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Newsroom

Lessons From Justice Breyer

ProJo columnist Ed Fitzpatrick reflects on U.S. Supreme Court Justice Stephen Breyer's background and philosophy, and his recent appearance at RWU Law.

From the PROVIDENCE JOURNAL: "[With Justice Breyer presiding...](#)" by Edward Fitzpatrick

BRISTOL, R.I., Oct. 30, 2011 -- Pick your least favorite U.S. Supreme Court decision.

Perhaps it's *Roe v. Wade*, or the decisions forbidding prayer in public schools. Perhaps it's *Citizens United*, or the decision that effectively handed the 2000 presidential election to George W. Bush.



"What we do affects a lot of people — it might affect you," **Supreme Court Justice Stephen G. Breyer said at the Roger Williams University School of Law last week.** "A lot of what we do is pretty unpopular, and at the same time, what we do may be wrong." He noted, for instance, that he dissented in the *Bush v. Gore* ruling that stopped the counting of Florida's disputed presidential votes. "I thought it was wrong — absolutely wrong," he said.

But the most remarkable thing about the *Bush v. Gore* ruling is that "despite the fact that it's very important, unpopular and probably wrong, people followed it," Breyer said, paraphrasing Senate Majority Leader Harry Reid. "They did not go out in the streets and start killing people. They did not throw sticks and bricks and stones and wound each other with guns."

Some might think it's too bad that such a ruling did not provoke riots, Breyer said. But, he emphasized, "Before you reach that as a definite conclusion, just turn on the television set and see what happens every day in countries that decided to resolve their major differences not under law — but with sticks, stones, guns, grenades."

Breyer expounds on that point in his 2010 book, "Making Our Democracy Work," saying, "Day after day, I see Americans — of every race, religion, nationality and point of view — trying to resolve their differences in the courtroom. It has not always been so."

It's a point worth considering as the nation's economy breeds widespread dissatisfaction and the political discourse becomes more bitter and polarized. And it's a point worth considering when at least one presidential candidate, Republican Newt Gingrich, has said he would ignore the Supreme Court if he fundamentally disagreed with the court's decisions.

Now, Gingrich seems to be playing to a conservative base, since he cited lower court rulings about same-sex marriage and school prayer, and maybe he thinks he must make such statements given his dismal poll numbers. But his timing is odd given the Supreme Court's conservative majority, and his ill-advised comments can only add to the nation's cynicism, polarization and dysfunction.

"People are awfully cynical about public life," Breyer said. "Some cynicism is justified, but if you are too cynical, the country can't work."

In contrast to the mounting cynicism, Breyer believes public institutions such as the courts can move the country forward and make life better for people.

In his 2007 book "The Nine: Inside the Secret World of the Supreme Court," Jeffrey Toobin described Breyer as "the sunniest individual to serve on the Supreme Court in a great many years. Optimism was the core of his character."

Breyer is a product of San Francisco in the 1950s, Toobin explained. "This was not the San Francisco of the following decade, of Haight-Ashbury and the Summer of Love, but rather a growing metropolis that was both cozy and booming," he wrote. "Few places, before or since, matched San Francisco of that era for civic harmony and commitment to community."

Breyer's father worked as a lawyer for the San Francisco school system. His mother was a homemaker who volunteered with the Democratic Party and the League of Women Voters.

He arrived at the Supreme Court as someone who admired Congress and "believed that government existed to serve people and solve problems," Toobin wrote. "In other words, as Stephen Breyer began his first full term on the court, he was profoundly out of step — with the country, with the Congress, and even, to some extent, with his new colleagues."

If anything, that gulf has grown in Breyer's 17 years on the court.

Before joining the high court, Breyer served on the Boston-based 1st U.S. Circuit Court of Appeals with Senior Circuit Judge Bruce M. Selya, a Rhode Islander who invited him to the state's only law school on Wednesday.

Breyer told students about a president who undermined a Supreme Court ruling.

In the 1830s, settlers in Georgia began mining for gold on land long occupied by the Cherokee Indians. "The Cherokees, being a group of very civilized people, did what any group of civilized people would do — they hired a lawyer," he said. When the Supreme Court issued a decision favoring the Cherokees, Georgia resisted the ruling, and President Andrew Jackson sent in federal troops — not to enforce the court's decision but to force the Cherokees to move to Oklahoma. So many died on the way, the route became known as the Trail of Tears.

That episode did not "bode well for the possibility of the country following the Supreme Court in cases where their decision is very unpopular," Breyer said.

But we've made progress, he said, noting that, in 1957, President Dwight Eisenhower faced the question of how to enforce the *Brown v. Board of Education* ruling requiring racial integration in public schools.

Arkansas Gov. Orval Faubus had sought to stop the integration of a Little Rock high school, so a meeting was arranged between Faubus and Eisenhower at the "summer White House" here in Newport, Breyer said. Eisenhower "dressed down" Faubus, who gave Ike the impression he'd permit integration but "then went out and told the press the opposite," he said. So Eisenhower decided to send in members of the 101st Airborne Division, the "heroes of Normandy," to escort nine black students into that Little Rock high school.

"That was a great day for the rule of law," Breyer said. "It was a great for the cause of equality. It was a great day for the United States of America."

In Little Rock, just a mile from that high school, you can find the grave of Cherokee Chief John Ross' wife, who died on the Trail of Tears, Breyer noted. "Although the distance between the grave and the school is small, the nation had come a long way in the time between the two decisions they symbolize," he wrote. "It was moving in the right direction."

Today, we must keep moving in the right direction, even as the Supreme Court continues to issue controversial rulings. The court could, for instance, decide as early as Nov. 10 whether to hear a

challenge to the health-care overhaul, and it might take up a same-sex marriage case in the next couple of years.

At a time of frustration and anger, Breyer provides a cool-headed reminder about the value of the rule of law. At a time of deepening cynicism, he provides a dose of optimism. And at a time of mounting dysfunction, he provides a pragmatic focus on making this country work better.

For full story, click [here](#).