Reflections on Judicial Independence after Twenty-One Years on the Supreme Court of New Jersey

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I am honored to deliver this year's Weintraub Lecture, named after the second Chief Justice of the New Jersey Supreme Court.

I wish to thank the Rutgers Law School and the Rutgers Newark School of Law Alumni Association for hosting the Lecture Series and inviting me to deliver remarks this evening. In particular, I want to thank Dean Rose Cuison-Villazor and Associate Dean Robert Steinbaum for all they have done to make this event go smoothly.

I would be remiss, before beginning my remarks, were I not to acknowledge how overwhelmed I am by the luminaries of the Bench and Bar in this audience and joining us on the livestream. There are among us distinguished members of both the State and federal judiciaries, current and former, who have gathered for these remarks. I am aware that we have in our audience all three Chief Justices with whom I have served. I am so pleased to have their support and that of many of my colleagues on the Court, present and past. And I am extremely grateful to have among us so many members of the

* Associate Justice, Supreme Court of New Jersey (2000-2021). I acknowledge with gratitude the research and editing assistance provided by my three law clerks during the 2020-2021 Court Term: Levi Klinger-Christiansen, Shane Bogusz, and Robert Nuse.

Rutgers Law family of faculty, administrators, students, and alumni, friends from the Bar, several of my law clerks, and some of my most dear personal friends. Thank you.

I.

A.

Now, as we all know, Chief Justice Vanderbilt was the architect of the modern Judiciary in New Jersey. His vision and leadership led to the 1947 State Constitution's refashioning of the Judicial Branch of Government and, specifically, the modern Supreme Court as we now know it. The new Judiciary was designed to be more efficient and, importantly, *independent*. The first Chief Justice set the Judiciary down that path with new Court Rules, and his early decision in *Winberry v. Salisbury*,[1] which, with its progeny,[2] advanced those goals.

Then, the second Chief Justice -- Joseph Weintraub, for whom this Lecture is named -- made a point of ensuring that independence and integrity became hallmarks of the Judicial Branch *in practice*. He recognized that the two go hand in hand, and he was keenly aware of the importance of the

[1] 5 N.J. 240 (1950).
[2] *See, e.g.*, Busik v. Levine, 63 N.J. 351 (1973) (Weintraub, C.J.); State v. Leonardis, 73 N.J. 360 (1977).

public's perception of the Judiciary as independent and free of extraneous and improper influences.

His reasoning is transparent for anyone reading his seminal decision in *In re Mattera*.[3] Although *Mattera* is known as the case in which the Court proclaimed its authority under the 1947 Constitution to impose discipline on members of the bench,[4] it is remarkable for another reason. In it, the Chief Justice explored the themes of the public's perception of, and faith in, the integrity and independence of the Judiciary. And he made plain his belief that we had to have an independent Judiciary -- at every level -- so that decisions would be accepted by litigants, and the public at large, as dispassionate rulings -- free of favoritism, influence, or bias.[5]

I can recount, by one degree of separation, how he personally helped convey that message. It traces back to a morning early in my career on the Court when I was to address newly appointed Municipal Court judges. I mentioned to my spouse that I was to deliver remarks meant to instill the importance of judicial independence to the new judges, encouraging them not to feel beholden to their appointing authority, to whom they would likely have

[3] 34 N.J. 259 (1961).
[4] *See* Robert Ramsey, 46A New Jersey Practice, *New Jersey Judicial Discipline* § 1:8, at 10 (2020-2021 Edition) ("The principles of judicial independence and freedom from disciplinary retaliation as expressed . . . remain a hallmark of New Jersey judicial disciplinary law to this day. Simply put, the *Mattera* decision constitutes the foundation upon which the body of New Jersey judicial disciplinary law has been based.").
[5] 34 N.J. at 275-76.

close proximity due to the local sourcing of municipal appointments. In other words, in order to promote the public's sense of Municipal Court impartiality, I was to encourage the new judges not to be reluctant to render decisions unpopular with the people who had appointed them and who would make reappointment decisions.

"Oh," my husband replied, "you're giving the 'It's okay to be ungrateful' speech." He explained that Chief Justice Weintraub had told him, and the other law clerks in the Newark chambers shared by the Chief Justice and several Associate Justices, about that talk when the Chief went during their clerkship year to deliver it, as the Chief told them he did *every* year.

So, yes, I delivered the "ungrateful speech." And I have thought from that time forward about the tradition that had begun with the late Chief Justice Weintraub.

There is, in that story, the connection to my remarks.

When asked to deliver this lecture, it was suggested, given my anticipated retirement from the Supreme Court, that a look back on the past twenty-one years might be appropriate. That helpful suggestion sparked my interest in focusing on Judicial Independence *and its derivative* -- the Independent Thinking Judge, *or Court*, from the perspective of my experience with the Supreme Court of New Jersey.

In these reflections on my two-plus decades as an Associate Justice, I consider the two strong currents that flowed through that river of time.

First is a point I have made several times, and repeat now, because it is so extraordinary. Over the course of the past twenty-one-plus years, I have served with twenty-one different members of this Court. That is a unique amount of change in the composition of the Court. The most experienced by any Justice in the history of the Modern Court -- a dubious honor to say the least.

It is a circumstance that has roots, admittedly among others, in the historical fact that two Justices were not reappointed for tenure during that time and no explanation based on competence was ever cited to support those actions. When it first happened, the implications for the independence of the Court, and the Judiciary as a whole, triggered overt discussion -- in press reports, legal gatherings, and in published reports -- that an affront to Judicial Independence had occurred.[6] One published article in the Rutgers Law Review, authored by my colleague and friend, Justice Barry Albin, considered those actions in historical context, comparing it to actions taken before the ratification of the 1947 Constitution and those that had followed -- up until that point in time.

[6] *See* Barry T. Albin, *The Independence of the Judiciary*, 66 RUTGERS L. REV. 455 (2013).

But my point here is not to repeat those discussions that appeared in the press or other published pieces. Although I must admit, when living through it, the experience seemed extraordinary compared to historical experience. You see, I was a person who had seared into her memory the night Chief Justice Wilentz secured reappointment, with some controversy. I was on the Senate floor that night when the voting board was kept open for hours while, among others, Governor Kean himself was on the phone to persuade a particular Senator to cast the hoped-for twenty-first vote to grant the Chief Justice tenure. As described in a memoir,[7] despite ideological differences with certain of the Chief Justice's decisions, Governor Kean viewed his reappointment nomination of Chief Justice Wilentz as providing important, demonstrative gubernatorial support for the very notion of judicial independence. The recollection of that night remains with me still. But let me come back to the point from that history.

I bring up that past for a specific reason. To the extent that extensive turnover in the makeup of the Court during the past twenty-one years *had the capacity* to impact the judicial independence of the Supreme Court, I wish to address that concern through my experience. Which leads to my prime point.

[7] Thomas H. Kean, THE POLITICS OF INCLUSION, 194-95 (1988).

I can attest that Judicial Independence -- in the most commonly thought of sense -- and, importantly, in other senses that merit identification and appreciation -- *persists* on our State's highest court. Allow me to detail what I mean.

The need to keep judicial officers and the judicial process, in this instance the Supreme Court, Independent -- "unpolluted" to use Chief Justice Weintraub's vernacular in *Mattera* -- from outside influence is what typically comes to mind when Judicial Independence is referenced. The concern is that when external influences are brought to bear, they will impact decision-making by judges. Does it even need to be said aloud that one does not want judges, at any level, to look over their shoulders when deciding cases? Of course not. Fear or the desire to curry favor does not belong as a factor in judicial decision making. That very concern is at odds with the point of the "ungrateful" speech Chief Justice Weintraub worked to impart to new judges.

From my vantage point over what has transpired over the course of a significant number of years, that worry -- since dissipated over time I should add -- has not affected our Court's functioning.

B.

Preliminarily, it bears noting that judicial independence takes many forms. The Judicial Branch is separate and independent under the

Constitution, no doubt, but it functions cooperatively with the other two Branches of State Government.

Our Court, like other courts, construes and applies legislative enactments in the cases that are brought for resolution. We do so even when declaring a result that is publicly unpopular but accords with the law as it exists. An independent judiciary is at work when making such pronouncements that leave change in the law to another branch of government. *Fraternal Order of Police v. City of Newark* was just such an example.[8] Similarly, at times we are required to inform the Legislature that the law is ineffective to secure a result and that legislative action is needed to cure a gap. Such was the case involving a statute controlling the extra-territorial reach of a specific criminal statute involving child endangerment, in a matter captioned *State v. Sumulikoski*.[9] And in more unusual settings, the Judiciary has been called upon to resolve a dispute between the other two Branches. Such was the case in a fairly recent appeal involving the Legislative Review Clause,[10] which had been added to the State Constitution. In that matter, the Legislative and Executive Branches were at odds over the validity of an administrative agency's regulation and the Court had to review the dispute, requiring the

[8] 244 N.J. 75 (2020).
[9] 221 N.J. 93 (2015).
[10] N.J. CONST. art. V, § 4, ¶ 6.

Court to assess the standard of review that would pertain in such an inter-Branch dispute over the Legislature's use of its veto power.[11] We did, in an opinion written by Justice Patterson for the Court. Those are among the varied roles that an independent judiciary is called upon to play in the resolution of litigated disputes -- roles that our Court has played over that last two decades alone.

But Judicial Independence has another dimension.

C.

Judicial Independence, or any feared diminution of it in demonstration (which is more often the way in which the topic is introduced), is often evaluated based on instances of inter-Branch tension and conflict in which strong institutional concerns run up against the constitutional principles the Court exists to protect. It falls to us, at times, to tell coordinate Branches of Government what they may not wish to hear, namely that actions taken in the legislative or executive arenas are inconsistent with the Constitution. And the Court has not shied away when such occasions have happened. Not historically, and not presently.

[11] Commc'ns Workers of Am., AFL-CIO v. Civil Serv. Comm'n, 234 N.J. 483 (2018).

Certainly, the *Robinson v. Cahill* decisions during the 1970s provide dramatic examples from the past.[12] But, we have had similar "high profile" matters during the past twenty-one years, one example of which can again be found in the realm of school funding. I refer to the Court's 2011 decision requiring that the Legislative and Executive Branches fully fund the approved school funding formula, under the School Funding Reform Act of 2008 (SFRA), [13] for Abbott districts.[14] That decision has received much attention and been described by Rutgers' own Professor Tractenberg as exemplifying the Court's independence.[15]

In case there is anyone unfamiliar with the school funding litigation history in New Jersey, suffice it to say that beginning with the seminal *Abbott v. Burke* decision in 1985,[16] our Court has played an ongoing role in ensuring that the state's approach to educational financing satisfies the Thorough and Efficient Education Clause of the State Constitution.[17] After decades of legislative and executive attempts to satisfy the constitutional right of disadvantaged school children in under-resourced school districts to a

[12] Robinson v. Cahill, 69 N.J. 133 (1975); Robinson v. Cahill, 70 N.J. 155 (1976).
[13] L. 2007, c. 260.
[14] Abbott *ex rel.* Abbott v. Burke (Abbott XXI), 206 N.J. 332 (2011).
[15] Paul L. Tractenberg, *New Jersey's School Funding Litigation, Robinson v. Cahill and Abbott v. Burke* (2011), in COURTING JUSTICE: TEN NEW JERSEY CASES THAT SHOOK THE NATION, 195 (Paul L. Tractenberg ed., 2013).
[16] Abbott v. Burke (Abbott I), 100 N.J. 269 (1985).
[17] N.J. CONST. art. VIII, § 4, ¶ 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.").

thorough and efficient system of education, SFRA finally provided a constitutionally permissible formula. After review, our Court allowed the new "constitutionally adequate" formula to go into operation with its built-in mechanisms for review and adjustment after its initial three years of implementation.[18] Importantly, the Court finally released the Executive and Legislative Branches from all prior *Abbott* funding orders, in order to allow the SFRA funding scheme to function as it was legislatively created to.[19]

The "Ahhh" moment was short lived, as the Executive Branch reneged in the next fiscal year on its explicit promise to follow the SFRA funding scheme. The matter returned to us.[20] The governmental institution whose responsibilities include control over appointments to the Court sought to escape a promise of constitutional magnitude it had made.

Grounding our analysis in the constitutional mandate *and* the conditions under which the State had been released from the prior Judicial Orders that had controlled State education funding to Abbott districts, the Court's decision delivered the "strong medicine" required -- an Order enforcing SFRA funding to the Abbott districts.[21] That Order was demonstrative of our Court's

[18] Abbott *ex rel.* Abbott v. Burke (Abbott XX), 199 N.J. 140, 175 (2009).
[19] *Id.*
[20] *Abbott XXI*, 206 N.J. 332.
[21] The release that the Court had granted from prior Judicial Orders, which had specifically controlled funding to the Abbott districts, had been conditioned upon full funding as promised by SFRA. The case posed a failure of consideration, in the contractual sense of the term. *See id.* at 341, 353-54. The Executive and Legislative Branches abided the Court's Order and restored the required full funding under SFRA to the *Abbott* districts.

commitment to the rule of law notwithstanding it being drawn into inter-Branch confrontation; the constitutional guarantee at stake would not bend with the political winds.

Not long thereafter there occurred another demonstration of such judicial action implicating inter-Branch dynamics, this time in the area of affordable housing.

Decades ago, the Court had identified a State constitutional duty that municipalities exercise their zoning power to create an adequate supply of affordable housing and, ultimately, had to fashion a judicial enforcement remedy, although a legislative solution was noted to have been preferable.[22] Eventually, through the Fair Housing Act, [23] the Legislature established the Council on Affordable Housing (COAH),[24] to be the agency responsible for the periodic assessment and approval of fair share affordable housing requirements for municipalities.[25] The system presented the means for municipalities to avoid the judicial builders' remedy that had been the *only* remedy available prior to the legislation.[26] Now municipalities had an avenue to affirmatively pursue and avoid such litigation.

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[22] S. Burlington Cnty. NAACP v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158, 212-13 (1983); *see also id.* at 213 ("We may not build houses, but we do enforce the Constitution.").
[23] L. 1985, c. 222 (codified as amended at N.J.S.A. 52:27D-301 to -329.4).
[24] N.J.S.A. 52:27D-305.
[25] *Id.*; Hills Dev. Co. v. Bernards Township, 103 N.J. 1, 20 (1986).
[26] *Hills Dev. Co*, 103 N.J. at 42-43.

The Court's cooperative venture with the legislative solution lasted for many years, but then collapsed, requiring the Court to demonstrate its fidelity to already articulated constitutional principles.[27] COAH had become moribund, through executive inaction, and the defunct agency could not be permitted to stymie constitutional obligations.[28] The Court's Decision and Order, which created a new process for litigation to proceed again in the courts, enforced the constitutional obligations as case law had developed them, and the Court was unanimous in doing so.[29]

Our action exemplified necessary independence from the other branches of government, with which the Court plainly must deal on other matters. But when it comes to judicial matters -- ones implicating constitutional principles and past constitutional precedent -- inter-Branch dynamics and any personal prior loyalty to having worked with or in another branch of government posed no impediment to the discharge of judicial responsibilities.

II.

Dramatic cases, like the afore-described *Abbott* and *COAH*, do not come along frequently, which is why I choose tonight to shine a light on other, equally critical aspects of a healthy, and necessary, judicial independence.

[27] In re Adoption of N.J.A.C. 5:96 and 5:97 *ex rel.* New Jersey Council on Affordable Housing, 221 N.J. 1, 3-5 (2015).
[28] *Id.* at 19-20.
[29] *Id.* at 34.

The Framers of the Federal Constitution,[30] as well as the delegates and speakers at the New Jersey Constitutional Convention[31] certainly viewed the idea of an independent judiciary as essential for the health of a democratic form of government, at each respective level. As often detailed, the most-ready explanation is legitimacy -- it is essential that the Judiciary be perceived as independent so litigants may believe they are being treated fairly and accept the results of the judicial dispute-resolution process. That is of course beyond question. But I submit that there are other positive externalities that come from truly independent courts.

Beyond promoting legitimacy, independence is, I submit, essential to substantive progress in our legal landscape. Judicial Independence fosters the environment for independently thinking judges. And that area of positive results deserves attention, for it has been exemplified by the unabated independence shown by the Supreme Court of New Jersey historically, and

[30] THE FEDERALIST NO. 78 (Alexander Hamilton) (McLean, ed.), The Avalon Project, https://avalon.law.yale.edu/18th_century/fed78.asp. *See also id.* ("This independence of the judges is . . . requisite to guard the Constitution and the rights of individuals from the effects of those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

[31] At the Convention that led to the birth of the 1947 New Jersey Constitution, the delegates and speakers stressed the need not just for an efficient and sensibly organized Judiciary, but for an independent one. As one delegate put it, "for the highest type of judicial service the first requirement is the independence of the judge. . . . Above all, he must be free from political pressure by those exercising the appointing power." *New Jersey Constitutional Convention of 1947*, Comm. on the Judiciary, Vol. IV 21 (Statement of Mr. Louis de Luc on behalf of the New Jersey Committee for Constitutional Revision).

during the two-plus decades while I have been a participant-witness in its work.

I will highlight three ways in which the Court has continued to demonstrate this independence-of-thought aspect of Judicial Independence.

A.

One is in the area of constitutional rights. Scholarly writings, as well as judicial decisions, note that state constitutions and state supreme courts serve an important role in preserving constitutional rights, at times expanding fundamental rights beyond the minimum preserved under the United States Constitution. Leaving aside debate over the various views of how to assess when state constitutional divergence from federal constitutional rights should occur,[32] issuing a holding recognizing that an expansion is necessary in a particular matter is itself a manifestation of Judicial Independence, I submit.

It is up to the New Jersey Supreme Court to serve and protect the unique rights and needs of New Jersey citizens, as they are meant to be guaranteed through construction of our State Constitution, informed by state policy, interests, customs, and concerns.[33] Where a lower floor to a constitutional

[32] *See* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); *see generally* Deborah T. Poritz, *The New Jersey Supreme Court: A Leadership Court in Individual Rights*, 60 RUTGERS L. REV. 705, 711-13 (2007) (discussing views and trends, citing *e.g.*, State v. Hunt, 91 N.J. 338, 353-58, 359-68 (1982) (Pashman, J., concurring; Handler J., concurring)).

[33] *See, e.g.*, Lewis v. Harris, 188 N.J. 415, 456 (2006) ("In protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people. . . . The New Jersey

right may make sense when uniformly applied to fifty states by the United States Supreme Court, and even maintained at that level in a particular state by its own highest court, that might not be so here in New Jersey.

Our case law is replete with instances when our Court has recognized that the New Jersey Constitution provides greater protection in a particular area. Focusing on the example of the Fourth Amendment's protections against unreasonable searches and seizures and its essentially identically worded language in Article 1, Paragraph 7 of the State Constitution, our Court has cut its own path from that set by the United States Supreme Court despite the lack of textual differences between the two provisions.[34] In 1987, our Court flatly stated in *State v. Novembrino* that the New Jersey Constitution "affords greater protection against unreasonable searches and seizures" than does the Fourth Amendment.[35] Decisions exemplifying that heightened protection go back and forward in time from *Novembrino*'s pronouncement.

For example, back in 1975, Justice Sullivan wrote *State v. Johnson*,[36] in which the Court rejected the United States Supreme Court's approach in *Schneckloth v. Bustamonte*[37] regarding the exception to the warrant

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Constitution not only stands apart from other state constitutions, but also "may be a source of 'individual liberties more expansive than those conferred by the Federal Constitution.'" (quoting State v. Novembrino, 105 N.J. 95, 144-45 (1987)).

[34] *Compare* N.J. CONST. art. 1 ¶ 7, *with* U.S. CONST. amend. IV.

[35] 105 N.J. at 145.

[36] 68 N.J. 349, 353-54 (1975).

[37] 412 U.S. 218 (1973).

requirement when there is consent to search, and held that under the New Jersey Constitution the State would be required to prove, as a necessary predicate, that a person has "knowledge of the right to refuse consent" in order to establish that the State has obtained consent to search.[38] The line of holdings concerning New Jersey's expanded search and seizure protections continued in the 1980s with *State v. Hunt*[39]and *State v. Mollica,*[40] finding a privacy interest in certain telephone billing records. And similar holdings continued into the time I have spent on the Court, with Chief Justice Zazzali's decision in *State v. McAllister,*[41] finding a reasonable expectation of privacy in bank records notwithstanding third-party handling of those records by banking officials, and then with two decisions by Chief Justice Rabner in *State v. Reid,*[42] recognizing a reasonable expectation of privacy in internet subscriber information, and *State v. Earls,*[43] requiring a search warrant for cell phone location data.

Just this past Court Term, our Court issued an important addition to that growing list.

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[38] *Johnson*, 68 N.J. at 353-54.
[39] 91 N.J. 338.
[40] 114 N.J. 329, 344-45 (1989).
[41] 184 N.J. 17, 19 (2005).
[42] 194 N.J. 386, 389 (2008).
[43] 214 N.J. 564, 588 (2013). The United States Supreme Court evidently followed our path when, five years later, it decided similarly in *Carpenter v. United States*, ___ U.S. ___, 138 S. Ct. 2206 (2018).

In *State v. Roman-Rosado*, a driver was pulled over because the bottom portion of the words "Garden State" on his vehicle's license plate were partially concealed by a license plate frame.[44] The phrase was otherwise completely legible. The stop ultimately led to the discovery of a gun and criminal charges against the defendant. The defendant sought to have the evidence of the gun suppressed. After the defendant's motion to suppress was denied, the case eventually reached us.[45]

We first determined that the applicable statute that prohibits concealing or obscuring marks on a license plate was not violated by the partial covering of the phrase "Garden State."[46] But, as an alternative argument, the State asserted that even if the statute did not prohibit the defendant's particular license plate frame, the officer made a "reasonable mistake of law," in interpreting the statute and pulling over the defendant. In 2014, the United States Supreme Court had held that a vehicular stop premised on a reasonable mistake of law does not violate the Fourth Amendment's prohibition on unreasonable searches and seizures.[47]

In our case, citing *Novembrino* for our tradition of greater protection under our State Constitution, we declined to adopt the "reasonable mistake of

[44] 247 N.J. 488, 506-07 (2021).
[45] *Id.* at 506-09.
[46] *Id.* at 520-22.
[47] Heien v. North Carolina, 574 U.S. 54 (2014).

law" exception under our State Constitution.[48] As our Court saw it, what was at stake was "not whether an officer reasonably erred about the meaning of a law;" "[i]t is whether a person's rights have been violated."[49] The Court's opinion, authored by Chief Justice Rabner, stated, "Under [our Constitution], it is simply not reasonable to restrict someone's liberty for behavior that no actual law condemns, even when an officer mistakenly, although reasonably, misinterprets the meaning of a statute."[50] For me, that single sentence captured our reason for differing from the Supreme Court.

Independence and, needless to say, mettle are involved when deviating from what the United States Supreme Court holds to be a constitutionally permissible degree of error by law enforcement, especially when it seems a majority of states, under their respective state constitutions, agree. But in New Jersey, we continue to blaze our own trail.

No doubt, some have had their doubts when this Court has done so. Some may still harbor such doubts. The Court's decision in *State v. Hempele*[51] was met with mixed reception based on visceral reactions to our Court's finding that warrantless police searches of one's curbside trash were unreasonable under our State's constitutional protections. But expectations of

[48] *Roman-Rosado*, 247 N.J. at 529-32 (citing 105 N.J. at 145).
[49] *Id.* at 530.
[50] *Id.* at 504.
[51] 120 N.J. 182 (1990).

privacy deserve more than a visceral reaction, as Chief Justice Poritz's discussion of *Hempele* in her Weintraub Lecture[52] demonstrated. As she recounted in her lecture, an interesting change in perception about the case occurred when she was informing an initially skeptical class of out-of-state law students about the decision. Once the students learned that their New England state followed the federal rule and not the New Jersey approach on such searches, their views on *Hempele* quickly changed. I submit, it is when due consideration is given that the wisdom of the Court's holding in that case is made plain to see. I would posit that to give up such privacy, now, would seem a shocking reversal of protection for New Jersey citizens.

Without disputing the brilliance or acumen of the jurists that compose the United States Supreme Court, our own highest Court is more attuned to the particular needs and values of this state, which inform expectations of privacy and reasonableness considerations in search and seizure matters. Independent thinking equips our Court's members to act based on that greater familiarity in properly developed records in our own matters and encourages the legal community and the public to accept our decisions. Our Court is, as Chief Justice Poritz noted in her Weintraub Lecture on state constitutional adjudication, a Court that, *to this day*, remains "willing to entertain -- and

[52] Poritz, *supra* note 32, at 718-19.

discuss -- argument rooted in the individual rights provisions of the New Jersey Constitution."[53]

B.

Beyond constitutional rights, the Court's judicial independence, and concomitant independence of thought, are demonstrated in two other arenas deserving attention.

For one, they have found expression time and again in innovative procedural requirements imposed to ensure fairness in proceedings -- steps taken using the Court's constitutionally granted superintendence power over judicial proceedings.[54]

Sometimes those steps are modest improvements to the fairness of proceedings, such as when our Court introduced the *Ferreira* Conference for preventive case management use in professional negligence matters so that the salutary addition of the legislatively required affidavit of merit would not prove to be a trap for the unwary and would instead be used to "bring a swift demise to frivolous lawsuits while allowing meritorious ones to have their day in court."[55]

[53] *Id.* at 713.
[54] N.J. CONST. art. VI, § 2, ¶ 3.
[55] Ferreira v. Rancocas Orthopedic Assocs., 178 N.J. 144, 155 (2003).

Sometimes, though, the Court's superintendence power is wielded for more sweeping improvements.

Ten years ago, that authority and independence was employed when the Court crafted a new path in eyewitness identification procedures in *State v. Henderson*.[56] The steps required by our Court moved the new procedures -- addressing the reliability of such identifications and their use in trials -- into prominence nationally during the ensuing decade, which resulted in the case's consideration in appellate courts from coast to coast -- almost three quarters of the fifty states, by my last count, have cited it in their own reckoning with the issue.

Similarly, our Court's administrative steps to study and then promote bail reform led to a major legislative initiative whereby New Jersey became the first jurisdiction to implement statewide bail reform practices.

But I need not cite examples from the past, even those not-so-distant examples. Just last Term, the Court again exercised such independence of thought and action. The Court took novel action to recognize implicit bias in the jury selection process and called for steps to curb it in *State v. Andujar*.[57]

[56] 208 N.J. 208 (2011).
[57] 247 N.J. 275 (2021).

Independence is the cousin to courage -- the courage to act, and to act first, as independent jurists perceive necessary to promote just proceedings. Complacency with the status quo risks a sclerotic Judiciary -- rigid, unresponsive, and unable to adapt to contemporary legal practice needs and notions of justice. One need only consider the Court's practically molded, yet constitutionally sensitive, adjustments to remote grand and petit jury procedures during the challenges presented by a pandemic, where the Court found ways to advance the justice system, protect the public, and maintain fairness to litigants.[58] Justices Albin and Solomon described in their respective decisions for the Court in *Vega-Larregui* and *Dangcil* how and why the Court exercised its power to adapt proceedings to new and extraordinary challenges during the last Court Term.

C.

The final area I highlight for its demonstration of the Court's independence of thought is not the least in importance.

One of the Court's chief responsibilities is stewardship over the common law's development, an area in which "[t]he power of growth is inherent," as our Court said in 1957 in *State v. Culver*.[59]

[58] State v. Dangcil, 248 N.J. 114 (2021); State v. Vega-Larregui, 246 N.J. 94 (2021).
[59] 23 N.J. 495, 506 (1957).

The common law is not static, and judges of all stripes have recognized that, no matter the characterization placed upon them. As he often did, the great Learned Hand may have put it best when he compared the common law's incremental growth to the accretional development of a coral reef. [60]

Our Court has long recognized and acted on its obligation to infuse case-developed law with vibrancy to address new needs and current societal values. The Court has allowed expansion of common law duties as modern problems presented themselves, even when we acted ahead of the Legislature or of sister jurisdictions, or in ways in contradistinction to other jurisdictions.

A perfect example of the Court's deeply rooted tradition of innovative thinking in the common law's development is the Weintraub Court's opinion in *Henningsen v. Bloomfield Motors, Inc*.[61] *Henningsen* is an example of the Court breaking from past constraints on how to analyze a novel claim, specifically a claim involving defective merchandize placed in the stream of commerce. The Court refused to limit relief on the basis of privity between the injured plaintiffs and the defendants and proceeded to issue

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[60] Learned Hand described it this way:

> [T]he whole structure of the common law . . . stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.
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> Learned Hand, Book Review, 35 HARV. L. REV. 479, 479 (1922).

[61] 32 N.J. 358 (1960).

groundbreaking rulings that led to the nation's evolution of the law concerning product safety.

Kelly v. Gwinnell is another such example. There, Chief Justice Wilentz, writing for the Court, held that a host who "provides liquor directly to a social guest and continues to do so even beyond the point at which the host knows the guest is intoxicated, and [knowing that person] will shortly thereafter be operating a motor vehicle, [will be] liable for the foreseeable consequences to third parties for the results of that drunk driving."[62] And, one can point to others, such as *Pierce v. Ortho Pharmaceutical Corp*.[63] In that case, the Court acted to protect at-will employees from employment retaliation for whistleblowing, an area where the courts led, and the Legislature followed with statutory whistleblower protection through enactment of the Conscientious Employee Protection Act.[64]

Perhaps the best historical example of such independent thinking came in the common law area of premises liability with *Hopkins v. Fox & Lazo Realtors*, the case that expanded premises liability and recognized that a realtor, conducting an open house of a residence listed for sale, owed a duty of care to a potential customer who was injured while inspecting the property. [65]

[62] 96 N.J. 538, 559 (1984).
[63] 84 N.J. 58 (1980).
[64] L. 1986, c. 105 (codified as amended at N.J.S.A. 34:19-1 to -14).
[65] 132 N.J. 426, 441 (1993).

As noted in *Hopkins*, our common law approach to premises liability had depended in general on "the status of the person on the property at the time of injury" and the duty owed by the owner or occupier was "gauged by the right of that person to be on the land."[66]

In *Hopkins*, the Court deviated from the formerly strict perspective of the status of the visitor to the premises, and instead determined that a full duty analysis was more appropriate. The Court laid out general principles for considering when it was fair to expand a duty, explaining the factors that should guide such an analysis and showing again the type of independence of thought secured through robust Judicial Independence.

During my time on the Court that common law development has continued. Keeping within the realm of premises liability, the Court took principles expounded in *Hopkins* and advanced premises liability in a direction that, at the time, was ahead of, as I recall, all but one other jurisdiction. The case was *Olivo v. Owens-Illinois*.[67]

In *Olivo*, the Court considered whether a defendant could be liable for asbestos exposure, not only to those working on the defendant's premises, but to those who could be foreseeably exposed to the asbestos carried off-

[66] *Id.* at 433.
[67] 186 N.J. 394 (2006).

premises. In that instance, a worker was exposed to asbestos while at work on the defendant's property. The asbestos contaminated his work clothes, eventually subjecting the worker's wife to exposure from that asbestos when she washed his clothing. In determining to extend the defendant's duty of care to the spouse, the Court resisted a status-based analysis and instead looked more holistically to use of the *Hopkins* factors in our analysis, namely the nature of the relationship, nature of the risk, the opportunity and ability to exercise care, and the public interest.[68]

And premises liability is not the only example of a duty expansion of late.

Social host liability also experienced an expansion just last Term in *Estate of Narleski v. Gomes*.[69] In that case, we opened the door to social host liability in a case involving an underage adult who controlled access to his home, owned by his parents, where a guest was allegedly allowed to drink to a state of visible intoxication and then drive, leading to third-party injury. The

[68] In a following matter, the Third Circuit Court of Appeals asked whether our holding in *Olivo* could extend beyond providing a duty of care to the spouse of an employee, and if so, what were the limits on that liability rule and the associated scope of duty. Schwartz v. Accuratus Corp., 225 N.J. 517 (2016). It is obviously difficult to answer a question about next steps in the evolution of the common law as a certified question because the common law develops in fact-specific situations and on a case-by-case basis. But we did the best we could, emphasizing again "that the evolution of case law must reflect the simultaneous evolution of societal values and public policy." *Id.* at 527.

[69] 244 N.J. 199 (2020).

Court closed a gap that was left open in the wake of *Kelly v. Gwinnell* and subsequent legislative enactments.

In all these settings, Judicial Independence provides the thematic score for the law's development and growth.

Now, I plainly am not the first to acknowledge that the common law is an edifice that is never finished, just like the cathedral in Barcelona, Spain that is never completed. The challenge for a court of last resort is to ensure that the law remains responsive to new needs. A progressive vision is needed by the courts, aided, of course, by practitioners and scholars, to identify places where the common law is failing to support shared values that a developing society will recognize, protect, and promote.

With an independent Judiciary, we can have independently thinking judges, which is essential to the development of a state's common law, which is a key responsibility of the New Jersey Supreme Court.

The work of a Justice of a State Supreme Court -- a court of last resort -- like that of a United States Supreme Court Justice, requires self-discipline because each of us is human and yet we must be able to put aside personal predilections in the face of judicial responsibilities. That point was explained by Justice Felix Frankfurter in a famous essay titled "The Process of Judging in the Supreme Court" when, back in 1954, he wrote to the effect that, while

judges *do not* cease to be themselves and *do* carry with them their experiences, the mark of a good judge, "worth his salt [and] in the grip of his function" is "self-discipline" – in other words, a judge must rely on his or her intellectual habits of self-discipline to actively push back against internal predilections and biases from prior influences.[70]

While of course Justice Frankfurter provided an examples of the performance of that form of judicial duty, examples can be found right here in the work of our Court, where persons of varied backgrounds, including previously representing plaintiffs, doing defense work, and serving in the government in many roles and forums, put aside past representative advocacy and other policy work when becoming judges and can join together in the Court's development of the common law, recognizing, as appropriate, new duties and protecting and promoting interests as evolving societal needs and public policy reveals. That is so necessary in order that the law continue on the path of progress so that, buffeted by change and changing circumstances, it

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[70] Felix Frankfurter, *The Process of Judging in the Supreme Court*, in THE SUPREME COURT: VIEWS FROM INSIDE 41 (Alan F. Westin, ed., 1961). Justice Frankfurter wrote:

> It is asked with sophomoric brightness, does a man cease to be himself when he becomes a Justice? Does he change his character by putting on a gown? No . . . . He brings his whole experience, his training, his outlook, his social, intellectual and moral environment with him when he takes a seat on the Supreme Bench. But a judge worth his salt is in the grip of his function. The intellectual habits of self-discipline which govern his mind are as much a part of him as the influence of the interest he may have represented at the bar.

does not become brittle or hollow -- hobgoblins to a vibrant common law system.

III.

As, I said at the outset, Chief Justice Weintraub was keenly aware of the importance of the public's perception of a Judiciary that was independent so its decisions would be accepted. His work to keep the Judiciary so, in practice, enabled the progressive and independent thinking for which this Court's decisions became extolled and whose legacy we, on the Court, are challenged by history to maintain.

The New Jersey Supreme Court I joined in 2000, and the Court compositions before that, had a reputation for Judicial Independence, having taken on many high-profile controversies brought to it by litigants.[71] In my view, what they, and subsequent Court compositions have in common, and what has empowered the Court to be a national thought-leader for the past seventy-odd years, is the capacity for independent thinking, which is not only important to the public's acceptance of the Court's decisions, but is the necessary predicate -- the key enzyme -- to the fulfillment of the Court's

[71] *See* John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701 (1998).

supervision of the law's development, the protection of constitutional rights, and superintendence of the fairness of proceedings within our court system.

The examples I highlighted tonight demonstrate how the independence of the Judiciary is no mere aspirational slogan. It is a state of mind, beyond rejection of past loyalties and pleasing others, including other branches of government, that may have helped one in the past. Or that are in a position to help -- or, worse, hurt -- the Judiciary in the future.

Hard policy decisions cannot be ducked by the Court when properly raised in a litigated matter. In my experience, they are not. The hard calls brought to us are made and that is how it must be. That is how it should be.

The Judicial Independence of mind of which I speak tonight has made me proud to be a member of this Court where gratitude for one's appointment and other extraneous influences are anathema to how we must operate in judicial decision-making.

Judicial Independence is precarious though. It is ultimately dependent on individuals. It depends on how gubernatorial, as well as advice and consent, power is exercised. After all, it is not enough for belief in an independent Judiciary to endure among members of the Court -- it also requires the continued consent of our elected officials.

And, as I have stressed here, it is dependent on the fortitude of individual Justices and judges. Over the past twenty-one years, I have witnessed real courage in action in tense, high stakes matters, and in the other ways discussed.

The Court I have served on has demonstrated its independence through its legal thinking and development of the law, its sturdiness in the face of political maelstroms, and its innovations in procedures as societal challenges and social sciences demonstrate the need and justification.

The individuals who have peopled the bench with me on the New Jersey Supreme Court -- whether there for just a year or for longer -- have had the necessary mettle and have labored to preserve the independence of this Court, demonstrating repeatedly the ability to be open-minded and independent in thought and action, thus allowing the law to develop in all the ways I have highlighted.

That independence of thought is what the Court, on which I presently serve, continues to advance. It is my fervent hope -- and charge to future members of this Court, who will be responsible for its stewardship going forward -- that it will always continue to do so.