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KATZMANN LECTURE

REFLECTIONS ABOUT JUDICIAL INDEPENDENCE

THE HONORABLE SONIA SOTOMAYOR*

DEAN TREVOR MORRISON

Good evening and welcome to the inaugural Lecture of the Robert A. Katzmann Annual Symposium Series. I'm Trevor Morrison, the Dean here at NYU School of Law and it's my pleasure to welcome the great many of you—over three thousand we believe—who are joining us for this evening's event. The idea for this event came from its namesake, our dear friend and colleague, the late Robert Katzmann, longtime Judge and then Chief Judge of the United States Court of Appeals for the Second Circuit—and, for many years, one of the country's most important thinkers about the role of the courts, their relation to other branches of government, and their capacity to deliver justice and preserve the rule of law.

Among his myriad activities beyond the bench, Judge Katzmann taught for many years here at NYU as an adjunct instructor. He was of course an outstanding teacher, much beloved by his students, and after he took senior status last year, Judge Katzmann assumed a more

* Copyright © 2022 by The Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States. An earlier version of this Lecture was delivered as the inaugural Lecture of the Robert A. Katzmann Annual Symposium Series, hosted virtually at the New York University School of Law on February 9, 2022. The Lecture took the form of a dialogue between Justice Sotomayor and Trevor W. Morrison, Dean and Eric M. and Laurie B. Roth Professor of Law at New York University School of Law. Justice Sotomayor and Dean Morrison thank the Katzmann student fellows whose excellent work provided valuable preparation for this dialogue: Brian Cross, Jemie Fofanah, and Luiza Leão.

substantial role at NYU. We envisioned it as involving even more teaching, as well as leading a number of other initiatives outside the classroom. And one of those initiatives was his idea to establish a new annual lecture here at NYU Law, featuring legal jurists, public servants, legal academics, and others who on an annual basis would address pressing issues in law and policy, especially as they relate to the broad topic of the rule of law.

The idea was to make the lecture a key fixture in the intellectual life of the NYU Law community and the legal community more broadly; we were terribly excited about it. But Judge Katzmann wanted more than simply an annual lecture—his vision included study groups, which would dig deeply into the ideas advanced by each year’s lecture, and then think about concrete policies and other reforms that could be proposed on the issues discussed. And his vision included a student fellows program, which would involve current NYU Law students in these activities.

In many ways, the inspiration for all of this was the Marden Lecture that Judge Katzmann himself delivered at the New York Bar back in 2007. That lecture was entitled “The Legal Profession and the Unmet Needs of the Immigrant Poor.”¹ In the lecture, Judge Katzmann put a spotlight on the lack of legal representation in many immigration cases in the federal courts and on the consequences of that lack of representation. After he delivered the lecture, a study group was convened to examine the issue more deeply and to suggest solutions. The ultimate result, thanks to the hard work of many and the generosity of some key funders, was the creation in 2014 of the Immigrant Justice Corps, which now provides legal representation to people in immigration cases within the Second Circuit.² Their work, which is directly traceable to Judge Katzmann’s vision, has had an immense impact and is inspiring similar initiatives across the country.

Judge Katzmann’s idea was to replicate that model here at NYU with an annual lecture, study groups, plus the innovation of student fellows, all leading to impact. It was a brilliant idea, and we were thrilled that he would implement and lead this initiative here at NYU. But then, tragically, Judge Katzmann passed away in June of last year.

¹ Robert A. Katzmann, Judge, U.S. Ct. of Appeals for the Second Cir., *The Legal Profession and the Unmet Needs of the Immigrant Poor*, *The Orison S. Marden Lecture of the Association of the Bar of the City of New York* (Feb. 28, 2007), <https://www.nycbar.org/pdf/report/marden9.pdf> [<https://perma.cc/V2BC-BDBG>].

² See *About IJC*, IMMIGRANT JUST. CORPS, <https://justicecorps.org/about> [<https://perma.cc/5WGU-C82W>] (describing the story of the organization and tracing its origin to a lecture given by Judge Katzmann, which in turn inspired studies on the issue of immigrant representation and led to the establishment of the Corps toward this goal).

This, of course, was an immense loss for everyone who knew him, and also for the law and the country more broadly. One dimension of the loss is that we were deprived of the opportunity to continue to learn from Judge Katzmann in his capacity as convener of this new lecture series and its associated activities. Instead, we have resolved to push forward with his idea and to do it in his name and his honor.

In doing so, we are extremely grateful for the support and engagement of many people, including especially Judge Katzmann's widow, Jennifer Callahan, his brother, Judge Gary Katzmann, and the rest of the Katzmann family along with many dozen former clerks of Judge Katzmann who have agreed to serve on Program Committees for this initiative and also on a Mentors Committee to support the NYU Law Katzmann student fellows we will select on an annual basis. And speaking of the student fellows, we are grateful to them for the excellent work they have done to help us prepare for tonight's event. Let me name those student fellows—the first class of NYU Law Katzmann Fellows are Sasha Boutilier, Brian Cross, Jemie Fofanah, and Luiza Leão. They've done outstanding work. Finally, and certainly but not least, we are grateful to the donor supporters, all admirers of Judge Katzmann who have thrown their support behind this initiative to create an endowment that is sufficient to support the annual Katzmann Lecture as well as all the related activities, study groups, student fellows, and the like that will make up what we will call the Katzmann Symposium.

With that, I am honored to welcome to NYU Law our inaugural Katzmann Lecturer, Justice Sonia Sotomayor. Justice Sotomayor needs no introduction to any audience—she is a hero to millions in this country and around the world and is a singularly powerful voice on today's Supreme Court. What some in our audience tonight may not know, though, is that she was also for decades a very close colleague and friend of Judge Katzmann's. In fact, it was his idea to invite her to be our inaugural lecturer and I know he would be so pleased to see her here with us tonight. Justice Sotomayor, welcome.

JUSTICE SONIA SOTOMAYOR

Hello everyone. I'm so delighted to be here. I'm obviously sad that my brother Bob Katzmann is not physically here, but I know he's watching from above.³ I have to tell you, as I prepared for today's talk, I kept thinking of all of the conversations I would have had with Bob in preparing this talk if he were still with us, but I know that I, as

³ See SONIA SOTOMAYOR, *MY BELOVED WORLD* 307 (2013) ("I have three brothers: my birth brother, [John S. Siffert], and Robert A. Katzmann.").

well as so many others, were so deeply touched by him during our lives and I hope some of his concerns will be reflected in my thoughts.

DEAN MORRISON

Thank you, we do all miss him tonight, but it's a good occasion to remember him and to be inspired by his vision; to carry it forward. And part of doing that is in our theme for our conversation tonight—which, instead of a formal lecture, we will have a conversation, the Justice and I—and that theme is judicial independence. This topic was chosen by Judge Katzmman himself, and so in seeking to carry his vision forward, we are sticking with the topic that he chose for the inaugural event. It is of course an immensely important topic and a complicated one, and I look forward to hearing, Justice, your thoughts on it this evening. So why don't we begin?

We could start by trying to define judicial independence. It is not necessarily self-defining.⁴ Judge Katzmman himself once described judicial independence as having at least two forms or dimensions, something he called “decisional independence,” which refers to the ability of individual judges to rule on cases without fear of retaliation, and then secondly, “institutional independence,” which has to do more with the freedom of the judiciary as a whole from pressures, or undue pressures, from other branches of government.⁵ Do you see it that way, Justice, or how would you define judicial independence?

JUSTICE SOTOMAYOR

Trevor, as you noted, few in their lives have been more devoted to or more a careful student of the judiciary as an institution than my brother Bob Katzmman. I would be foolish indeed to question his thoughts, so I don't. I fully adopt Bob's two-part matrix for structuring our talk about judicial independence. And this is a lecture, so I'm going to be teaching in the process, but also expressing my thoughts.

So for the general public, they don't realize that the Constitution does deal with judicial independence in its own ways, particularly decisional independence, by giving Article III federal judges lifetime appointments. Our salaries can't be reduced during our tenure and the Constitution provides that we can't be removed from office—only by impeachment and conviction for bribery, treason, and other high

⁴ See generally JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH (Stephen B. Burbank & Barry Friedman eds., 2002) (compiling different perspectives on the meaning of judicial independence).

⁵ Robert A. Katzmman, Chief Judge, U.S. Ct. of Appeals for the Second Cir., The Role of the Judiciary in a Democracy, Remarks at the City University of New York Graduate Center's Series on the Promise and Perils of Democracy, at 14:04 (May 7, 2019), <https://www.youtube.com/watch?v=fn2aM9zgADs> [https://perma.cc/MLQ6-C4EY].

crimes and misdemeanors by a two-thirds Senate majority.⁶ Those are powerful protections for individual decisionmaking. Additionally, however, there are judicial codes of ethics which help reduce decisional pressures by requiring judges to recuse themselves from cases involving family members, from matters they previously handled as lawyers, or from matters involving entities in which they have a financial interest.⁷ So one can imagine the kind of pressures that would exist if, in making decisions, you were dealing with people you know, or if you're financially indebted to one of them.

These explicit constitutional provisions and judicial conduct codes directly support structural decisional independence and create a legal doctrine for independence. But, alone, they're not enough. To protect the second form of judicial independence, institutional independence from the other branches of government, we need something else. Although judges' salaries cannot be reduced during their tenure, there is no explicit constitutional provision that sets or protects the court's budget. That is left entirely to Congress and the Executive in the budget-making process and it doesn't take much for people to understand that it could be a big threat against any entity. Similarly, no explicit constitutional provision prevents Congress from depriving the courts of jurisdiction to hear certain kinds of cases. No constitutional provision explicitly obligates the other two branches of government to follow the courts' decisions, nor does the Constitution protect judges from political influence in their selection. To the contrary, everybody knows that federal judges are appointed by the President and confirmed by the Senate.⁸

⁶ U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”); *id.* art. I, § 3, cl. 6 (setting forth the Senate power to try impeachments by a two-thirds majority); *see also* *Nixon v. United States*, 506 U.S. 224, 235 (1993) (“In our constitutional system, impeachment was designed to be the *only* check on the Judicial Branch by the Legislature.”).

⁷ *See* 2A GUIDE TO JUDICIARY POLICY ch. 2 (JUD. CONF. OF THE U.S. 2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/HD5Y-NQQC>] (establishing a code of conduct that is binding on circuit, district, Court of International Trade, Court of Federal Claims, bankruptcy, and magistrate judges). These ethics rules currently do not apply to the Supreme Court, but most Justices claim to follow them. *See* JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4–5 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/7FJL-BDRB>].

⁸ U.S. CONST. art. II, § 2, cl. 2.

Many other countries do it very differently. England, for example, has laws setting forth the qualifications for judges.⁹ The Queen, on the advice of the Prime Minister, selects judges, but from a limited list of people recommended by an independent judicial appointments commission made up, I think, almost exclusively of judges.¹⁰ The commission is required to confer with some government officials and a limited veto power of the commission's choice by the Lord Chancellor exists. But by statutory directive, judicial selection is required to be on the basis of merit and structured to be protected from political influence.¹¹

So, how do we here in the United States create what Bob called institutional independence when we as a nation have chosen to protect judicial independence primarily by norms—albeit norms that the nation has largely followed and, up to this point in our history, largely supported? Congress has never used the power of the purse to blackmail the Court or to do its bidding and has traditionally allotted the Court the funds it seeks for it to function. Now during the Reconstruction Era, Congress stripped the Court of jurisdiction to review the Reconstruction Acts because it feared our Court would declare those Acts unconstitutional.¹² But since that time, the

⁹ Constitutional Reform Act 2005, c. 4, §§ 25–31 (UK) (setting forth qualifications for judges that include the holding of high judicial office for at least two years, or status as a qualifying practitioner for at least fifteen years, among other requirements).

¹⁰ *About Us*, JUD. APPOINTMENTS COMM'N, <https://judicialappointments.gov.uk/about-the-jac> [<https://perma.cc/Y8W7-E54W>] (stating that the Commission makes recommendation for posts up to and including the High Court in England and Wales, but does not select magistrates or judicial office-holders for the UK Supreme Court); *The Board of Commissioners*, JUD. APPOINTMENTS COMM'N, <https://judicialappointments.gov.uk/the-board-of-commissioners> [<https://perma.cc/58JM-VHBL>] (noting that the Chairman of the Commission is a lay member, while the rest of the board is composed of six judicial members, two professional members, five lay members, and one non-legally qualified judicial member); *Appointments of Justices*, SUP. CT., <https://www.supremecourt.uk/about/appointments-of-justices.html> [<https://perma.cc/33BD-M7HB>] (describing the process of selecting UK Supreme Court Justices). For selection of Supreme Court Justices in England, the Judicial Selections Commission must “submit a report to the Lord Chancellor which must state: who has been selected; who was consulted; and which contains any other information required by the Lord Chancellor.” *Appointments of Justices*, *supra* (citing Constitutional Reform Act 2005, c. 4, § 28).

¹¹ *About Us*, *supra* note 10 (noting that the Judicial Appointments Commission makes selections based on merit, which involves consultations with, and recommendations to, other government officials); *Appointments of Justices*, *supra* note 10 (“If, following the consultations above, the Lord Chancellor is content with the recommendation made by the selection commission, he forwards the person's name to the Prime Minister who, in turn, sends the recommendation to Her Majesty The Queen who makes the formal appointment.”).

¹² The Reconstruction Acts outlined the conditions under which the ex-Confederate states would be readmitted to the Union. See ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 90 (2019). The

Congress has stripped the courts of jurisdiction in discrete areas, like certain immigration law disputes,¹³ or given executive agencies initial review of many matters.¹⁴ But Congress has generally accepted independent judicial review of controversies, which permits the Court to do its work.

Finally, only twice in our history have presidents ignored Supreme Court rulings—imagine that—in two hundred years of history. First, Andrew Jackson permitted states to displace Indians from their sovereign lands and gave them federal support to do so in direct contravention of the Supreme Court’s ruling in *Worcester v. Georgia*, holding that Indian nations were sovereigns and states could not pass laws controlling Indian lands.¹⁵ Second, after Chief Justice Taney ruled (in a case he heard alone, not with the full Court, and that was filed with the United States District Court) that President Abraham Lincoln’s unilateral suspension of the writ of habeas corpus was unconstitutional, President Lincoln maintained the suspension and did not release the detainee in question.¹⁶ Congress later avoided a continuing confrontation with the courts over this issue by authorizing presidents to suspend the writ during a crisis.¹⁷ Decades later, when President Franklin Delano Roosevelt moved to add Justices to the Supreme Court in order to secure the Court’s approval of his legislative agenda, a Democrat-controlled Senate, the public, and the media defeated his attempt.¹⁸ Our norms respecting the importance of judi-

Supreme Court upheld Congress’s authority to withdraw jurisdiction in *Ex parte McCordle*, 74 U.S. 506, 513–14 (1868).

¹³ See 8 U.S.C. § 1252 (stripping federal courts of jurisdiction to review certain matters pertaining to immigration removal proceedings). See generally RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 295–345 (7th ed. 2015) (detailing such instances of jurisdiction stripping by Congress and exploring their constitutional parameters).

¹⁴ See FALLON, JR. ET AL., *supra* note 13, at 345–61 (discussing the extent of Congress’s ability to allocate adjudictory power to federal agencies).

¹⁵ 31 U.S. (6 Pet.) 515 (1832).

¹⁶ *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (holding that the Constitution authorizes only Congress to suspend the writ of habeas corpus and so invalidating President Lincoln’s suspension of the remedy); see also David L. Martin, *When Lincoln Suspended Habeas Corpus*, 60 AM. BAR ASS’N J. 99, 99 (1974) (discussing *Ex parte Merryman* and President Lincoln’s suspension of habeas corpus).

¹⁷ See Martin, *supra* note 16, at 102 (“A compromise Habeas Corpus Act was finally passed in 1863, but it was ambiguous as to whether the president or Congress suspends the writ and whether this power can be delegated, leaving the constitutional issue unresolved to the present day.”).

¹⁸ See William H. Rehnquist, *Judicial Independence*, 38 U. RICH. L. REV. 579, 591–94 (2004) (recounting how Senate Democrats opposed Roosevelt’s court-packing plan, and that, when it became clear that the court-packing “plan was indeed dead,” the “spectators’ galleries broke into applause”).

cial independence have been central to the survival of our nation and generally have been adequate to protect institutional independence when it has been challenged by the other branches. It is an aspirational goal, not a legal norm, but one so far with a lot of bite in our history.

DEAN MORRISON

Thank you, that's a wonderful opening. I think it's especially important for people to understand that, other than the few constitutional protections that you pointed to, which presumably are legally enforceable in the right context, almost all of what we think of judicial independence entailing in this country is at a level of more informal norm, established maybe over the course of years, decades, even centuries. But only norms—and we know that norms can take a long time to be built up and yet may be frittered away quickly if not attended to.

JUSTICE SOTOMAYOR

Yes.

DEAN MORRISON

One thing we sometimes ask when speaking about judicial independence is: What is it for? Is judicial independence an end in and of itself or is it a means to other ends? And various of your colleagues, as you know, have spoken and written about judicial independence over the years offering some thoughts in seeming answer to that question. For example, Justice Kennedy has argued that the judiciary needs to be independent from political pressures because judges must sometimes make unpopular decisions—politically unpopular decisions though they are constitutionally correct. On this view, judicial independence is a means to the end of the Court being able to do its work.¹⁹ Justice Breyer has said that the framers' goal in creating an independent judiciary was to help establish legal impartiality and to protect the rights of minorities.²⁰ Justice Scalia once argued that judicial independence is valuable really only if and as long as judges act as neutral arbiters as opposed to implementing their own personal

¹⁹ See Interview by Bill Moyers with Stephen Breyer & Anthony Kennedy, Justices of the Supreme Court of the United States, on PBS Frontline (1999), <https://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html> [<https://perma.cc/KJ4Q-GVBR>].

²⁰ Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 GEO. L.J. 903, 906 (2007) (explaining how the Constitution “offers protections to minorities in the form of guarantees of fundamental rights,” and that “without an independent judiciary, such basic Constitutional protections . . . can become merely empty rhetoric”).

views.²¹ So it seems that Justice Scalia felt that the more judges act as policymakers, the less they deserve to be granted independence. How do you see it, Justice, in terms of what underlying goals judicial independence is there to serve and, if you're willing, what do you think about what your colleagues have said on the topic?

JUSTICE SOTOMAYOR

Well, I agree with all of them because I do not view their thoughts as contradictory. Most people don't understand that we're not a pure democracy. What democracy means is a majority of the people voting in a particular way and setting the rules for everyone. Instead, we are a constitutional republic in which all three branches of government are limited in their powers. The Court is charged with monitoring those limits for both the other two branches of government and even for ourselves. The Bill of Rights explicitly sets forth things that the government cannot do, even if approved by Congress and the President as representatives of the people.²² Courts and judges are going to issue unpopular rulings under the Constitution—it's just a given, once you give us the power to say what's unconstitutional, that the end result is going to be unhappiness for someone. Now some would say we gave ourselves that power in *Marbury v. Madison*.²³ But the point is that that's the structure that we have accepted for over two hundred years.

Now, Justice O'Connor once said that “[j]udicial independence is hard to define.”²⁴ She reinvented an old phrase and said it's hard to define, but “I know judicial independence when I see it.”²⁵ In her speeches and in many that Steve Breyer has given, they both have pointed out that judicial *dependency* is often easy to spot.²⁶ Justice

²¹ John Heilprin, *Scalia Sees Shift in Court's Role*, WASH. POST (Oct. 23, 2006), <https://www.washingtonpost.com/archive/politics/2006/10/23/scalia-sees-shift-in-courts-role/f1ee91fc-e74f-4c8c-8f45-3615c91111bf> [<https://perma.cc/24YG-LNF3>] (reporting that, in a speech, Justice Scalia questioned the notion of judicial independence as an unqualified good, elaborating that the value of judicial independence “depends on what . . . courts are doing,” and that “[t]he more your courts become policymakers, the less sense it makes to have them entirely independent” (quoting Justice Scalia)).

²² See U.S. CONST. amends. I–X.

²³ There is no constitutional provision that explicitly gives courts the authority to review legislative or judicial acts and find them unconstitutional. The Court interpreted the Constitution to confer this authority upon it in *Marbury v. Madison*, 5 U.S. 137 (1803).

²⁴ Sandra Day O'Connor, *Remarks on Judicial Independence*, 58 FLA. L. REV. 1, 2 (2006).

²⁵ *Id.* (paraphrasing *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it.”)).

²⁶ See, e.g., *id.* (noting that “we can all agree” that certain threats to judges by the political branches, such as the executive “threaten[ing] to cut the water supply to the Supreme Court building,” are “not judicial independence”); Breyer, *supra* note 20, at

Breyer talks a lot about telephone justice, referring to countries where politicians call judges and tell them how they must rule.²⁷ There are countries where judges are threatened with violence if they do not rule in certain ways or where uncontrolled bribery has become endemic in the judicial system. Justice O'Connor once told the story of a country in which its president's security force killed the chief judge's beloved cat after the judge ruled against the president.²⁸

It's easy to say bribery, coercion in any form, direct interference with judicial decisionmaking—they will all break down the public's belief not just in judicial independence, but in the government as a whole.²⁹ I believe the public will likely conclude that its governing bodies are ruling in their own self-interest and not for the public if those things exist. What I believe Justice O'Connor was saying is that the reasons for judicial independence are self-evident. If the public does not perceive its judges as impartially rendering decisions, whether popular or unpopular, there will not be continued support for the norms that keep the judiciary independent and keep people believing in the trustworthiness of their government.

DEAN MORRISON

You've touched on this a little already but I wonder if you might say more about who or what is responsible for achieving and maintaining judicial independence. Is it the Congress? Is it the President? Is it the Court itself? The press? The people more generally? We understand the importance of judicial independence, but whose job is it to make sure we don't lose it?

JUSTICE SOTOMAYOR

It's every actor's job in our society. Every actor—Congress, the public, the press, the Court itself—is equally responsible for achieving and maintaining judicial independence. It doesn't exist without all of

904–05 (contrasting the American understanding of judicial independence norms with the absence of such norms).

²⁷ Breyer, *supra* note 20, at 904–05 (describing “telephone justice” as a practice in Russia that occurred when “the party boss called judges and told them how to decide the outcome of a particular case,” and noting the incredulity of Russian jurists when told that the United States does not have such a practice, because, here, “no such call would be placed”).

²⁸ O'Connor, *supra* note 24, at 2 (describing an occurrence in “early- to mid-1990s in Russia under Yeltsin”); see also Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 *NEB. L. REV.* 1, 2 (2011) (commenting on the same occurrence).

²⁹ See Breyer, *supra* note 20, at 903 (stating that “the judicial system, in a sense, floats on a sea of public opinion,” in that it is “in at least some measure, dependent on the public's fundamental acceptance of its legitimacy”).

us, and no one sector has more or less responsibility. Through our history, every actor in our society has played vital roles in maintaining judicial independence. When President Jefferson lobbied for the impeachment of Justice Samuel Chase—the first and only Supreme Court Justice to be impeached—a Senate made up of both Federalists and Jeffersonians acquitted him, even though Justice Chase was an avowed Federalist and even though he had spoken out intemperately against President Jefferson’s ideas.³⁰ President Lincoln, as I noted before, ignored Chief Justice Taney’s ruling that only Congress had the power to suspend the writ of habeas corpus.³¹ And as I said, Congress later averted the long-term repercussions of a president ignoring judicial rulings by giving presidents authority to suspend the writ in emergencies.³² President Roosevelt’s proposal to add judges to the courts to assert his own agenda was blocked by Democrats, as I noted, and by an outcry of public and media opinion.³³ There are other reported examples of presidents who have contemplated not following Supreme Court rulings. I’m not going to talk about the most recent ones. For example, President Eisenhower hesitated to use federal forces to integrate schools in the South. He thought about it, investigated it, but we all know the rule of law norm withstood that challenge. Everyone remembers the Norman Rockwell painting of Ruby Bridges, an African American school child, being escorted to her new school flanked by federal agents.³⁴

Without all sectors of our society understanding the importance of our shared responsibility to protect judicial independence, it will not—and cannot—survive. Now, threats to judicial independence historically have come from different actors for different reasons, but our belief in judicial independence has nonetheless triumphed because other actors have taken up the mantle of defending us. I hope that continues.

³⁰ See generally WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 49–57, 106–13 (1992) (recounting the impeachment of Justice Chase and the animosity between Federalists and Antifederalists).

³¹ See *supra* note 16 and accompanying text.

³² See *supra* note 17 and accompanying text.

³³ See *supra* note 18 and accompanying text.

³⁴ Norman Rockwell, *The Problem We All Live With* (painting) (1964); see Breyer, *supra* note 20, at 906–07 (“Dwight Eisenhower sent in paratroopers not to subvert the rule of law, but to enforce it. . . . That moment . . . represented a tremendous (and far from inevitable) victory for the rule of law in America.”).

DEAN MORRISON

Maybe we could talk about a related, in some ways contradictory, idea to judicial independence—and that’s judicial accountability. These days in particular, there are some critics of the Court who want it to be more responsive to what those critics take to be the values of democracy and to the will of the people. They argue that even a judiciary such as ours which doesn’t stand for election or reelection still must be accountable in some way to the public. What do you think about the relationship between ideas of judicial accountability and the powerfully important norm of judicial independence as you’ve been describing it?

JUSTICE SOTOMAYOR

Trevor, I’ve already noted we’re a constitutional republic. Our founding fathers explicitly rejected a democratic model of government in which only legislatures determined the constitutionality of their laws. Some nations do not have the Bill of Rights protecting their citizens from certain acts of the majority. We elect our president through the Electoral College, not by majoritarian rule;³⁵ our Congress gives each state, despite its size or number of people, equal representation in the Senate.³⁶ I don’t believe the Court can or ever should sacrifice the limits imposed by the Constitution on the government’s ability to bend to majority rule.

What is the people’s will is a hard question in any event. We know that a majority of Americans may well believe differently on certain issues than their elected officials. Look at recent polls on hot-button issues in America.³⁷ It is hard for me to subscribe to a view that judicial accountability needs to come at the cost of judicial independence. To the extent any branch of our government, press, or public believes it must, I fear we would be on the road to destroying the very core of judicial independence that we value. And so I don’t think the two should be seen as conflicting with one another—they have to be seen as complementing one another.

³⁵ U.S. CONST. art. II, § 1.

³⁶ *Id.* art. I, § 3.

³⁷ See Jeff Diamant, *Three-in-Ten or More Democrats and Republicans Don’t Agree with Their Party on Abortion*, PEW (June 18, 2020), <https://www.pewresearch.org/fact-tank/2020/06/18/three-in-ten-or-more-democrats-and-republicans-dont-agree-with-their-party-on-abortion> [<https://perma.cc/B8YK-REWF>] (reporting that party stances on abortion do not necessarily reflect the opinion of party constituents for both Republicans and Democrats); Nate Cohn & Margot Sanger-Katz, *On Guns, Public Opinion and Public Policy Often Diverge*, N.Y. TIMES (Aug. 10, 2019), <https://www.nytimes.com/2019/08/10/upshot/gun-control-polling-policies.html> [<https://perma.cc/J34J-HXBN>] (“Public opinion and public policy on guns have seemed to be at odds for decades.”).

DEAN MORRISON

So to the extent there will be accountability, we have to figure out a way to do that without compromising judicial independence—that’s what I hear you to be saying.

JUSTICE SOTOMAYOR

Exactly.

DEAN MORRISON

A related topic is the question of judicial independence and partisanship—political partisanship. I think few would disagree that the present period is one of especially intense political polarization. What’s the relationship between judicial independence and extreme political polarization?

JUSTICE SOTOMAYOR

We have had extreme partisan times throughout our history. The Federalists and Jeffersonians at the beginning of our founding were extremely polarized.³⁸ In 1801, Congress reduced the size of the Supreme Court from six to five to deny President Jefferson the power to appoint a new Justice.³⁹ Congress did a similar thing in 1866, reducing the court from nine to seven Justices in order to limit President Andrew Johnson’s power to appoint new judges after Lincoln’s assassination.⁴⁰ All these laws were legislatively reversed very quickly, largely in part because of the fluidity of political control of Congress and the presidency, with different parties alternating fairly regularly.⁴¹

Today, polarization has new foundations that can put judicial independence at greater risk. With modern gerrymandering, political parties are able to set voting districts in ways that entrench themselves

³⁸ See REHNQUIST, *supra* note 30, at 49–54 (discussing the strong political conflict between Jefferson and the Federalists, detailing Jefferson’s displeasure at the Federalists retaining control over the federal judiciary despite his election and the Republican congressional win).

³⁹ See Judiciary Act of 1801, ch. 4, § 3, 2 Stat. 89, 89.

⁴⁰ See Judicial Circuits Act of 1866, ch. 210, 14 Stat. 209; Michael C. Blumm, Kate Flanagan & Annamarie White, *Right-Sizing the Supreme Court: A History of Congressional Changes*, 72 CASE W. RESV. L. REV. 9, 33–34 (2021) (arguing that the original House bill’s “unmistakable intent was to deprive Johnson of a Supreme Court appointment,” and that the ultimate congressional enactment “effectively prevented President Johnson from appointing anyone to the Supreme Court”).

⁴¹ See Judiciary Act of 1802, ch. 31, 2 Stat. 156 (repealing, in effect, the Supreme Court restructuring wrought by the Judiciary Act of 1801 by fixing the court at its then six-person membership); Judiciary Act of 1869, ch. 22, 16 Stat. 44 (reversing the change in number of Supreme Court seats worked by the Judicial Circuits Act of 1866).

and their party in power in ways never known before.⁴² Gerrymandering means that how much change will occur on a regular basis between political parties in many states and congressional districts is unknown. To the extent a political party wants to entrench its views of proper judicial outcomes, it is easier to do so now because the views of judicial appointees on many issues are so well known. The internet has been a blessing in many ways, but it also permits both the public and appointing entities to review the entirety of a person's writings and determine whether that person's approach comports with their views or views that they endorse.

This is particularly worrisome because, I think for the first time in our history, the mantle of judicial philosophy has become tightly interwoven with political parties. For almost all of our history, political parties debated what was the best way to govern—you just have to look at the debates between Federalists and Jeffersonians on whether state or national power should be given precedence.⁴³ Political parties rarely discussed the issue of the best way to approach interpretation of the Constitution and statute. That discussion was largely an academic exercise. Now, political platforms have adopted the language of judicial doctrines as a way to control outcomes in cases. But dangerously, the back and forth that comes in academic debate—that goes into looking at the strengths and weaknesses and costs of different doctrinal approaches—is a nuance the public is not taught by political players. It becomes an issue of slogans rather than the public fully appreciating what it means to approach this in one way or another. Chief Justice Rehnquist believed the country cyclically had threats to judicial independence and he pointed to the Chase situation and the *McCardle* situation, another one, and the FDR situation.⁴⁴ But in each situation, he said, the nation always met the challenge and judicial

⁴² See Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1089 (2021) (“The threat of extreme and punishing partisan gerrymandering has increased exponentially since the Supreme Court’s 2019 decision in *Rucho v. Common Cause* holding that partisan gerrymandering claims are nonjusticiable.” (footnote omitted)).

⁴³ See generally Kevin R.C. Gutzman, *The Jeffersonian Republicans vs. the Federalist Courts*, 14 U. SAINT THOMAS L.J. 56, 56, 61 (2018) (discussing the “longest-running, most consequential” conflict between Jeffersonian Republicans and the Federalists, “who wanted more power in the central government than the Articles provided”); Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 157 (2003) (noting “well-documented, cyclical attacks on the courts” by the political branches ranging from the “Midnight Judges” affair to President Nixon’s campaign against the Warren Court).

⁴⁴ See Rehnquist, *supra* note 18, at 584, 589, 591 (recounting the political impeachment of Justice Samuel Chase, a staunch Federalist, by Jeffersonian Republicans; the arrest and refusal of habeas corpus to *McCardle*, a Mississippi newspaper editor who criticized Reconstruction; and President Franklin Delano Roosevelt’s recommendation that the

independence continued to thrive.⁴⁵ I hope he will continue to be right—that we will survive the new challenges. But I do have concerns that the new strains on it may be as harsh and costly as our polarization has been on our government’s functioning. It could cost us a lot.

DEAN MORRISON

You’ve already referred to this, but the Senate confirmation process for Supreme Court nominees and even lower court judicial nominees has itself become increasingly partisan. The divisions along a party line seem deeper. The prospects for the members of the party opposite to the nominating president casting any votes in favor of a nominee seem increasingly dim. Does that have an impact on the extent to which the Court itself is independent of politics? It might be a process that we lament, but it might not have a great effect on the independence of the Court once those who are nominated get through that process and join the Court. Or maybe it does have an effect, or at least an effect on the appearance of the independence of the Court—what do you think?

JUSTICE SOTOMAYOR

Surely it has an effect on the appearance of the impartiality of the Court. As you noted, we are far from the time when Supreme Court nominees would receive nearly unanimous approval, even in divided Congresses. And the more partisan the voting becomes, the less the public is likely to believe that Congress is making a merits-based or qualifications-based assessment of judicial nominees.

Is it going to directly affect the Court’s functioning? It could. Academics have pointed to a recent increase in what one study called “partisan en banc behavior” on the courts of appeals.⁴⁶ For the audience who doesn’t understand that, I come from a circuit court which, during my time there, believed that the three judges who heard a case were doing the best job they could, coming to the most reasonable decision they can or could, and that even if you disagreed with them, only in extreme circumstances would you ask the entire court of judges to review that decision. And so, in my time on the court, maybe

judiciary be “reorganized” after a series of New Deal legislation was struck down by the Court).

⁴⁵ See *id.* at 595 (stating that “the independence of our Supreme Court and the federal judiciary has been preserved when such conflicts have arisen” largely due to “the public’s respect for the judiciary”).

⁴⁶ See Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1413–16 (2021) (documenting a statistically significant rise of partisan en banc behavior in the period from 2018–2020).

one or two en banc proceedings happened each year.⁴⁷ On the Second Circuit and other courts—circuit courts—the number of en bancs has continued to decline, but as I noted, studies have documented a recent increase, nationally, in partisan behavior in those en bancs. Many who view the situation think it has something to do with the partisan nature of the appointment process.⁴⁸ I hope not, but it certainly does feed into the public’s uncertainty and that has a price.

DEAN MORRISON

Could you say more about that—the perceptions of the public, the extent to which the public perceives the Court and the judiciary more broadly as independent? Do you think that an ebbing of the public’s confidence in the independence of the judiciary, even if it’s wrong—does that pose a threat to the actual functioning of the Court and to the role of the Court in American life?

JUSTICE SOTOMAYOR

Sure, it does. We talked about the norm of following judicial opinions. To the extent that our political branches have followed that norm and that the people followed that norm, it’s attributable in large measure to their belief that we are independent. That alone could be at risk if the public starts losing confidence in us.

DEAN MORRISON

Presumably, if the public—that is, the voters—stop believing that the Court is independent, then the political price to elected officials of not upholding the independence will go down, and so, in that sense, the threat could arise just as you say.

⁴⁷ See *Ricci v. DeStefano*, 530 F.3d 88, 89–90 (2d Cir. 2008) (Katzmann, J., concurring in the denial of rehearing en banc) (“I concur . . . consistent with our Circuit’s long-standing tradition of general deference to panel adjudication—a tradition which holds whether or not the judges of the Court agree with the panel’s disposition of the matter before it. Throughout our history, we have proceeded to a full hearing en banc only in rare and exceptional circumstances.” (citing Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 HOFSTRA L. REV. 297, 311–12 (1986))); John M. Walker, Jr., *Second Circuit Survey: Foreword*, 21 QUINNIPIAC L. REV. 1, 3–4 (2001) (documenting that in the years between 1994 and 2000, the Second Circuit continued its tradition of granting the fewest en banc reviews of any federal court of appeals, even accounting for circuit caseload); Devins & Larsen, *supra* note 46, at 1423–24 (discussing the Second Circuit’s tradition of few en banc proceedings as a product and a source of collegiality). In the period from 1998 through 2009, while Justice Sotomayor sat on the Second Circuit Court of Appeals, the Circuit convened for eleven en banc hearings. See Mario Lucero, Note, *The Second Circuit’s En Banc Crisis*, 2013 CARDOZO L. REV. DE NOVO 32, 64 tbl.1.

⁴⁸ See, e.g., Devins & Larsen, *supra* note 46, at 1428 (suggesting the possibility that the weaponization of en banc proceedings may continue because, inter alia, “judicial confirmation politics is increasingly nasty and increasingly salient”).

JUSTICE SOTOMAYOR

Exactly.

DEAN MORRISON

And what about the Court's power over its own independence? I don't need to tell you that the members of your Court and federal judges more broadly agree on some things and they disagree pretty deeply on others. Many espouse very different ideas about how the Constitution should be interpreted and how the present Court should relate to its precedents. Given those disagreements, do judges also tend to value judicial independence the same way, or is there deep disagreement on even that seemingly fundamental issue?

JUSTICE SOTOMAYOR

Justice O'Connor once said that no judge ever perceived him or herself as interpreting law arbitrarily.⁴⁹ I think every judge prides herself or himself on being bounded by the law and its legal norms. I dare say that you would never read a legal decision in which any judge says, "this is the right thing to do, period." Every legal decision is explained thoroughly, and it's explained based on well-recognized principles of interpretation and judicial norms. So I dare say that no judge, or virtually no judge, has ever questioned the essence of Bob Katzmann's view that we, as a society, prize both decisional and institutional independence⁵⁰—I doubt any of us fails to value that.

We differ, however, on what best promotes judicial independence and how it affects the public's perception. For example—you alluded to this—some judges believe that following precedent gives stability to the law and protects the courts from being viewed as beholden to either the president who appointed them or to the party to which they belong.⁵¹ Others believe that getting the law right under the Constitution, unmoored to precedents they feel were erroneous, fulfills their constitutional obligation to interpret the Constitution faithfully.⁵² Justice Scalia and some of my current colleagues say the courts

⁴⁹ See Sandra Day O'Connor, *Judicial Accountability Must Safeguard, Not Threaten, Judicial Independence: An Introduction*, 86 DENV. U. L. REV. 1, 4 (2008) ("A fundamental value of the Rule of Law is that judicial decisions are not made arbitrarily, but through a process of reasoned decision making.").

⁵⁰ See Katzmann, *supra* note 5 and accompanying text.

⁵¹ For example, Justice Powell remarked that "[s]tare decisis . . . enhances stability in the law. . . . Even in the area of personal rights, stare decisis is necessary to have a predictable set of rules on which citizens may rely in shaping their behavior." Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 286 (1990).

⁵² For example, Justice Thomas has written that "if the Court encounters a decision that is demonstrably erroneous—*i.e.*, one that is not a permissible interpretation of the text—the Court should correct the error, regardless of whether other factors support overruling

staying out of social issues will best foster public views on our independence.⁵³ Others believe that social issues often drive majoritarian laws that impinge on the rights protected by the Constitution and that courts have no alternative but to address those questions.⁵⁴ Now, few would claim that the Court was wrong in ruling in *Brown v. Board of Education* that segregation violated the Fourteenth Amendment of the Constitution.⁵⁵ That was a social issue. Social issues are not picked by the Court, they come to the Court.

How we view the Constitution—as set out in its words, in our practices as a nation, in our precedent and what constitutional experience has taught us—typically explains how we deal with disagreement. We explain our thoughts, views, and approaches to each other in our conferences and in our writing; it is a pity that most people in the public, including elected representatives and perhaps some journalists, don't read our opinions. If they did, they might realize that outcomes they think are easy almost always present closer questions than they imagine, with pros and cons on both sides that need to be carefully evaluated. Whatever judicial philosophy or approach you adopt has potentially negative consequences, and the public should understand that before they choose a side. We need a public who will actually understand what is being argued and that doesn't concentrate only on the outcome of cases.

DEAN MORRISON

I think your point here is a very important one, that sometimes disagreements among judges, between or among people, may be at the level of ends—disagreeing about ultimate goals—and sometimes they are really disagreements about means. And when it comes to judicial independence, I think you must be right that surely virtually

the precedent.” *Gamble v. United States*, 139 S. Ct. 1960, 1984 (2019) (Thomas, J., concurring).

⁵³ See *supra* note 21 and accompanying text (summarizing Justice Scalia's view); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (criticizing living constitutionalism on the ground that, in projecting current views onto the constitution, this philosophy leads people to “look for judges . . . who agree with *them* as to what the Constitution *ought* to be”), in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 46–47 (new ed. 2018).

⁵⁴ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 676–77 (2015) (acknowledging that “the Constitution contemplates that democracy is the appropriate process for [social] change, so long as that process does not abridge fundamental rights” but stating “[t]he dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right” because the individual “can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act”).

⁵⁵ 347 U.S. 483, 493 (1954).

all, if not literally all, judges value the independence of the judiciary and see its importance to their own work. The question is how to achieve it, and that's where we seem to get the disagreements that you mentioned.

JUSTICE SOTOMAYOR

That's true, most certainly.

DEAN MORRISON

Now, if we're talking about the Court's role in fostering its own independence, I suppose we could look at some doctrines that the Court has developed over time that limit the extent to which it will become involved in certain kinds of cases. I'm thinking of the political question doctrine, for example, which counsels that the Court may have formal jurisdiction in an area, but perhaps should not get involved in certain kinds of inter-branch disputes between the legislature and the executive, or in matters that are entirely left to another branch.⁵⁶ Or standing doctrine, which might limit the ability of the Court to hear a case that would seem to call upon it to oversee the actions of another branch of government in ways that go beyond ordinary adjudication of cases.⁵⁷ I'm not asking you to state your views pro or con on those doctrines, but do you see them as representing important ways for the Court itself to maintain independence by not getting too involved in conflicts with other branches? Or is that not how you would see them?

JUSTICE SOTOMAYOR

There's not a "yes" or "no" answer to that, Trevor. Obviously something like the political question doctrine clearly arose from a belief by the Court that there are certain political questions that should not be subject to review by the Court.⁵⁸ And that motivation arose largely in questions that the Court understood it shouldn't play a role in choosing sides, that that had to be something that would be done by the two other—elected—branches. Other doctrines, and all of these doctrines are in fact created by the Court, doctrines that narrow the cases that courts will hear—are in part driven by the Constitution's command that we should only decide actual cases and

⁵⁶ See generally FALLON, JR. ET AL., *supra* note 13, at 237–66 (discussing the political question doctrine).

⁵⁷ See *id.* at 101–95 (discussing standing doctrine).

⁵⁸ See *Baker v. Carr*, 369 U.S. 186, 211–26 (1962) (discussing several circumstances under which political questions may be unsuitable for judicial review).

controversies.⁵⁹ But each time the Court recognizes a doctrine, it has to be very careful to strike a balance because if it goes too far one way or too far in another, for example, in telling too many people that they don't have standing to bring their inflicted harm to judicial review, the public is going to stop thinking that the courts are there to protect them in any way. And so there is a cost when we go too far in judicially creating exceptions to our ability to hear cases. And so there is a danger in us proceeding down a path where the balance is not properly struck—or acknowledged, I should say.

DEAN MORRISON

Now, let's put these last two topics together—what the Court can do about its own independence and the particular concerns around political polarization. I think I heard you earlier say that with respect to political polarization and the current moment and the continued health of some of the key elements of our constitutional republic, including judicial independence, we may be in or near a crisis moment, but I don't want to put those words in your mouth. I wonder if you would agree with that characterization, and if you do, what can be done either by the Court or by other actors to protect against a deepening of that crisis, if you see it as a crisis?

JUSTICE SOTOMAYOR

Big question; long answer, not a simple one. Yes, I have concerns that we might be in crisis. As norms in the nomination process are broken, as more senators, congressional representatives, governors, mayors, local politicians, and the media question the legitimacy of the Court, many of them heap scorn on the Court and its claim to be nonpartisan. The threat is unprecedented and greater than any time in our history. I am, like my colleague Stephen Breyer, an optimist who believes in the great experiment that our country is, and that we will endure.⁶⁰ Yet as Benjamin Franklin said, when asked what type of

⁵⁹ See U.S. CONST. art. III, § 2; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (“[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.”).

⁶⁰ See *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> [<https://perma.cc/97ZM-3WSS>] (“It's an experiment that's still going on. . . . [Y]ou know who will see whether that experiment works? . . . It's us, but it's you. It's that next generation and the one after that. . . . They'll determine whether the experiment still works. . . . I am an optimist, and I'm pretty sure it will.”).

government the constitutional convention had forged, he responded by saying: “A republic . . . if you can keep it.”⁶¹

For our republic to endure, we need public education focused on understanding both our system of government and what makes it work, what its limits are, and the checks and balances of our tripartite equal branches of government. Whether appointed by Republican or Democratic presidents, many Justices have emphasized the importance of civic education and supporting judicial independence. Justice Sandra Day O’Connor, appointed by President Reagan, founded iCivics, which teaches students about civic education, and aimed at revitalizing civic education in our schools.⁶² I now sit on the board of that organization, and I was appointed by President Obama. Justice Neil Gorsuch, a President Trump appointee, and I have spoken frequently together on a lot of different occasions on the importance of civic education and participation.⁶³

We need the public to hold its elected officials accountable in respecting the judiciary and its work; we can only do it if the public understands the importance of our independence to the survival of the nation. It is strange indeed that virtually every media account today announces a Supreme Court decision by noting the Justices’ votes according to the political party that appointed them.⁶⁴ Few media accounts report on the nuances of thinking that often divide the judges appointed by presidents of the same party or that lead in some cases to unexpected alliances between judges appointed by presidents of different parties. We all have a civic responsibility to avoid rhetoric

⁶¹ *Papers of Dr. James McHenry on the Federal Convention of 1787*, 11 AM. HIST. REV. 595, 618 (1906).

⁶² See *Who We Are*, iCIVICS, <https://www.icivics.org/who-we-are> [<https://perma.cc/L4KK-6C9P>].

⁶³ See, e.g., *Civics as a National Security Imperative: A Conversation with U.S. Supreme Court Justices Sonia Sotomayor and Neil M. Gorsuch*, CTR. FOR STRATEGIC & INT’L STUDIES (Apr. 14, 2021), <https://www.csis.org/events/civics-national-security-imperative-conversation-us-supreme-court-justices-sonia-sotomayor> [<https://perma.cc/7WV9-X7XN>]; Tom McParland, *Gorsuch, Sotomayor Boost 2nd Circuit Efforts to Engage Communities, Revive Civic Education*, N.Y.L.J. (Oct. 31, 2019, 5:44 PM), <https://www.law.com/newyorklawjournal/2019/10/31/gorsuch-sotomayor-boost-2nd-circuit-efforts-to-engage-communities-revive-civic-education> [<https://perma.cc/DL9K-DLVY>]; *Civics Lessons: Justices Sonia Sotomayor, Neil Gorsuch on Promoting Education in Citizenship*, CBS NEWS (Nov. 4, 2018, 9:09 AM), <https://www.cbsnews.com/news/supreme-court-justices-sonia-sotomayor-and-neil-gorsuch-promote-civics-education> [<https://perma.cc/M323-NQ6G>].

⁶⁴ See, e.g., Adam Liptak, *Supreme Court Restores Alabama Voting Map that a Court Said Hurt Black Voters*, N.Y. TIMES (Feb. 7, 2022), <https://www.nytimes.com/2022/02/07/us/politics/supreme-court-alabama-redistricting-congressional-map.html> [<https://perma.cc/DLJ2-BWNJ>] (noting that in *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.), “[t]he vote was 5 to 4, with Chief Justice John G. Roberts Jr. joining the court’s three liberal members in dissent”).

to inflame people against each other in our institutions, and we must engage in serious, thoughtful conversations about what works and may work better in our judiciary. That's why Bob chose this topic, because he believed in that so much—as I do.

Now, what can the Court itself do to safeguard its independence? Every judge knows that one of the most important ways we have of protecting our independence is by writing careful and thorough opinions explaining our decisions. Even though I believe it is true that most people do not read our opinions, setting forth our interpretations and what supports them can be used by others, authorized to seek change, to change the law if they disagree with us. Congress or the public, if they believe we got it wrong, can work a change in our interpretations of laws, maybe not of the Constitution, but certainly of laws. It happened with the Lilly Ledbetter Fair Pay Act, following Justice Ruth Bader Ginsburg's dissent in *Ledbetter v. Goodyear Tire Rubber Company*.⁶⁵ For those in the public watching who don't understand that case, the Court ruled that Lilly Ledbetter, who had been paid a differential salary for years only because of her sex—she was equally qualified to everyone else—wasn't permitted to recover damages by the Court because it viewed a statute of limitations as limiting her recovery.⁶⁶ Obviously the public understood that finding out that you're paid less than others can sometimes take a very long time and you shouldn't be precluded completely from recovering what you fairly worked for. And hence the Fair Pay Act legislation.⁶⁷

Further, the clarity of our arguments can affect the thinking of future generations of judges. Justice Harlan's dissent in *Plessy v. Ferguson* condemning segregation as violating the Fourteenth Amendment won the day over fifty years later in *Brown v. Board of Education*.⁶⁸

But judges also must always be sensitive to the public's perception of their interactions with public officials and their representatives.

⁶⁵ 550 U.S. 618, 661 (2007), *overturned due to legislative action* (Jan. 29, 2009) (Ginsburg, J., dissenting) (“Once again, the ball is in Congress’ court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29 and 42 U.S.C.).

⁶⁶ *See id.* at 621–22, 642–43.

⁶⁷ *See supra* note 65 and accompanying text.

⁶⁸ *See Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (Harlan, J., dissenting) (“In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights.”); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (finding that “segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal” violates the Equal Protection Clause of the Fourteenth Amendment).

Most appointed judges have friends and people they know in the political arenas. Ending relationships is not required, but care by judges in ensuring that contacts do not give the impression of undue influence. We must also be sensitive to not prejudging cases in speeches. We have a wonderful vehicle—our opinions—to set forth our judicial views. Speeches on legal issues, if not done carefully, can give the appearance of undue influence by groups we choose to give speeches to. We need to be careful.

But if I can tell you what I think is the most important aspect of what judges can do to support judicial independence, it's to keep open minds. The history of the Court has been filled with Justices changing their doctrinal views over time. Harry Blackmun once said: "I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed And if one didn't grow and develop down there I would be disappointed in that person as a Justice."⁶⁹ And it would have been disappointing to him if a Justice over time in his work did not grow and change. Now, Justice Blackmun was appointed by Richard Nixon and was viewed as a Republican conservative at the time of his appointment.⁷⁰ He was called the "Minnesota Twin" to Justice Burger, with whom he was friends. Justice Blackmun voted consistently to uphold death penalty laws in the 1970s after his appointment, but by the 1990s came to believe that the death penalty as administered was unconstitutional—a big shift.⁷¹ Justice Stevens also was appointed by a Republican, President Ford. He had written opinions as a court of appeals judge challenging the existence of substantive due process—he didn't think it existed.⁷² In a speech he later gave at Fordham University that I attended in the 2000s, he explained why he had changed his mind and had come to believe that substantive due process was inherent in the

⁶⁹ Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1212 (2005).

⁷⁰ See *id.* at 1209 ("From the moment of his nomination by President Nixon in 1970, Harry A. Blackmun attracted a bevy of predictive characterizations Contemporary court-watchers described the new Justice as 'consistently . . . on the conservative side of the issues,' a jurisprudential twin of Chief Justice Warren Burger" (quoting Nathan Lewin, *There Is No Mistaking the Swing of the Pendulum*, N.Y. TIMES, June 27, 1971 (§ 4), at 8)).

⁷¹ See Ruger, *supra* note 69, at 1214–15 (describing Justice Blackmun's evolving judicial position on the death penalty over the course of his time on the Court).

⁷² See John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1561 (2006) ("When I became a federal judge in 1970, I thought that the text of the Due Process Clause defined the limits of its coverage. A literal reading of that text provides procedural safeguards, but has no substantive conduct."); *Jeffries v. Turkey Run Consol. Sch. Dist.*, 492 F.2d 1, 4 (7th Cir. 1974) (Stevens, J.) ("Certainly the constitutional right to 'substantive' due process is no greater than the right to procedural due process.").

constitutional structure—another huge change.⁷³ For me, most importantly, I think each judge on every court has to remember that we have an obligation to keep open minds that are willing to change with time and experience. If we don't show it, people will believe, perhaps wrongly, that we are just political creatures and not independent judges.

One of the judicial attributes that the public over our history has come to appreciate is that Justices have never voted consistently with the views of presidents or parties that appointed them. So, for example, Justice McReynolds was appointed by a Democrat, Woodrow Wilson, but he became one of the so-called “Four Horsemen” that voted against nearly all of President Roosevelt’s New Deal legislation. Another Justice who frequently voted with the Four Horsemen, Justice Owen Roberts, switched votes to uphold minimum wage legislation, and it is said that he thereby helped to defeat President Roosevelt’s court-packing plan.⁷⁴ Yes, consistency is critical to civility and law, and the public’s perception of judicial fidelity to law and not to outside influence is critical. Yet, I believe the public appreciates the fact that individual Justices’ views may grow and develop over their time on the Court in a way that reflects an honest change of opinion.

We have institutional setups now that might affect how willing or disposed judges are to change. The emphasis to pick nominees with extensive writings and publicly expressed views on precedent of the Court can be viewed by the public as ways to control a judge from changing his or her mind, and it can also stifle the growth of a judge. Similarly, we now have organizations whose membership center around judicial philosophies, and to the extent that those organizations supply the friends and employment support for judicial nominees who think in the same way, that too is likely to make growth more difficult and the public’s perception of independence less sure. I hope, however, as our prior Justices understood, that views should

⁷³ See Stevens, *supra* note 72, at 1561–62 (describing his evolving view on substantive due process and remarking that “I know that I, like most of my colleagues, have continued to participate in a learning process while serving on the bench”).

⁷⁴ See Barry Cushman, *Inside the “Constitutional Revolution” of 1937*, 2016 SUP. CT. REV. 367, 370 (“In the June 1936 decision in *New York ex rel. Morehead v. Tiplado* [sic], Justice Roberts voted . . . to strike down New York’s minimum wage law for women [The next year] in *West Coast Hotel Co. v. Parrish*, by contrast, Roberts . . . [voted] to uphold Washington state’s minimum-wage law for women.” (first citing *Morehead v. New York ex rel. Tiplado*, 298 U.S. 587 (1936); and then citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937))); Michael Nelson, *The President and the Court: Reinterpreting the Court-Packing Episode of 1937*, 103 POL. SCI. Q. 267, 267, 291 (1988) (noting that the vote switch by Justice Roberts constituted “the switch in time that saved nine”).

change in light of the way the law developed and created tensions with other constitutional principles; that we as Justices will continue to grow and will protect the public's belief that we are truly independent, even from our own previously fixed views.⁷⁵

I think personally that every litigant who comes into a courtroom has a dream that their arguments will change a judge's mind. If we destroy that dream, I think we've destroyed an important part of people's faith in the judiciary.

DEAN MORRISON

That's really powerfully put—that judicial independence includes a measure of independence from your own prior self.

JUSTICE SOTOMAYOR

Exactly.

DEAN MORRISON

We have just a few minutes left Justice, and if you'll permit me, I wanted to put in front of you a couple of critiques of judicial independence. One such critique, to put it directly and perhaps impolitely, is that the Court does not deserve the independence that you and I have been talking about. Some have suggested that the independence and indeed even the authority of the Court is worth preserving only to the extent that the Court functions effectively in protecting groups that are most likely to be marginalized by majoritarian democracy, what the Supreme Court in the famous *Carolene Products* case called “discrete and insular minorities.”⁷⁶ These critics say that protecting such groups is the Court's key function, and they argue that the Court's independence is worth preserving if, but only if, the Court is effective in protecting those who would be most vulnerable to oppression by majoritarian institutions.⁷⁷ To what extent has the Court over time earned its independence by living up to that role? Or, I suppose to put

⁷⁵ See *supra* notes 69–74 and accompanying text.

⁷⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting the possibility that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

⁷⁷ See, e.g., Nikolas Bowie, *Antidemocracy*, 135 HARV. L. REV. 160, 202 (2021) (arguing that “[t]o the extent the Supreme Court is insulated from majoritarian values, the Court could be in a strong institutional position to police ‘prejudice against discrete and insular minorities’” but that “as a matter of historical practice, there is little evidence that the Supreme Court's review of federal legislation has facilitated democracy” (emphasis omitted) (quoting *Carolene Prods.*, 304 U.S. at 152 n.4)).

it another way, what actually is the capacity of the Court to protect the most vulnerable in our society?

JUSTICE SOTOMAYOR

Trevor, that is such a huge question because you do have to understand the Court's history, and maybe in answering I have to go back to what I said earlier. Every actor in our society has a role and that role not only includes supporting the judiciary, but supporting the people of our country. I understand where the critics come from, because the Court—perhaps except in *Brown v. Board of Education*—generally has been behind in time in viewing changes that protect people. So if you think of the right to vote, it wasn't recognized for women until there was a constitutional amendment.⁷⁸ And the Court was way behind the Congress passing Title VII and Title IX to protect racial minorities and then women from discrimination in the 1960s and 1970s.⁷⁹ Our cases didn't fully protect women and their right to participate in our society until Justice Ruth Bader Ginsburg. It wasn't until the 1990s, after Justice Ruth Bader Ginsburg had joined the Court, that the Court's equal protection doctrine protecting women from gender-based discrimination became fully developed—and that was in *VMI*, the Virginia military school case.⁸⁰ So, for a long time the Court didn't act to protect women.

Now, there are many who say that the Court led the society, from where the society was at the time, in reaching integration—that most of our country wasn't prepared to accept *Brown*.⁸¹ And in fact, Stephen Breyer has pointed out that it took us almost thirteen years later to reach laws that prohibited people of different races from marrying, and he says some of that hesitation in the Court was probably recognition that the country was in strife about racial integration and that the Court had to proceed somewhat more slowly than perhaps we should have.⁸² But there have been some academics who have said that this issue was one of the Court's creation. We are the ones who

⁷⁸ See U.S. CONST. amend. XIX.

⁷⁹ Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253–66; Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373–75.

⁸⁰ See *United States v. Virginia*, 518 U.S. 515 (1996).

⁸¹ See O'Connor, *supra* note 49, at 3 (describing *Brown* as a “compelling example” of when “[j]udges are called upon to stand firm against both the tide of public opinion and the power of the legislative and executive branches” and noting further how “[t]he case provoked a firestorm of criticism in much of the country”).

⁸² See STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERIL OF POLITICS* 60 (2021) (“The thirteen-year delay between *Brown* and *Loving*, a calculated part of the Court's enforcement strategy, reflected its views about the state of public opinion.” (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), and *Loving v. Virginia*, 388 U.S. 1 (1967))).

decided *Dred Scott v. Sandford*, and some think that that was instrumental in creating the circumstances of the Civil War⁸³ and that segregation was legitimized by the Court in *Plessy v. Ferguson*, and if the Court had done its duty back then and read the Constitution according to its terms, we wouldn't have had to deal with segregation.⁸⁴ So I guess I'm pointing out to people that relying on *one* of our institutions to protect people is a misplaced expectation; that we can't believe that there is only one part of our society that can protect us. It has to be a joint enterprise by all segments of our society.

DEAN MORRISON

Well, Justice, left to my own devices, I'd continue the conversation for four more hours at least, and I'm sure our audience would love that. But we've already run past our hour. I do want to thank you on behalf of myself and our law school, but also the larger Katzmann family of clerks and colleagues. There could not have been a better inaugural Katzmann Lecture than this event tonight, thanks to you. This has really been insightful and thought provoking, and given your day job, we are so grateful that you've taken time to honor Bob Katzmann and all of us with your words tonight. Justice, thank you—if not for COVID, we would have been doing this event here at the law school and you right now would be in the midst of receiving a standing ovation. In the absence of that, thank you very much, Justice, for being with us this evening and thanks to everyone who joined us for this special event.

JUSTICE SOTOMAYOR

Thank you, Trevor.

⁸³ See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; DANIEL FARBER, LINCOLN'S CONSTITUTION 10 (2003) ("Despite the Court's hopes of finally putting the vexing issue of slavery to rest, its opinion had the opposite effect.").

⁸⁴ See, e.g., Benno C. Schmidt, Jr., *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 469 (1982) (discussing the role of the Supreme Court in fostering segregation and noting that "*Plessy* set the Court and the country firmly on the path of Jim Crow").