

Op-ed | Verniero: Listen to Breyer. ‘Nine is fine.’

by Peter G. Verniero

When a sitting member of the U.S. Supreme Court speaks to us about the institution that he faithfully has served for the past 27 years, perhaps we should listen.

Justice Stephen Breyer’s latest book, *The Authority of the Court and the Peril of Politics*, essentially is a plea to policymakers to refrain from altering the structure of the court or its inner workings. He says those contemplating such changes should “think long and hard” before enacting them.

Breyer also tries to defeat the notion that the court merely is a collection of political partisans — “junior varsity politicians,” as he puts it.

Breyer is right on both fronts. The idea of adding seats to the court to dilute the influence of the supposed “conservative” members is much discussed in today’s political circles. And it has been talked about or tried in the past.

The last time Congress adjusted the court’s structure was in 1869. That brought us the current configuration of nine seats, ending what had been a fluctuation in number, which at one point was as low as five and as high as ten. In 1937, Franklin Roosevelt offered a plan to “reorganize” the judiciary, which would have diluted the influence of those justices whom the president believed were hostile to his New Deal agenda. That plan was never approved.

For Breyer, “nine is fine,” as he said in a media interview in 2019, a position echoed by his late colleague, Ruth Bader Ginsburg, who shared Breyer’s outspokenness in urging elected officials to leave the court alone. It’s a position borne of practicality as much as anything else.

If members of today’s majority party in Congress can adjust the court in response to judicial decisions with which they disagree, then there is nothing to

stop tomorrow’s majority in the opposite party from doing the same. That never-ending cycle would cause instability at the court and in the state of our law.

Breyer also urges that we stop thinking about the court as a political institution. For starters, we should resist the temptation to identify justices by referring to the presidents who appointed them or by labeling them as either “liberal” or “conservative.” Admittedly, that might be too much to ask.

Still, we should try. Chief Justice Roberts did his part when he famously said in 2018: “We do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them.”

Breyer explains that years ago reporters and commentators did not use such short-hand labels but today they are commonplace. Breyer is neither nostalgic nor naive. He appreciates that many times the court is sharply divided along familiar lines. Those disagreements, however, are due to “jurisprudential differences, not political ones.”

To some, drawing that distinction between jurisprudential and political beliefs is like splitting hairs. Maybe so — but it’s a valid distinction. And a necessary one if we want to avoid politicizing the court.

A member of the court, for example, might approach a case from a narrow or minimalist perspective, which is a form of judicial philosophy. And, according to Breyer, such an approach can be a basis for judicial compromise in appropriate cases. But there is no absolute guarantee on how a particular philosophy will affect a court’s decision, which ultimately depends on the facts and procedural posture of each case. That’s why a court that

is known to be divided along jurisprudential lines still has the capacity to surprise us with its rulings.

All of this affects the degree to which the court retains its legitimacy to act, which is Breyer's larger point. Polls show that a majority of the public views the court favorably, which is quite a feat in this unprecedented era of divisiveness. The court's legitimacy helps us to accept its decisions, even those with which we fundamentally disagree. The more we talk about packing the court with like-minded justices or labeling it as no more than the third political branch, the less likely its decisions will command our respect. And if that happens, then the rule of law is diminished and we all lose.

The court is about to begin its new term on the first Monday in October, an opportune time to pay attention to Justice Breyer's message. The best way to maintain the court's independence and uphold the rule of law is to let the justices do their jobs, free of political influences. If we want an apolitical court, then we should stop treating it like a political one.

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