

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Disclaimer: The views and opinions expressed on *Reasonably Speaking* are those of the speakers and do not necessarily reflect the policy or position of The American Law Institute or the speakers’ organizations. The content presented in this broadcast is for informational purposes only and should not be considered legal advice. Please be advised that episodes of Reasonably Speaking, explore complex and often sensitive legal topics and may contain mature content.

David Levi: I’m David Levi. I’m President of The American Law Institute, and Director of the Bolch Judicial Institute at Duke Law School, and I’m here today with three of our finest judges in the entire system. We have Chief Judge Jeffrey Sutton, who’s the Chief Judge of the Sixth Circuit Court of Appeals, the federal circuit. We have Judge Ray Lohier, who is a judge on the Second Circuit with chambers in New York City, and we have former Chief Judge Diane Wood, who’s a judge of the Seventh Circuit with chambers in Chicago.

All three of you are members of the Council of The American Law Institute, and I’ve known all of you for many, many years in different ways, some of us going way back in time, and you’re all friends of mine. And I asked you to have a conversation today about judging, and the perception of the Supreme Court in particular, because of the very troubling poll numbers from the most recent Gallup Poll about the loss of confidence by the American people in the Supreme Court. And a lot of us are worried about this.

I should say that the Supreme Court is not the only institution of government, or in society, that has lost the confidence of the American people. The other two branches actually scored much worse than the Court. But there’s been a somewhat sudden drop in the confidence ratings. The Gallup organization does this every year. And in June they did their survey, and it should be noted that this survey was done before the last quite controversial cases came out from the last term, including the abortion case, which we call *Dobbs*, and the New York gun case, which we call *Bruen*.

Most of the drop is from respondents who identify as Democrats. If we include the some confidence category, not just the categories where they have complete confidence or almost complete confidence, then almost 70% of Americans have at least some confidence in the Supreme Court. But nonetheless, there’s been a significant drop in confidence in the two highest categories — a “great deal” or “quite a lot” of confidence — and those numbers have fallen, from 36% of respondents saying they have quite a lot of confidence in the Court to only 25%. And that’s a big drop under the way these polls are set up.

I think it’s fair to say that the Court is in the middle of things right now, and it’s received a lot of criticism from all sides of the political spectrum. I mean from my point of view, the Court’s been under fairly continuous attack from conservatives at least since the 1970s, and it’s now under fairly continuous attack from the left as well,

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

from progressives. I would say that this began roughly in 2006 when Justice O’Connor retired, although it may have started earlier than that. We see lots of critical writing. We have books from quite esteemed legal commenters, one from Cass Sunstein called *Radicals in Robes, Why Extreme Right-Wing Courts are Wrong for America*, and Linda Greenhouse, a very well-known writer for *The New York Times*, has written a book called *Justice on the Brink: The Death of Ruth Bader Ginsburg, the Rise of Amy Coney Barrett, and Twelve Months that Transformed the Supreme Court*. I think by “on the brink,” she doesn’t mean like on the brink of something really terrific, she means on the brink of going over the cliff.

Even well before the decisions of the last term, which were so consequential, there have been serious calls for court-packing, for jurisdiction stripping, for other kinds of devices that would either limit the Court or change its direction. Again, I think it’s fair to say that from whatever vantage point these critical assessments are launched, whether from the left or the right, the basic point that the critics seem to make is that the Court is a political — perhaps even partisan — institution, and that it is making decisions on a host of pressing issues facing the country that ought to be left to the other branches, to the political branches. And this characterization of the Court as being partisan or political is intended as a challenge to the Court’s essential legitimacy, which is: Why should nine people have that kind of authority to make political decisions? They presumably have that authority to make legal decisions, but the critics would say that many of these decisions aren’t legal.

So, with the three incredibly wise people here today, why don’t we just start with why this is of concern. The reality is that there’s been a loss of confidence, as revealed by the Gallup poll. Should that concern us? Let’s start with you, Jeff.

Jeffrey Sutton: It’s wonderful to be with you and Diane and Ray, and I’m looking forward to our conversation. Perhaps a few caveats are in order about the poll numbers. I’m skeptical about looking at one set of data points. I think to the extent that the Court should be concerned about public support, public credibility, one year doesn’t seem like a very good way to do it. In fact, one year of poll numbers seems much more likely to be used by the opponents of the decisions, as opposed to people trying to assess whether the Court is performing like a court.

Then we have another complication. The Court sometimes rightly does exactly what the public does not want. You could imagine a horrible murder in which the U.S. Supreme Court correctly reverses a conviction on legitimate constitutional grounds. In that setting, the public understandably would be agitated that the crime went unpunished. But I suspect the four of us would agree that that is a setting in which public disapproval would not legitimately undermine the Court’s credibility and reputation for principled decision making. That’s why we have a Bill of Rights. Sometimes the federal courts are supposed to act in a counter-majoritarian way, which, no surprise, sometimes leave the people frustrated by case outcomes.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

I also wonder whether the Court's equipped to assess these kinds of things. They presumably read the papers and see various public opinion polls. But are they really in the same position as, say, a political party or an elected official, to be responsive to such polls? And even if many Americans would like all nine members of the Court to look at these polls and respond in kind with respect to this right or that right, would that improve the Court's standing or undermine it in the long run? If someone had told me 10 years ago the Court was going to overrule *Roe* and *Casey*, I would have expected a significant response — not because one side is right, but because Americans have long had strong feelings about the issue in both directions. No matter how you look it, the decision is quite consequential and is likely to generate strong views.

The last problem with the polls is that they don't necessarily reflect an accurate assessment about the impact of a series of cases or one case such as *Dobbs*. People know whether a case came out their way, but it's doubtful they understand whether they might still be able to vote on the issue or invoke state constitutions as an alternative method of defending their interests.

Levi: Thank you, that's a very interesting answer. I take it you don't have people on your front lawn protesting your latest decisions.

Sutton: Well, I have given people things to protest for sure. So, you're right to wonder. But the more controversial any decision of mine might be, the more likely it is that the Supreme Court will look at it. It's easier to be an anonymous judge than it is to be a very public judge.

Levi: Ray, what's your thought on this? I think Jeff is saying we should take these numbers with a note of caution. I don't hear him to say that we shouldn't be concerned about a loss of confidence in the Supreme Court. I don't think that was really your point, Jeff. But what's your take on this, Ray?

Raymond Lohier: First of all, I want to say thank you for this discussion about a very important topic. I don't dispute at all the caveats that Jeff mentioned, about, for example, the counter-majoritarian role of the courts, and also about polls generally. But I do worry. One reason that I worry, one reason that I think we should all worry about a loss of confidence and support in the courts, or even a reported loss in confidence and support, is that — this is almost cliché — but we really have nothing other than public confidence to protect the branch.

You mentioned protests in front of lawns. In a case that I had, the way that I found out that I had a Wikipedia page is that someone changed it in response to an opinion that I had written, and I got a call from the U.S. Marshals saying, "Someone changed your page to say 'If you see him,' namely me, 'arrest him on the spot.'" That's when I, early on in my judicial career, fully appreciated the job and the risks of the job.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

As Jeff mentioned, the lack of anonymity and the level of vitriol that's directed at Supreme Court justices these days does make it less appealing. But I also think it's true of so many different public positions.

That all said, I do think that we should pay attention when there's any indication of flagging confidence or support in the judiciary. I think what's important in my view, but I know that some people disagree, is that there has to be at least the perception of some connection — and a judicial appreciation that there must be a connection — between the public and the Court, between what the public expects, broadly speaking, and how the Supreme Court and courts of appeals and the district courts rule, and how we justify or explain our rulings.

Any loss in confidence in what we do or what the Supreme Court does really makes the rule of law — again, in my view — somewhat more vulnerable, and detracts from the legitimacy of what we do. What I mean by that, at least in part, is that a lack of confidence — and I've heard other judges in other countries talk about this, and I'll get to that in a second — but a lack of confidence, I think, increases the risk that actors, it could be public actors, legislatures, certainly ordinary people, are just over time going to ignore our orders and mandates. And they're going to do so as they perceive a lack of confidence or diminution or decrease in confidence and support in courts. They're going to do so thinking that there will be no practical consequences. And that's always the worry. It also increases the chances that — and I think you alluded to this a little bit, David, in your introductory remarks — that the public not only here but also abroad, which I think is an important point, is going to start to regard our judicial decisions not as a product of impartial deliberation based on the facts and the law in each particular case, but as in favor of or against a particular party, or against a particular position, and as essentially pre-ordained, based entirely on the composition of the decision-making panel.

I can't tell you the number of times that people ask me: "Isn't it entirely" — that is, the decisions of our court, let alone the Supreme Court — "isn't that entirely the product of who's on the panel?" I protest and say no. But that is the perception, and that is deeply worrying to me, and we'll get to some of the reasons why that's based on a complete misperception at the court of appeals level of what we do and how we do it, and how we do our work. But it's very, very troubling.

A few years ago, I had the fortune of meeting a chief justice of what I would describe as a troubled democracy. He spoke to a few federal judges here in New York City and described this phenomenon that I am worried about in a very powerful and very sobering way. What he described is a series of repeated and un rebutted attacks from different sectors within the government in that country, especially the media and government actors in that country, that simply over time caused a significant reduction in public confidence in the supreme court of that country in particular, marginalized legal principles, and also marginalized the people within the country — at many

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

levels, but certainly at the highest level — who believed in and were trying to foster a belief in the rule of law.

That's a problem. And as we, the federal judges, were listening to this chief justice, we were thinking about the fact that it's not an impossible future in the United States. It may be remote, I don't know, but it is not impossible in the way that it was described. And part of the problem is that when you have that loss of confidence in the court system, people resort to other means to resolve those matters that are properly or historically within the realm of the judiciary.

Let me just say one more thing. I think that there's a bright side. I don't think that the poll that you mentioned, David, or the polls that I've seen have picked up on any decrease in confidence in the judiciary among members of the Bar, among the attorney class. And I think that's pretty important. That was not true, by the way, in the troubled democracy that the chief justice of that country described. And I do think that if that ever begins to happen, that is, a decrease in confidence among the members of the Bar in the pronouncements of the Supreme Court or of the lower courts, or in state court rulings, then we have a truly significant problem. So I'll end there.

Levi: That's so well stated. Diane?

Diane Wood: Well, thank you. What a treat to be with this group of people to talk about such an important issue. I wanted to go back and ask why we find ourselves in this place, because I am troubled by these polls. I take Jeff's point that one poll here, a poll there, could miss a lot of nuance. But the first question that I asked myself is: These are public polls, and so where is the public learning about the Court? We in this conversation are in rare air, and we think of theories of interpretation, and we think of Court opinions, and we think of scholarly articles. That's not where the public, as a whole, learns about the Supreme Court. I would say the primary place they learn about the Supreme Court is in the confirmation process. And the confirmation process is portrayed, in the press at least, as this grand fight between Camp A and Camp B, between liberals and conservatives, and who's going to get this pre-ordained result, and who's going to get some other pre-ordained result.

Then you pile on something such as a decision by the Senate not to move forward on a vote with Merrick Garland, and then a decision by the Senate in a much tighter timeframe to move ahead aggressively with a vote on Amy Coney Barrett, my former colleague — and they're both terrifically well-qualified to be on the Supreme Court, and I'm not complaining about anybody's membership on the Court. But the public at large is told that this is a big partisan fight, and so somebody "wins" and somebody "loses" as a result of that. And that's a shame.

But it seems to me that — and believe me, I have no idea how to do this — but if we could somehow dial down the temperature on the confirmation process, and begin to

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

think that we really are looking for people who are going to be what I'm going to define as a good judge, and especially people who are likely to sit on the Court for 30 years, 35 years, 40 years. Who among us has any idea what the hot issues of the day are going to be 20 years from now? I certainly don't claim that crystal ball. So, you need the good judge, and I don't think the public is learning about the Court in a way that's very useful to building confidence in the Court and realizing that there are some issues that are proper for the Court have the final word.

So, what are those issues? Well, I would take us all the way back, at a minimum, to the 1920s — 100 years ago at this point, thinking of David's opening remarks, to legal realism. As soon as you began to get this idea afoot that "I'm going to rule in a case because I'm in a good mood that day, or because I like somebody, or they have a nice shade of blue on their brief or something," people confuse judicial independence with judicial whim, and there really is a tremendous difference between those two things. Judicial independence means you're not afraid somebody's going to fire you or cut your salary or threaten your life or whatever because of the opinions that you've come out with. Judicial whim is the antithesis of the rule of law. We're all trying to do the best we can.

And the effort of building back from judicial realism and saying actually, no, there are constraints on judges, is a tremendous undertaking. And judges, to an astonishing degree in this country at least, observe those restraints. People may have their favorite canons of construction for statutes or for the Constitution. They may have either stronger or maybe somewhat more qualified views of *stare decisis*, but we have doctrines that keep us in check, so to speak. And for that, I would actually say, there's a lot to learn from the experience of the courts of appeals. Because the courts of appeals do have those nine people in Washington looking over our shoulder. I sit on panels every day with people appointed by a great variety of presidents, from all the way back, in terms of some of our senior judges, to Ronald Reagan and up to and including President Biden. Four people were appointed by President Trump. It goes on and on. In 97% of the cases, we have no trouble coming to an agreed disposition. Sometimes there's some negotiation, "do you want to take a broad view?" or maybe "do you need to drill in and take a narrow view?" But this illustrates rules of law that are persuading those members of the panel. And it's actually very reassuring to me that the law is real, that it guides us. Sometimes you may not be particularly happy with an outcome at some gut level, but if that's what the law says, it has to be. That's what the law says it has to be.

We can all pick the 3% that are the source of most differences in opinion. It's the abortion cases, it's guns; it's the tough ones. That used to be the death penalty. And actually, in the Seventh Circuit we wind up involved in every federal death case, because the federal death row is in Indiana. People find some way of bringing the case to us, but sure, those are hard cases. And, as Jeff said vis-à-vis abortion — but I would say on these other points, too — many people have sincerely held, strong views on

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

one side or the other of these issues. Guns, certainly the same thing. Some people see this as just integral to their ability to defend themselves and their families. Other people just see slaughter in the cities. And I'm not sure how you bridge those gaps, but truly you begin by respecting the fact that these are very difficult issues and that people of good faith are going to come out differently on them. One other point I want to make — which, again, I think this is the system we have, but we need to understand its weaknesses — and that is the cert power. I think any of us, if given a pool of 6,000 cases and told, "pick out the 60 hardest cases, the most consequential that you can find, and give those your attention," we would end up with the tough ones. They will be the cases that have political overtones, that turn on policy, that have all sorts of dimensions. And a court is going to have to find some way of objectifying them. I'm not sure how you do it. At the court of appeals level, where we have mandatory jurisdiction, you don't have that selection issue. But you do have it when you have the cert power. And the Court, for better or for worse, faces this challenge. We have asked this institution of nine human beings to somehow cope with these extraordinarily eventful and consequential cases. It's a little unfair of us then to turn around and say, "Oh, now you're being partisan," because we've asked them to do exactly that. We've asked them to take these extraordinarily difficult cases.

My only suggestion, or my wish, I suppose, would be that when opinions are being written, judges take great care with their audience. Shorten them, make it clear what principles are being used. Don't stoop to name calling, probably don't even go into 20-page digressions into history. I'm not sure that's helping that much. I think clear rules of interpretation — where a judge can plausibly say, "This is the way I understand the law. This is how I got to where I need to be" — might be of some help in pulling back from the little 'p' politics view.

I will say, it's troublesome. Even right now, I pick up the paper — this is my last point for the moment — I pick up the paper and see people discussing quite openly, some latter-day version of massive resistance to some of the Court's recent opinions. And I, at least, bemoaned that phenomenon in the 1950s and 1960s, because if the Court — whether it's school prayer, or whether it's racial integration — was just told, look, society's just not going to follow what you did, then we have badly weakened the institution. And I hope that is not the reaction of this recent bout of cases that we've had, but I'm a little concerned that it might be.

Levi:

Well, thank you. You've all opened up a ton of issues, and we're going to cover them — I think many of them, not all of them. Diane, just listening to you, one thing I don't think the public really understands is that — in addition to the courts of appeals judges usually agreeing with one another to the point where at least in some of the circuits it's not even deemed necessary to hold oral argument because the case is just so one-sided — it's not even fair to the parties, in a way, to impose more expense on them when the judges are quite convinced in how they're going to decide it. And they're often unanimous. The court is often unanimous and often decides these cases by lopsided

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

margins that cross lines. And that's been true for a very long time. So, I mean, even on the Supreme Court, out of those 60-odd cases, maybe each year there are 10 or so that are going to cause a lot of consternation, but the majority of them, particularly in the technical areas, the judges are quite constrained and do tend to agree.

It's also true that there are a lot of bad actors out there trying to convince the American people that their judges — and not just their Supreme Court judges, but all judges — are essentially “on the take,” that they are beholden to certain interests, and that the system is fundamentally and always has been fundamentally unfair. And a lot of this is coming from foreign powers, enemies of the United States who are trying to undermine American democracy. And I think that's one of the long-range goals of the Russian empire, I'll put it that way, is to undermine Americans' faith in their democracy. And this has been shown — that many of the harshest voices that are on social media these days are actually not real Americans. They are government operatives from the former Soviet Union.

And then, I think your last point is so interesting, too, which is to understand that the American legal system asks our lawyers and judges and, to some extent, our citizens as well to bring many of our public policy disputes into the legal system. Our legal system in the United States is a place where we do hash out many social problems. It's not a given that would have to be the case, because it's not the way lawyers and judges tend to hear cases, for example, in England or Great Britain. But it has been our tradition. And, it partly reflects Americans' sort of distrust of administrative agencies.

There probably are many other factors involved here. The whole public interest movement in the law — which is a very old thing now, it's not nothing new — is to use the legal system to effect social change. And that's part of our landscape. Some people are comfortable with it. Some people are not comfortable with it. But it's certainly part of our system.

So, as you say, to turn around and criticize judges for ruling on matters that have been brought to them, and which consistently get brought to them, that are of national importance and where the law may be unclear or undeveloped — it's not really fair. On the other hand, Jeff and I both clerked for Justice Powell, and there are different kinds of judges. My experience of Justice Powell — maybe yours was different, Jeff, but I doubt it — was that I never knew how he was going to rule. And the reason I didn't know is that he didn't know. I still remember on a very important immigration case, *Plyler v. Doe*, he called me the morning of oral argument. The two of us got in very early; it was like 6:30 in the morning. He said, “David, come talk to me.” And he literally was just in agony, just did not know how he was going to decide that case. And that's kind of the way, that's sort of my model of a good judge — it's somebody who doesn't know everything.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Well, getting back to the three of you. Because you're all on the court of appeals, we've talked about this, really: In a way, do you feel like you are affected when the Supreme Court is in the crosshairs, and the public has less confidence in the Court? Do you think that affects the stature of the lower courts? Not just because people admire you, but because people accept the rulings, and they understand what it is that you're trying to do. But on other courts — not just federal, but state courts as well — since the Supreme Court attracts so much attention, does anybody feel that this is somehow a threat to the entire legal system? Ray, I see you.

Lohier: Yeah.

Levi: Yeah.

Lohier: I think that this is what I would describe as a trickle-down effect to the entire federal judiciary and perhaps even state courts — I'm less sure about that. And just to pick up on something that Diane said, the level of civic education about what it is that we do is such that most people don't distinguish between different court systems. They just hear the term judge, or federal judge, and they have a general impression that applies to all judicial decision-making. Many people — and I agree with Diane — a lot of what they see is the confirmation process and the top-line divided decisions of the Supreme Court because that's what the media picks up on. There very rarely are cases or media reports about circuit court decisions that don't ultimately make it up to the Supreme Court. And there's no news about unanimous decisions either, certainly not with respect to Supreme Court decisions, but definitely not with our courts and intermediate courts of appeals.

And so, I don't think that the courts of appeals — or for that matter, district court judges — are immune to the sorts of losses in public confidence that we're describing. I will say that — and I think that we're going to talk about this a little bit later on — but when the Supreme Court, as a result of its certiorari power, is able to reduce its docket to 65 or so decisions on the merits, so much more attention then gets paid to each one of those decisions. Diane and Jeff and I are dealing with, each probably with hundreds of decisions on the merits, and our courts are dealing with thousands at some point.

With great respect for the individual litigants in each, decisions are like pebbles thrown into the ocean, right? By contrast, each one of the Supreme Court's decisions has the seismic — or is perceived to have — this seismic effect because there are so few decisions that come out. And again, the press and others don't focus on the unanimous decisions on, as you put it, David, on more or less technical issues. They focus on the decisions that are sharply divided or that show the Court as sharply divided. And that view trickles down to the rest of the judiciary.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

I think that forms of civic education would help ameliorate that misperception. That is the perception that the courts of appeals, which as Diane said, I guess on the Seventh Circuit, Diane, it’s a 97% unanimity rate. On the Second Circuit, it’s something like 98%, very high level of unanimity notwithstanding differences in terms of the appointing authority, ranging in the Second Circuit from President Carter to President Biden and everyone in between. And that is just not a story that’s told. That is not a story that’s told. And that’s partly, I think, our fault as judges, partly the fault of different actors within our country. But that’s something that I think needs to be corrected and rectified and improved.

Levi: I’m going to turn to Jeff now. Jeff, in terms of telling stories, you have been telling the story of the state constitutions incredibly well. I’m just in awe of what you’ve been able to accomplish here in the past few years. You’ve written two really wonderful books on state constitutions [[51 Imperfect Solutions: States and the Making of American Constitutional Law](#), and [Who Decides? States as Laboratories of Constitutional Experimentation](#)]. And one of your points, I think, that you’ve tried to make is that these constitutions, and the state supreme courts that are interpreting them, can be very helpful to the U.S. Supreme Court, and take some of the pressure off of that Court to be the sole decision-maker on some of these very, very difficult issues. Can you talk to us about that in our current circumstance?

Sutton: When we think of federalism, or the pejorative “states’ rights,” lots of cautionary experiences come to mind, whether it’s slavery, Jim Crow, or other unfortunate chapters in American history. The last thing I want to do is forget those chapters. But I do wonder if, at this moment, federalism might offer some opportunities. I appreciate the risks of allowing 50 states to go their own way, as they might experiment in unsavory ways. But it is a very big country with 330 million perspectives. And it seems possible that many of the policy changes we face do not submit to just one overarching answer.

It’s hard to find anything in law or policy these days about which Americans still agree. But we still seem to embrace Justice Louis Brandeis’s insight that, if you have a tricky policy problem, it’s dangerous to have the national government experiment with a one-size-fits-all solution when you have little information about how it’s going to play out. Sometimes it’s a good idea to let state legislatures do the experimenting. Let a brave state try this or that. If the idea turns out to be a good one, other state legislatures can embrace the winning insight. If it turns out to be a bad idea, far fewer Americans will suffer from the mistake.

In making this point, Brandeis was referring to state legislatures as the laboratories of experimentation. But I wonder if the same insight applies equally to state courts — and state constitutions — as well. The key point Brandeis is making is that sometimes we should develop new ideas from the ground up. That of course is very much like the common law and its state-by-state development.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Why not do the same thing with innovative constitutional rights or structural ideas? Many of the biggest challenges in constitutional law — and many of the biggest divisions in the courts — arise from disputes about the meaning of vague words (say, whether speech is “free”) or concepts that offer no guidance at all (say, substantive due process). I worry that our desire to get it right by our lights as individuals and our impatience about nationalizing that solution gets the best of us — that we might do better if more often we gave our 50 state courts, in construing similar guarantees in our 50 state constitutions, the opportunity to develop these answers from the ground up. Just as Congress would be wise to see how various local initiatives in dealing with the opioid crisis are playing out before nationalizing a solution, so, too, the U.S. Supreme Court might do something similar in some of these vexing areas of American constitutional law.

When the U.S. Supreme Court identifies a new substantive due process right, for example, it is at the outer edges of its power. Is that not a good time to wait for input from other sources? If you see judging in pragmatic terms, like our former boss Justice Powell, state court trial and error can show what has worked on the ground. Surely that is worth paying attention to. If you see judging in flexible terms, and if you think rights can evolve over time, state courts (and even state legislatures) often offer the best evidence of changing norms in society. Why wouldn't such a judge want that information? And if you see constitutions as having a fixed meaning, state court decisions that construe the original meaning of these terms and phrases offer considerable value. Nearly all of the rights and structural guarantees in the federal constitution appeared initially in the first state constitutions.

I am skeptical that the current model, in which we Americans ask the U.S. Supreme Court to be the lead innovator, can last. There are three features of federal constitutional law that combine to put tremendous pressure on the Court. One is that, over the last 75 years or so, the U.S. Supreme Court has exercised judicial review in a muscular way. It's indeed hard to think of a country in world history that exercises judicial review with the same frequency and with respect to significant matters of public policy in the same way that the U.S. Supreme Court does.

The second point is that the federal courts are interpreting a document that requires three quarters of the states to amend. In other words, if the Court decision concerns anything remotely controversial, it can't plausibly be corrected by a vote of the people. While I am prepared to be corrected, I doubt there is a democracy in the world that uses judicial review so frequently and makes it so difficult to correct a Court mistake by a constitutional amendment.

That brings us to the third leg of the stool: All federal judges have life tenure, making it difficult and highly unpredictable to alter the composition of the Court. It seems unlikely that the next 75 years of our history will see all three of these things taking place together.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Now let me contrast these features of the federal system with the state systems to show why state court offer considerable promise as better vehicles for constitutional experimentation. As a general rule, the state courts do not have a single one of these problems. They do not exercise judicial review in such consistently broad ways. Every one of their constitutions can be amended much more easily — in all but a few states just by a 51–60% vote. No state has a 75% threshold. The highest is New Hampshire, with a two-thirds requirement. Ninety percent of state court judges face the electorate at some points, and nearly all of the rest of them face age limits. Only Rhode Island gives its state court judges life tenure.

As I see it, the judges who ought to be in the vanguard of experimentation are the state court judges. The risks are smaller given the size of their jurisdictions. Any innovations provide useful information to the U.S. Supreme Court before it nationalizes an approach. The people can far more readily correct flawed decisions with constitutional amendments. And the people nearly always have the option of not reappointing or reelecting judges with whom they disagree.

It’s not lost on me that there are risks with relying exclusively on state courts, just as there are risks with relying exclusively on federal courts. That’s why I prefer two chances, not just one, to protect our liberties. And that’s why I prefer a system in which, generally speaking, constitutional experimentation starts in the states, it sometimes ends there, and it always permits a valuable dialogue between the state and federal court systems.

Levi: It occurs to me that these last couple of cases, I don’t know whether they challenge your theory or they illustrate your theory. I mean, in *Dobbs* you have the Court sort of throwing the issue back to the states, and maybe to the state supreme courts, because as you point out in one of your books, they have not been ruling on a constitutional right to abortion under their own state constitutions since *Roe* was decided. It’s unusual that they take a case. But now they *will* get cases. And, I don’t suppose it’s easy to predict how that’s going to go, but it’s going to become something significant, I would expect.

And then in *Bruen* you have, in a way, the reverse point, which is now the Court’s taken this off the table and something that — I can’t ask any of you to be at all critical, but I’ll be somewhat critical here — an issue that involves guns in a country that is so different in different locations. The access to police resources and just the environmental threats that you might have in a remote location in Wyoming are going to be very different than what you find in a highly urbanized area. And that might have been something where legislatures and even courts would say, “We come to different views on this because the circumstances are so different.” But that’s not going to happen now, at least for the foreseeable future. And I think that’s, from my point of view, that’s too bad. But it’ll be interesting to see.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

Maybe there will be a test of your theory here. The abortion cases are so unique that it's maybe not your ideal experiment for testing the sudden view that the state court litigation around the country can generate consensus over time. But maybe it can. I don't know.

Sutton: Who knows? It's clearly an educational moment for Americans to appreciate that they have at least two shots to protect a right to abortion. That's a valuable thing for people to know. Obviously, the people of Kansas know it, and it's possible that we will find that this is an area that also will lend itself to some compromises at the legislative level. Until now, I should add, no state has enacted a constitutional amendment to protect a right to abortion or a right to choose, however one wishes to phrase it. Now we have several on the ballot this fall.

In *Bruen*, I appreciate the perspective that it seems to be limiting state experimentation. But that story, it seems to me, has yet to be told. Based on the handgun-related holdings so far in *Bruen* and *Heller* and *McDonald*, there is still plenty of room for local experimentation with respect to all kinds of weapons and ammunition. Time will tell. Whatever happens, I will be surprised if it ends with a country in which we have just one rule about gun regulation for rural Wyoming and urban New York. This is a big country, and I suspect all nine justices of the U.S. Supreme Court appreciate that the "right to bear arms," constitutional mandate though it is, still leaves room for local innovation and experimentation.

Levi: So, Ray, you gave this wonderful lecture some years ago, the Levine Lecture at Fordham, and you talked about the courts of appeal as being kind of the middle child. I'm a middle child myself, so it resonated with me. But you say you've got the Supreme Court on one side, that's like your older sibling who thinks that the world revolves around them. And then you've got the district court on the other side, and they also feel that way pretty much. They're the baby of the family and entitled to a lot of deference. And of course, they have a lot of discretion. And it's a very lively, interesting talk.

Jeff thinks that maybe the state supreme courts can take some of the pressure off of the U.S. Supreme Court. But I don't know if we think that the circuit courts can take some of that pressure off the Court. Is there a way in which they can? Not just be a way station on the way to the decision, but actually help to educate the public and maybe dissipate some of the division that we get on some of these issues so that people at least more thoroughly understand them?

Lohier: Yeah. It's interesting. The courts of appeals, the federal courts of appeals were created in part to take pressure — it's another form of pressure — off of the Supreme Court, when the Supreme Court was overwhelmed after the Civil War by a very congested docket. We were created to significantly reduce its docket. And then, of course, as Diane mentioned earlier, in the 1920s that all-important cert power was introduced to

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

take further pressure off. And prior to that, as I mentioned in that lecture, David, there had been a pretty active certification process whereby courts of appeals, different regional courts of appeals, could certify specific questions. There might have been a limit to the Supreme Court that, in effect, the Supreme Court had to take those cases, and I thought that that was important.

I think it was Jeff who mentioned dialogue between the courts, the state courts and the federal courts. And I think that if you have a certification process — of the type, by the way, that we've got with our state court counterparts in I think just about every state now — that would be very helpful, if we could resume this tradition of certifying at least one or two questions that the active members, say, of the court of appeals in each region thought were not only very important, but particularly vexing for them. I think that there's a growing disconnect. I'm trying not to be overly critical, but I think that there's sometimes at least the perception of a disconnect. We're talking about a disconnect between the public and what the Supreme Court does, sometimes a disconnect between what the courts of appeals do around the country and what the Supreme Court does. What the courts of appeals think are important issues in many areas, technical issues, and we see these circuit splits, but they're prolonged. They're not resolved by the Supreme Court. The Supreme Court takes other cases as is its prerogative.

But if we had a way to, with a more formal procedure, telegraph or tell the Supreme Court, "These are the issues that we're grappling with that are very vexing, that would be very helpful for you to resolve and to nationalize." That would be helpful. I also think that volume helps turn down the temperature. So, I mentioned earlier that when the Supreme Court takes on only 65 or so merits cases, as opposed to when you're clerking for Justice Powell, it must have been about 150 cases. So, there's been a substantial reduction in the number of cases that the Supreme Court takes on the merits. I think that becomes problematic for the Supreme Court, frankly, because every case gets a huge amount of attention. All of the energy of interested parties and of the justice are focused on very, very few sets of issues. And I think that's a problem.

Now the courts of appeals, we must take on appeals from final orders. So, we're in a very different situation. And I think that we are much better positioned, frankly, to adopt a very incrementalist approach in our decision-making because we've got sets of facts; we've got a set of legal principles, and we try to resolve those. If we were swinging for the fences in every case, we would not be able to get our jobs done. And that's also part of the theme of that lecture. But reintroducing certification of cases, trying to get more media attention on the level of unanimity that exists at the court of appeals, and not just media attention but sort of civic attention to the fact that the vast majority of our cases at the court of appeals level are decided unanimously notwithstanding differences, again, in background and views. I think that would be very helpful for the public to know. And that's a story that's not told much. In the

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

same way that I think the public doesn’t, as a general matter, really fully appreciate the role of the state courts, the role of the federal courts of appeals as the glue that binds everything is a story that’s not told.

I told the story that Jeff has heard, that is not apocryphal, of my cousin when he found out that I had been nominated/appointed — he didn’t care — to the Second Circuit. He said, “Congratulations, when do you think you’ll be able to graduate up to the first circuit?” So, there’s no sense of what it is that I do. He understands what the Supreme Court does.

- Levi: The certification process, as it used to be or as it would be, does that require action by the entire court?
- Lohier: I think that would require an action by the entire court. And there was still — actually one of my colleagues who read that lecture pointed out — that is still a statutory possibility. It’s just not real, given the total cert power of the Supreme Court.
- Levi: What might be interesting is if it became sort of the way in which appellate judges, court of appeals judges, could communicate to the Court that these are the cases that should be taken. Might it provide a little bit of pushback on the tendency, which we now see, toward these extreme dissents that seem to be directed entirely at the Supreme Court.
- Lohier: Yes. So that’s an excellent point, David, that I’m glad you made, so I can follow up on it. Now in order to draw the attention of the Supreme Court, you’ve got to use language and write these dissents for — in one of my cases, it was described — I apparently wrote a *concurrals* — to get the attention of the Supreme Court. I talked about taking down the temperature, a certification process that required a majority-say of active judges to decide *this* is the issue, or a case that we want to certify up the Supreme Court that would eliminate *this* language — these “pick me *dissentals* or *concurrals* I think are not ideal vehicles to get the Supreme Court’s attention.
- Levi: So, I’m going to shift to Diane. We’re in a period here where I think the lay public would be surprised — and I’ll put myself with the lay public, as I’m surprised, too — that so much of the debate about constitutional law and constitutional interpretation over the past 30 years or so has been in these competing camps of methodology of how to interpret the Constitution. We have living constitutional, we have originalism, we have textualism — there are apparently 13 to 15 different kinds of living constitutional theory, and judges and academics have developed these theories. And sometimes it is said that it’s important for a judge to decide where they fall, to pick one of these methodologies, and to stick with it through thick and thin, because that is constraining.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

In your Madison lecture, you say, "Both courts and society would be stronger if we stopped arguing over the interpretive conventions of so-called original intent versus purposive, or dynamic interpretation, and focused instead on content. This does not mean that courts should or could legitimately ignore the constitutional text — far from it. The text will always be the proper starting point. It does mean, however, that we should understand both the words in the text and the structure of the constitutional system at a high level of generality."

I'd like to hear your views on this as they may relate to what we're here for, which is to talk about the Court's stature. I take your lecture to be an elegant defense of some form of living constitutionalism with some textualism thrown in — it may be even more subtle than that. But one of the concerns about living constitutionalism is that, if it's alive, then it can go in a lot of different directions. And that those directions may be determined by the judge's own predilection, and less by what the American people thought when they ratified the document. So, what are your thoughts about that?

Wood:

Sure. I started from the proposition that the people who wrote the Constitution — and I'll include those who've written the rather small number of amendments that we have to the Constitution — were intelligent people who knew what they were doing, and who meant what they were saying. So that's where I say, of course, you're going to start with the text. But if the text you're worried about says "in order to be the president, you have to be 35 years old," that's easy. I have never in my life heard any big debate about what it means to be 35 years old. We haven't gone back to the Chinese system of giving you a year while you're in utero. I mean, it's just 35. So of course, you follow that. No titles of nobility, fine. I mean, that's a little fuzzier, but we have all understood what that meant.

But we have other provisions of the Constitution where, if you want to think in terms of rules versus standards, the people who wrote the document gave us very broad instruction — no cruel and unusual punishments, due process, equal protection. So, I would say if the constitutional text that we're starting with happens to be one of those "standards," one of those much broader-based things, then the people who wrote it themselves would've expected those standards to be applied in the contemporary world where the question arose. They would not have thought that you had to always excavate history in whatever year you want — 1787, 1791, 1868, and on. These are things that we build on experience. The common law judges themselves didn't just pick solutions out of a hat. They looked very carefully to the other similar problems that had arisen, to analogies. Could they ground the rule that was going to govern this case in propositions that had been there before? And the difference for us is those propositions have to be rooted in the constitutional text.

I'll take one controversial question which the Court has been working, and that's affirmative action. Well, can you get affirmative action out of the equal protection clause? The justices will decide that, I assume. I'm not going to venture forth and give

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

you my answer, but I’ll say it’s something where at least some people have argued that you’re perverting the constitutional text to say that equal protection means unequal protection, depending on whether you’re historically disadvantaged. Other people see it differently, but that’s a place where I think the rubber’s going to meet the road and you are going to see the Court needing to decide what this rather open-ended text means in that circumstance. I would say the same about many things.

I actually have to just go off point for a second and say that I wholly admire the books that Jeff has written on state constitutions. Don’t constitutionalize at the federal level things to the point where you’ve shut off the state courts. Whether maybe the Supreme Court has done that in *Bruen* is unclear. Maybe they haven’t. We’ll find out how much elbow room there is for the states to operate there. In the abortion area, if they really mean to give this issue back to the states, then give it back to the states. They could tomorrow take it all away from the states. If they said, “Well, we’ve taken another look at the due process clause: Life begins at conception. No state in the country can have a law that permits abortion.” I don’t know if they’re going to do that. I hope not. I think it’s a good one for the states to work with. The Affordable Care Act case came perilously close to taking close to 20% of the gross national product out of the legislative arena. I think that would’ve been very unfortunate. I think it’s much better in the democratic process. If you don’t like the statute, “elect people who will repeal it” would be the answer.

But back to the Constitution. I really think we can follow the constitutional text and still have flexibility where it’s needed and not flexibility where the people who wrote the Constitution meant what they said. I don’t think you’ve got to be completely on one side or the other — you don’t have to read the Second Amendment to apply only to blunderbusses that were available in 1791. I mean, we should be sensible. Post offices and post roads — all right, we have some idea what that means. Immigration. But there are a lot of provisions to the Constitution that I think give room for contemporary applications rooted in the law that’s developed around the clause.

Levi: How do you assess this sense that we have these different methodologies and the judges just have to elect one or the other? I think you’ve confused it a little bit by saying you can be eclectic depending on the nature of the text.

Wood: Well, right. So, here’s the evil that I hope we can avoid, and that’s opportunistic behavior. And I don’t mean to be too crazy about this, but I will give the example that comes to my mind. There was a period in the 1960s when some of the, whatever you want to call them, liberty or substantive due process cases were being decided, where you saw some members of the Supreme Court talking about the Ninth Amendment and the 10th Amendment. And they used the term penumbra, which became widely derided as not a very useful concept. What’s this penumbra thing? What are the emanations from these constitutional provisions? I’m actually quite sympathetic to that criticism. I don’t know what the outer limits are.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

But then, later on, we saw cases about the 11th Amendment, and you read members of the Supreme Court saying, "Well, actually the 11th Amendment doesn't say a word about state sovereignty. It's a jurisdictional provision about what the courts can hear and not hear, but the overall general meaning, the *aura* of the 11th Amendment is a state sovereignty protection." And I look at those and I say, "The Court loses legitimacy when it picks whichever convention will serve for the desired result in the case."

So, I don't mind a certain amount of consistency. If you think you want very literal interpretation, maybe you strike down the administrative state because Article II doesn't say anything about it, or maybe you think that's too much weight for the necessary and proper clause to carry. It's just when you're a textualist when that serves your end, and when you're not a textualist when that doesn't seem to lead to the result you want — I have trouble with that. It seems to me then you're not really a textualist. You're just doing sort of an ad hoc assessment of the provision in mind.

The way I would look at it, anyway, is that there is no rigid set of interpretive canons. I think the canons themselves are rightly criticized for either being strong canons or weak canons, or sometimes they're used and sometimes they aren't. So, I'm just not sure, other than as an after-the-fact description of what you've done, they're all that useful.

Levi: That's very helpful. I think what we want to avoid is we don't want to get to the point where the methodologies are so constraining that a robot could do your job. You just sort of say, "Okay, well we have an original intention robot over here. We have a textualist over here. We have a living constitutionalist over here. And they are so predictable, given the kinds of issues that we see now, that we all know how this person is going to vote." When I say vote, I mean decide. That is kind of a form of judging that I'm sure none of us subscribes to, and yet it's hard when you see these stable voting blocks on the controversial cases not to be, at least for me, not to be uneasy about it.

Lohier: I do think that we've seen some Supreme Court decisions in the Title VII area and a few other areas where a justice is able to say, "Look, I disagree." And it's clear that the justice disagrees with the result as a policy matter, but then goes on to describe how that particular methodology — say you are a strict textualist, and I'm thinking of just Justice Gorsuch in a particular case — but the text of the statute requires this result. And I think that what Diane is saying is that you will also see other judges, justices, who are known to embrace a particular methodology, but they dissent because you sense that they are uncomfortable with the result, and they're a little bit more prepared to pick another methodology. And that is the frustration, the concern.

I agree with you. I think flexibility is the byword. All three of us are very practical people. All of us are very practical people. And so, flexibility is the byword, but the

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

concern, to go back to public confidence, is that the public sees methodologies being used in a very instrumental way sometimes, or misperceives that. That’s the concern.

Levi Jeff?

Sutton: Well, first of all, I’d love to sit on a panel with Diane and Ray. I don’t think we’d have too much trouble and, if we disagreed, I suspect it would turn on reasonable grounds. Let’s remember that disagreement is not always bad. One premise of appellate courts is the possibility of disagreement. That’s why you have multiple members, who bring with them multiple perspectives. Take a case like *Bostic*, where Diane was affirmed. There were three different opinions in the case, all written by textualists, and all in disagreement. Even judges using the same methods of interpretation can come to different outcomes.

It might be helpful if we judges and the law schools could cut back on the “teams” approach to statutory and constitutional interpretation. It can be quite misleading in both directions. On one side, people should be happy to accept that all interpretation starts with the relevant words, and it usually starts with the assumption that they have a fixed meaning. There may be modest exceptions. If a statutory provision seems unreasonable, as Diane points out, there may be more room for debate about evolution in that setting or others. And history is always relevant, even if it is not always dispositive. There is no such thing as legal interpretation without history. On the other side, judges should be humble about their ability to use history to discern clear answers. And they should be humble about whether dictionaries, context, and canons of interpretation supply clear answers. Otherwise, we are going to politicize interpretation, which is not good for law. A society that cannot agree how to interpret language is going to have difficulty preserving the rule of law.

What is the source of heated fights about methods of interpretation? One is the reality, eventually appreciated by the American people, that the footprint of the federal courts has grown considerably over the last 75 years. Consider why it is that someone like Justice Powell — our former boss, the president of the ABA, the leader of a law firm, and one of the most respected lawyers in the country — likely could not get on the Court today? He did not have a track record. Today, the American people do not want a wise individual who approaches legal problems pragmatically. That is too unpredictable for a Court with such a large portfolio of important matters to decide. They want to bet on somebody either that they perceive as having an agenda similar to their political party or as having an approach to interpretation that — they think — lines up with their political agenda.

I see just two options. One option — the best option — is that the footprint of the federal courts gets smaller. Of course, it can’t be smaller in just one direction, which I take to be the point Diane’s making. That’s not going to help us with credibility. If the footprint of the federal courts shrinks only by de-constitutionalizing issues that one set

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

of Americans cares about, that will not end well. The other option is the rough approach of the last 30 years, in which the footprint of the federal courts continues to grow incrementally and does so in both directions. But that does not solve the imbalance of power problem. It just worsens things, and, it seems to me, makes it likely that the toxic intensity of the confirmation process will continue.

Levi: There's been some academic writing, which I think is consistent with what you just said, Jeff. Another Jeff, Jeff Powell, my colleague at Duke, has written this article called "*Judges as Superheroes: The Danger of Confusing Constitutional Decisions with Cosmic Battles*." And he's disappointed to find that appellate judges are attacking the legitimacy of the other judges on the panel when they disagree. "Well, we don't agree, and so I impugn your motives," or I say that you are acting in a way that is not lawful, or in some way illegitimate, rather than just focusing on what the difference of opinion is and trying to clarify it and actually trying to persuade one another. His main point, I think, is that this kind of overheated rhetoric, where I make an accusation against somebody who's on the other side as to their motivations or their intention — that I'm trying to embarrass them or coerce them, I'm not actually trying to persuade them — that that's just not helpful.

If you go deeper than that, I think what Jeff Powell is hoping is that, in a time of division, that the judiciary will have enough internal culture and professionalism that it will be not necessarily impervious, but its internal value system will be so strong that it won't break apart into teams. Two of you have been chief judges, so I think you've all been very aware of the collegiality of your courts, and I take it that the reason that's important is for the very reasons that we're talking about — so that the court can do its job really well.

How is it to be a judge in a divisive time? I'd just like to put that out there, and then I have one more question for you, and we'll call it a day.

Wood: Can I just say, as chief, I certainly tried hard to make sure that the rhetoric stayed cooled down. I'll relate an anecdote when I was doing a moot court at Columbia a few months after *Bush vs. Gore* had been handed down, and one of the other people on the moot court panel was Justice Breyer. He very kindly did a town hall with all of the students at Columbia. Justice Breyer could do this off the top of his head. He was taking all these questions, and one of the students said, and I'll paraphrase roughly, "How can you go to work the next day with these people that you just finished writing such an impassioned dissent about? Is this consistent at all?" And he gave the greatest answer. He said, "Look, I believe in every word of that dissent. That was that case. You have to put it away. These people, I'm going to work with today, and tomorrow, and the next day, and every case is a new case."

Now, whether we all think he achieved exactly what you're talking about, just the merits in that dissent, isn't my point. It's just that when I write dissents anyway, I try,

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

godfather-like, to “keep it business.” Not personal. If I don’t agree, I need to have a reason, and I need to be able to put the reason down in some way that a well-informed legal reader can understand what it was. If I can’t do that, I shouldn’t even write the dissent. The last thing in the world I want to do is write a dissent that’s going to antagonize a colleague whom I might want to persuade to join me tomorrow.

In fact, in over 27 years on the Seventh Circuit, there have been so many times — I couldn’t even count — when I have thought I knew exactly what Judge X was going to do. But I gave it a shot anyway. I figured, you never know. And Judge X would sometimes surprise me. Judge X would be open to something. So, I think that’s important.

The other thing I’ll just put in a huge plug for is at the Supreme Court level — just like at our level — if you can write opinions somewhat more narrowly, if you can do what the Supreme Court did during the term that it had only eight people while the vacancy was unfilled, they actually got a lot done and they narrowed things. They found ways of getting along together. So, they proved that they can do it if they need to.

Sutton: Instead of *The Godfather*, I will invoke *The Sound of Music*, the nun’s statement toward the end — “Father, I have sinned,” after pulling out the spark plug in the police car. I’m sure I have written some dissents that are stronger than they needed to be. But I agree with Diane, it is usually unproductive in the case at hand, usually springs from vanity, and is not good for the courts in general.

Perhaps one temptation is the growing number of people who cover the federal courts. When I came of age in the law, there were few people covering the courts — the most well-known being Linda Greenhouse and Nina Totenberg — and essentially no one was following the lower courts. With blogs and podcasts today, there are legions of people covering all of the courts. Perhaps that increases the temptation to write opinions that they will cover. Overwrought opinions do seem to be a growth industry and, one way or another, we would do well to find a way to decrease their number.

I agree with Ray and Diane that greater efforts to find common ground in our decisions would go a long way to curbing the problem. It’s difficult — indeed strange — to write an impassioned separate opinion when the majority accepts part of your view.

Lohier: I am an incrementalist, so I agree. My two colleagues and I think that narrow decisions help, unanimity helps tamp down the temperature. I think that peer pressure helps. What I’ve noticed, particularly in the context of en bancs, has been when other colleagues, particularly senior colleagues, call and just say, “You might want to take out a few words or sentences that you thought in writing your dissent, or whatever it was, were superb sentences.” There are so many — at least on the Second Circuit, and

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

I take it that it's true in other circuits — there are so many new judges, right? This is a real opportunity to reinforce the message about collegiality.

This is of course not a new problem. Harry Edwards, I know, on the D.C. Circuit has written about it, talked about it, and it was not unique to the D.C. Circuit. Every circuit's had these issues. But it's worth revisiting and being a little concerned about and making sure the judges are aware that language matters, the word choice matters with respect to their colleagues. And I agree. I always say to my law clerks, "Move forward. Move forward." And as Justice Breyer apparently said, "Tomorrow's another day, and you'll have to deal with your colleagues."

Levi: To stay with you Ray, and all of you, this is my last question. All of you do so much work in the civic education space. You go into high school classrooms. You probably have grammar students occasionally. You talk to law students. You talk to neighbors and friends, and some of them predictably will be very upset with decisions from time to time. If you have a wide group of acquaintances, they won't agree which cases they're most upset about, but they will be really upset. They're hearing this drumbeat from the media, from some of our political leadership, that the Court is just a political body. That's what it is. It's a partisan body. And as Diane and others of you have said, the confirmation process is not showing America at its best. Do you have a little elevator speech that you give when students say, "Gee, isn't this just politics by another name?" And, "I don't see why I should pay much respect to nine people." Ray?

Lohier: I do. I do. As you know David, actually I spoke to a number of high school students with very different backgrounds in New Mexico, as part of what I would describe as a civic education program that Roberta Ramo really spearheaded there. It was fantastic, but I was astounded, I was stunned — I may have talked to you about this — by the number of times that these 14- to 18-year-old kids, high school students, expressed the view that judges were really nothing more than purely political actors whose decisions were entirely political. I was very surprised, and what I tried to do — I don't know that it worked, I don't know that it disabused them of these notions that I gather they got from the media, from the confirmation process, and so on — but what I tried to do was to explain what I do, explain what my colleagues do, explain how I do my job every day. As Diane and Jeff both pointed out, I tell them how often we're unanimous in our decisions, despite very different viewpoints. That's the best that I think we can do.

I also encourage people to go see an actual court proceeding. Go to court, federal court, state court, lower court, I don't care — just see how it operates. See, frankly, how, in many ways — with great respect for the litigants in each case — mundane it is, and then they'll appreciate really the majesty of what it is that we do and the fact that we've been able to do it so well in a way that has until now preserved the rule of law.

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

That's the best that I can do. I think that is part of the civic education program that we're all engaged in, that I hope and pray more people engage in. But it was quite a surprise to me. I do think having students come to courthouses and watch oral argument and meet with judges helps, but civic education is the important pillar of any effort to reverse this trend.

Levi: Thank you. Jeff?

Sutton: I agree with Ray and Diane. If we were blue-robed and red-robed judges, why would we agree in 90% to 97% of our cases? I can personalize the point in this way. In my two biggest cases, I ruled opposite my policy preferences, proving either that someone gave me the wrong-colored robe or that robes correctly come in neutral black after all.

I would add that increasing respect for law and courts is not our job alone. It's also the job of lawyers. De Tocqueville, in *Democracy in America*, makes the point that lawyers have a prominent role in American government. Lawyers are in a great position to explain how the system works and to explain what are legitimate points of debate about a decision and what are not. Maybe we are not doing as good a job as we could in explaining to our neighbors and the people in our community how the system works — and what a decision not to recognize a federal constitutional right means and what it does not mean.

Levi: That's a great point. Diane?

Wood: Yes. The only thing I'll add to all of those great points is that when I'm in that situation, as I was earlier this year with a rule of law program in Chicago that had quite a few high school students attending it, I try to keep it pretty specific. I try to say, "What are you worried about? Are you worried about the gun case? Are you worried about abortion?" Because the press tends to run these "sky is falling, world is coming to an end" headlines, and I'm very often able to say, "Let's be specific. What did the Court say here?" Well take *Dobbs*. They said, "This goes back to the legislatures and to the people." So, I say, "If you want to feel empowered, the Court didn't shut you off, but you, as soon as you're able to do it, should register to vote, should make your voice heard." There are many, many court decisions that operate inside statutes where there's actually a pretty straight line between individual action and the ability to affect the system — not so for all constitutional things. But if you tell them, "Let's stop for a minute, take a deep breath and break it down," it becomes more manageable, and I think they wind up feeling empowered to do something about it.

Levi: Thank you all so much. I hope that this podcast is listened to by millions and billions of people, because we've had three of our finest judges, and you've all been so thoughtful. It renews, certainly, my confidence in a system that attracts such talent and genuinely nice and thoughtful people. I cannot thank you enough. And I will say

The American Law Institute

Reasonably Speaking *Episode Transcript: "The Public's Confidence in the Supreme Court"*

The following is an edited version of the podcast transcript, which was produced for publication in Judicature. This is posted as an aid to understanding the discussion. Please excuse typos due to inaudible passages or transcription errors.

goodbye to our listeners. I'm David Levi. I'm president of The American Law Institute and director of the Bolch Judicial Institute. Judge Sutton, Judge Lohier, and Judge Wood, thank you so very much for what you do every day in your work and for being with us here today.

Thank you.

END