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A Judge’s Warning About the Legitimacy of the Supreme Court

By LINCOLN CAPLAN

During interviews about his new book, Justice Stephen Breyer has spoken mainly about one of its two themes, how the Supreme Court should decide cases. A week before the court’s new term, it’s the second theme — about the court’s legitimacy, or the respect it relies on — that deserves attention.

In the last term of the conservative Roberts court, only Justice John Paul Stevens voted less often with the majority than Justice Breyer. This record, Justice Breyer’s 16 years on the court and Justice Stevens’s retirement make Justice Breyer the likely leader of the more liberal justices in the next term.

In his dissent from a decision striking down the District of Columbia’s gun-control law, he showed why. “In my view,” he said, “there simply is no untouchable constitutional right guaranteed by the Second Amendment to keep loaded handguns in the house in crime-ridden urban areas.”

Still, he fits no conventional model of a liberal. The historian Jeff Shesol wrote in The Times Book Review: “Breyer has been less willing than any of his fellow justices to overturn acts of Congress.” The Supreme Court now has no old-fashioned liberals, like William Brennan or Thurgood Marshall. If it did, Justice Breyer’s deference to Congress would likely make him a centrist.

So would his view of how the court should decide cases. As he puts it in the book, “Making Our Democracy Work: A Judge’s View,” the court “must thoughtfully employ a set of traditional legal tools in service of a pragmatic approach to interpreting the law.” Pragmatic means reckoning with a law’s words and history and the precedents interpreting it, but also its “purposes and related consequences, to help make the law effective.” The goal, he says, is “to apply the Constitution’s enduring values to changing circumstances.”
Justice Breyer describes the court in its early years, when it decided few cases and the ones it decided were trivial. From that lowly state, the court has earned considerable authority, but it has also forfeited legitimacy with bad decisions, some so bad they were “ignored or disobeyed.”

The court’s “infirmity” shows that its legitimacy in the public's eyes “cannot be taken for granted,” he writes. His pragmatic means are intended “to help maintain the public's trust in the Court, the public's confidence in the Constitution, and the public's commitment to the rule of law.”

There’s no accepted index of legitimacy for the court, so it’s not easy to know exactly how the public regards it. But in recent years court watchers have cited a range of reasons for concern.

Around the world, its influence has declined, measured by the number of times top courts in other countries cite it. In academic circles, conservatives and liberals alike have called for term limits for justices, because life tenure and long service could lead them to do the job less well than they should.

While there’s no chapter in Justice Breyer’s book called “Legitimacy: Why I’m Worried,” The New Yorker’s Jeffrey Toobin points to the judicial activism of Chief Justice John Roberts and the conservative majority as a major source of apprehension for Justice Breyer. In a profile this week, Mr. Toobin describes Justice Breyer as “unskilled in the art of the poker face” and says that he used last January’s Citizens United decision “to take a shot at Roberts” in the book.

In that ruling, the conservatives gave corporations an unlimited right to spend money in politics. Justice Breyer said they disregarded “a traditional legal view that stretched back as far as 1907,” and had recently been affirmed.

The message of Justice Breyer’s book is that the court jeopardizes its legitimacy when it makes such radical rulings and that, in doing so, it threatens our democracy. That message is powerful, ominous, and very useful.