack one. Charles Stewart III, *Voter ID: Who Has Them? Who Shows Them?*, 66 OKLA. L. REV. 21, 41 (2013). Latino voters in Texas were between 46 and 120 percent more likely not to possess any government-issued identification. BERMAN, *supra* note 137, at 266.

from eligible voter rolls based on unreliable data that disproportionately affects racial minorities and the less wealthy;<sup>138</sup> efforts to limit voter registration,<sup>139</sup> absentee ballot collection,<sup>140</sup> early voting,<sup>141</sup> absentee voting,<sup>142</sup> or the number of voting locations.<sup>143</sup> Or consider the wave of voter suppression measures enacted in the wake of the 2020 election,<sup>144</sup> including provisions that allow partisan state officials to take over local election boards.<sup>145</sup>

Unfortunately, the Republican-controlled Court has already greenlit many of these pieces of the Republican Party’s agenda.<sup>146</sup> And the Court may

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138. BERMAN, *supra* note 137, at 90–91 (detailing efforts in 1950s and 1960s Mississippi to purge voters in predominantly Black counties); *id.* at 207–08 (documenting pre-2000 inaccurate purges in Florida); ANDERSON, *supra* note 137, at 150–52 (documenting sweeping and inaccurate voter purges in the 2010s in Georgia).

139. BERMAN, *supra* note 137, at 261–62 (describing Florida law requiring advance registration of voter registration drives); *see also* ANDERSON, *supra* note 137, at 152–53 (describing Georgia investigations of the Asian American Legal Advocacy Center and New Georgia Project for voter registration drives).

140. *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2348 (2021) (upholding Arizona statute prohibiting collection of absentee ballots by people other than the voter); Act of May 3, 2021, ch. 96, 2021 Kan. Sess. Laws 1107 (to be codified at KAN. STAT. ANN. §§ 25-1124, -1128); Act of May 14, 2021, ch. 534, § 2, 2021 Mont. Laws 2152.

141. *See* Michael Wines, *The Student Vote Is Surging. So Are Efforts to Suppress It.*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/us/voting-college-suppression.html> [perma.cc/72GX-WUAG]. A federal court later invalidated the Florida secretary of state’s policy. *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018). For other states’ efforts, *see* BERMAN, *supra* note 137, at 263, 295–98. Arizona recently ended its permanently early voting list. *See* S. 1485, 55th Leg., 1st Reg. Sess., § 6 (Ariz. 2021) (to be codified at ARIZ. REV. STAT. ANN. § 16-544).

142. *E.g.*, H.R. 538, 2021 Leg., Reg. Sess. (Ala. 2021) (requiring absentee votes to be received at least seven rather than five days in advance of an election); S. 1003, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (to be codified at ARIZ. REV. STAT. ANN. §§ 16-547, -550) (requiring voters to sign return envelope containing absentee ballot and affidavit and prohibiting counting absentee ballots in unsigned envelopes unless voter returns to clerk’s office to sign return envelope before 7:00 p.m. on Election Day).

143. ANDERSON, *supra* note 137, at 151–52 (detailing Indiana effort requiring Republican consent to create more than one early voting site); *id.* at 118–19 (describing the different sizes of populations served by different early voting sites in counties with predominantly white versus predominantly Black voters).

144. *Voting Laws Roundup: December 2021*, BRENNAN CTR. FOR JUST. (Jan. 12, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021> [perma.cc/9V7R-DBWC] (“Between January 1 and December 7, at least 19 states enacted 34 laws restricting access to voting.”); *see, e.g.*, S. 413, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (omnibus voting restrictions).

145. *See, e.g.*, S. 644, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (removing the secretary of state as a member of the state election board and replacing him with “a chairperson elected by the General Assembly”); Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, HARV. L. REV. F. (forthcoming 2022), <https://doi.org/10.2139/ssrn.3926381> [perma.cc/DR9F-TWDL].

146. *See also* *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018).

do even more than that; it could deal considerable blows to democracy by disempowering other branches of the federal government or various institutions within the states from making the country more democratic.<sup>147</sup>

In one of the more disturbing passages of the book, Justice Breyer seems to either unwittingly embrace this brave new antidemocratic world or just wish it away. Writing about *Bush v. Gore*, the decision where the Supreme Court first stayed the 2000 presidential recount in Florida before ending it, Justice Breyer says that “[i]t is debatable whether that decision actually determined who would be president of the United States” (p. 27).

It is “debatable” in the sense that George W. Bush would have still become president if he had actually won a hypothetical recount that had attempted to count all of the votes. But by preventing that recount from happening, the Supreme Court made Bush the winner of Florida, and also of the presidency. To use modern parlance, one might say that the Court . . . stopped the count. One of the opinions did so for utterly baseless reasons.<sup>148</sup> (It’s not like Justice Breyer is unaware of this; as he notes in the book, “I did not agree with the majority. In fact, I wrote a dissenting opinion” (pp. 27–28).) Yet Justice Breyer goes so far as to praise the fact that people accepted *Bush v. Gore*, approvingly noting that “the losing candidate[] Al Gore told his supporters, ‘don’t trash the Supreme Court’” (p. 28). “Whether particular decisions are right or wrong,” Justice Breyer insists, “is not the issue here” (p. 29).

But why not? Elsewhere, the book acknowledges that part of how people evaluate the Court is based on the Court’s “ability to act justly” (p. 7), that is, based on the substance and effects of the Court’s decisions.<sup>149</sup> Scholars have made a similar claim.<sup>150</sup> I would offer another, or perhaps more specific, way in which people do and should evaluate the Supreme Court—not based on the substantive justice of the Court’s opinions but based on whether they are even minimally compatible with democracy.

Does Justice Breyer really mean to imply that “respect for . . . decisions even when one considers them wrong” (p. 28) would have been appropriate if the Supreme Court had not divided 4–4 on an election matter during the 2020 presidential election cycle (before Republicans confirmed Justice Barrett to the Court) and had instead stayed a Pennsylvania Supreme Court decision that allowed people to send in their absentee ballots by Election Day?<sup>151</sup> What if five justices, instead of three, had voted to stay in full a district court decision that had enjoined South Carolina’s witness requirement for absentee ballots

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147. See *supra* text accompanying notes 64–76.

148. *Bush v. Gore*, 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring).

149. See also p. 7 (“This last way, justice, was to convince people that those who govern deserve obedience.” (emphasis omitted)).

150. See, e.g., Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 540–50 (1999).

151. *Scarnati v. Boockvar*, 141 S. Ct. 644 (2020) (noted dissents from Justices Thomas, Alito, Gorsuch, and Kavanaugh).

(thus throwing out votes that had already been cast)?<sup>152</sup> Or what if, looking ahead to 2024 or 2028, the Court were to allow a heavily gerrymandered state legislature to assign the state’s electors to a presidential candidate who did not win the state’s popular vote? Or what if the Court were to stay a state court decision that permitted some number of additional people to cast absentee ballots, and the number of absentee ballots just happened to be outcome determinative: if counted, a Democrat would win the state’s popular vote, but if not, a Republican would win, and the winner of that state would also win the presidency. Should we respect a decision that prohibited the state from counting all of the votes, and in the process handed the presidency to the Republican?

Justice Breyer does not acknowledge these questions, much less analyze them. Again, all he has to say about the possibility that the Republican Party is appointing justices who would do these things (which several justices have already tried to do) is “so be it” (p. 55).

Part of what makes this reasoning so galling is that the book is pitched in terms of what is important to securing the rule of law. Justice Breyer seems to be suggesting that the *real* threat to the rule of law today is not the chance that the Court might exercise its authority at the expense of democracy and the rule of law but that people dare question the Court’s authority to reach such antidemocratic decisions.

Maybe it is my own naïve optimism, but a part of me thinks that Justice Breyer might agree that the greater threat to the rule of law comes from threats to democracy than from threats to the Supreme Court’s authority, particularly if the Court’s authority might be used at the expense of democracy. In his opening testimony in his confirmation hearing, after all, Justice Breyer observed:

[W]ords alone are not sufficient[;] . . . the words of our Constitution work because of the traditions of our people, because the vast majority of Americans believe in democracy.<sup>153</sup>

. . . But what if they don’t? What if important segments of Americans—the Josh Hawleys, the Ted Cruzes, the Mike Lees—no longer believe in democracy?<sup>154</sup> And what if they have perfected a system that allows them to select justices who will undo the democracy that we have?

“So be it?”

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152. *Andino v. Middleton*, 141 S. Ct. 9 (2020) (mem.) (“Justice Thomas, Justice Alito, and Justice Gorsuch would grant the application in full.”).

153. *Breyer Nomination Hearing*, *supra* note 23, at 21 (statement of Hon. Stephen G. Breyer).

154. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 5–8 (2018) (explaining how democracies end through the complicity of political insiders and established political parties).

## CONCLUSION

Despite how some people may read it, this Review does not take any position on whether the Supreme Court should be reformed. My claim is only that Justice Breyer's way of thinking through that issue in the book is indefensible. And it is not just that the book's core theses are wrong. It's that being wrong about these things matters.

Justice Breyer (rightfully) celebrates the justice that the Supreme Court has done, and what (a different) Court could still do. Yet a big part of why the Supreme Court has issued decisions that attempt to make our society more just and our government more democratic is because of social movements, organizers, and politicians who screamed and shouted about the importance of doing so. The arc of justice bent toward justice because people made it bend that way.<sup>155</sup>

They made it bend that way in part by aiming their protests and critiques at the Supreme Court. To shame those people, to imply that their organizing and protests are a threat to the rule of law, is not only undemocratic. It undercuts one of the ways this country has become more democratic and more equal.

It matters that the person saying these wrong things about the Court is a Democratic political (even though he'd dispute the term) elite. Justice Breyer's claims about the Court will be taken seriously by politicians who are in a position to do something about the Court, and by citizens whose views are supposed to matter to what happens with the Court.

And what he is selling them in the book is so incomplete as to be misleading. Claims that the Supreme Court is just "doing law" bracket so much of reality that they obscure it; they give cover to the way things are and facilitate what the courts are doing now and whatever they might do next. So do any other number of behaviors that people (lawyers) tend to fall into: engaging with this Court as if it were a neutral arbiter; commenting about the Court as if it were a debating ground for abstract ideas all of which have an equal chance of prevailing; choosing to emphasize the wonky, seemingly apolitical aspects of the Court's work in public commentary; failing to discuss the real, substantive effects of the Court's decisions; and trying to offer "both sides" analysis of the current Court all do the same thing.<sup>156</sup> They project a view—a view that people pick up on and seize—that all is well and that there is no cause for concern.

That view appeals to people who want to believe it—people who would understandably prefer to live in a world where everything is fine rather than one where we are on the precipice of a democratic crisis. But propagating the view that things are A-OK allows people to be complacent and makes it harder

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155. GARY MAY, *BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY* 144 (2013) (quoting Martin Luther King, Jr., as saying "the arc of the moral universe is long, but it bends toward justice").

156. Cf. Leah M. Litman, Melissa Murray & Katherine Shaw, *A Podcast of One's Own*, 28 MICH. J. GENDER & L. 51 (2021).

to address the situation we are in. It affirmatively enables the federal courts, and the Supreme Court, no matter what they might do.

So I find myself begging, pleading with people who have any platform to consider what view they project about the state of our constitutional democracy. It’s not about you, or your career, or what you feel comfortable or natural doing, or what will ingratiate you to the powers that be. It is about the fate of our country.

I expect, and have accepted, that some people just don’t care. That there are more than enough academics, practitioners, or public figures whose career goals or personal amusement or cultivated persona or self-identity matter more to them than the future of our multiracial democracy. (I like debating procedure as much as anyone, but come on.) I don’t foresee everyone going to the mat for our democracy. But I guess I hold out hope that they would at least try to do our democracy no harm.

I was disappointed when it seemed as though Justice Breyer, of all people, would fail to clear that low bar. I clerked on the Supreme Court for Justice Kennedy, whose chambers were next door to Justice Breyer’s. For that and other reasons, I ended up seeing a lot of Justice Breyer during my clerkship. And I came to admire Justice Breyer as someone who cared about other people, and who thought pragmatically about how to fulfill the Constitution’s promise that our government could be a constitutional democracy that works, and works for everyone.

While norms of Supreme Court confidentiality make it difficult to share much of what led me to hold Justice Breyer in high regard after that year, I will try to convey what I can.<sup>157</sup> I started my clerkship at the Court having finished a court of appeals clerkship that had piqued my interest in becoming a government lawyer who focused on appellate law, or maybe an academic who researched and wrote about the law. I ended my clerkship at the Court questioning whether I should take the bar exam and feeling like I did not want to exist within 200 miles of the appellate world. At the time, I wasn’t sure that academia was for me; I wasn’t sure there was room for me in the legal profession. That should give you some sense of the 2011–2012 year at One First Street.

Justice Breyer was one of the few bright spots—really one of the brightest spots—of that year. On several occasions, he showed me that he could laugh at himself, and he invited me to laugh with him. It is rare that someone in his position would do that. Because I was around his chambers so much, he tried to learn my name, though that was not his forte. He tried to get to know other law clerks, going on run-walks, to happy hours, and to movie nights, and he went out of his way to find ways to support the clerks. He allowed me to basically work from his chambers for a while. (I alternately parked myself in a giant red chair or at a table in his chambers.) I liked it so much that, when it was time for him to interview clerkship candidates for subsequent years, I jokingly (?) presented his judicial assistant with a copy of my resume. He laughed.

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157. My focus here on personal anecdotes does not imply that they are more important than substantive decisions. But it’s easier to share the former without breaching confidentiality.

After one year at the Court, I wasn't sure I could be a lawyer. After almost two decades at the Court, Justice Breyer still showed up every day with the same energy and optimism to make *this* the day that the Supreme Court would help make our democracy more democratic, our government more functional, and our constitutional law more coherent. I admired Justice Breyer's ability to wake up every day and hope for the best from the Court and for justice no matter what had happened the day before. I kind of wished I could emulate it.

But as the book says, "I cannot jump out of my own skin" (p. 56). Perhaps the same traits that made me unable to ignore what was happening in and around the Court during OT2011 are what make it difficult for me to ignore what is happening in and around the Court now. Perhaps the same optimism that allowed Justice Breyer to go to work every day convinced that *today* was the day that his colleagues would adopt his views on the Commerce Clause is what allowed him to write a book that writes off, or at least minimizes, some of the dangers we face today.

After reading the book and following the accompanying press tour, I began to wonder whether optimism was the right word for it after all. The more appropriate word seemed to be naïveté or maybe even delusion—the things he had to tell himself to go to work in the mornings and sincerely engage with his colleagues. It was one thing to tell himself, a Supreme Court justice, that democracy or voting rights stood a chance with this Supreme Court if that's what he needed to get up each day. It was another thing to feed that story to the country as if it were true.<sup>158</sup>

Worse still, Justice Breyer seemed to be acting on that belief and risking potentially perilous consequences by doing so. Throughout the spring and summer of 2020, Justice Breyer faced mounting pressure to retire while Democrats held the presidency and a bare majority in the Senate, which they could lose in the 2022 midterms—if not before, were something to happen to one of the fifty Democratic senators.<sup>159</sup> But at the end of OT2020, Justice Breyer gave an interview to CNN's Supreme Court correspondent Joan Biskupic in which he said that he had not yet decided whether to retire, and reiterated his view

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158. In reality, it seemed like *ishkabibble*. Transcript of Oral Argument at 40–41, *Goldman Sachs Grp. v. Ark. Tchrs. Ret. Sys.*, 141 S. Ct. 1951 (2021) (No. 20-222) (Breyer, J.) ("But, when I read what they said, it seemed to me that what the judge was saying is, wait a minute, suppose what the guy had said at the company was *ishkabibble*, total nonsense . . .").

159. Indeed, the week that Justice Breyer announced his retirement, Democratic senator Ben Ray Lujan suffered a stroke. Chris Cameron & Emily Cochrane, *Senator Ben Ray Lujan Recovering After Suffering Stroke*, N.Y. TIMES (Feb. 1, 2022), <https://www.nytimes.com/2022/02/01/us/politics/ben-ray-lujan-stroke.html> [perma.cc/JK66-NUK]. Some Republicans stated that Lujan's absence from the Senate would delay advancing the president's nominees out of committees. Morgan Rimmer (@morgan\_rimmer), TWITTER (Feb. 2, 2022, 10:23 AM), [https://twitter.com/morgan\\_rimmer/status/1488895903301779456](https://twitter.com/morgan_rimmer/status/1488895903301779456) [perma.cc/K3X9-8MZF]. It was as if the Democrats had (temporarily) lost their majority in the Senate.



that the Court was not political, as if that was informing his decision not to retire.<sup>160</sup>

During subsequent press appearances promoting this book, Justice Breyer elaborated on why he thought people shouldn't view the Court as political. He declared that judges fundamentally transform themselves when they become judges and put on a judicial robe.<sup>161</sup> He insisted that people couldn't *really* predict how someone will vote based on the political party that appointed them.<sup>162</sup> One implication from these statements is that the party that controls the Presidency and the Senate shouldn't affect a justice's decision about whether and when to retire. Indeed, when pressed by Judy Woodruff on PBS, Justice Breyer suggested that the fact that Democrats held the narrowest of majorities in the Senate was “in the mix” of his retirement considerations, but then went on to say that some justices believed it should not be a relevant consideration, while others believed it should.<sup>163</sup>

Part of what made this so maddening was that Justice Breyer was acting like someone quite different than the person I had come to admire. The person I had observed was someone who cared about the facts and the realities of how institutions operate; that person also thought about, well, other people.<sup>164</sup>

Happily, it turns out that the person I thought I knew (just a little) *was* the real Justice Breyer, notwithstanding this one odd, horribly timed book. All of a sudden, in mid-January, well before when other justices had announced end-of-term retirements, news broke that Justice Breyer would be stepping down at the end of the Supreme Court's term upon the confirmation of his successor.<sup>165</sup>

160. Joan Biskupic, *Exclusive: Stephen Breyer Says He Hasn't Decided His Retirement Plans and Is Happy as the Supreme Court's Top Liberal*, CNN (July 15, 2021, 12:01 PM), <https://www.cnn.com/2021/07/15/politics/stephen-breyer-retirement-plans/index.html> [perma.cc/SQ2N-BZAM]. The two considerations about whether to retire that he shared with Biskupic were his health and the Court. *Id.*

161. *The Authority of the Court & the Peril of Politics*, C-SPAN (Oct. 4, 2021), <https://www.c-span.org/video/?515182-1/the-authority-court-peril-politics>; PBS NewsHour, *Justice Breyer on 'Procedural Decision' Behind Texas Abortion Law, Politics on the Bench*, YOUTUBE (Sept. 23, 2021), <https://youtu.be/pIZvme4gE4c>.

162. *Id.*

163. PBS NewsHour, *supra* note 161.

164. Speaking to Joan Biskupic about his decision not to retire in the summer of 2021, Justice Breyer said that he simply *enjoys* the job more now that he is more senior, which allows him to speak earlier at the justices' conferences and to write more interesting opinions. Biskupic, *supra* note 160.

165. Pete Williams, *Justice Stephen Breyer to Retire from Supreme Court, Paving Way for Biden Appointment*, NBC NEWS (Jan. 26, 2022), <https://www.nbcnews.com/politics/supreme-court/justice-stephen-breyer-retire-supreme-court-paving-way-biden-appointment-n1288042> [perma.cc/AD92-4AXX].

During his official announcement at a press conference with President Biden, Justice Breyer invoked Presidents Abraham Lincoln and George Washington, including their statements that our country is “an experiment.”<sup>166</sup> He explained that future generations would be the ones to see whether that experiment, “a country . . . dedicated to liberty and the proposition that all men are created equal,” would actually work.<sup>167</sup> It turns out Justice Breyer does see that threats to a multiracial constitutional democracy are threats to the rule of law, and he also sees that we face those threats today.

After setting up an existential question about whether our country’s experiment in multiracial democracy would succeed, Justice Breyer smiled and said, “Of course, I am an optimist, and I’m pretty sure it will.” Of course, it turns out he’s a pragmatist too, and that his optimism was the endearing kind—the kind that does not obscure reality, including the reality that the Supreme Court, or at least the parts of the Court he refused to discuss in the book, is inextricably political.

So I can and will continue to think that Justice Breyer is a mensch, even though I think he wrote a pretty bad book.

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166. *Read Justice Breyer’s Remarks on Retiring and His Hope in the American ‘Experiment,’* NPR (Jan. 27, 2022, 2:47 PM), <https://www.npr.org/2022/01/27/1076162088/read-stephen-breyer-retirement-supreme-court> [perma.cc/UHT6-FMFK].

167. *Id.*