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State Constitutional Jurisprudence: Decision Making At The New York Court Of Appeals

Michael Hutter

Vincent Bonventre
*Albany Law School*Luke Bierman
*Stockton State College*Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>Part of the [Constitutional Law Commons](#), [Fourth Amendment Commons](#), and the [Judges Commons](#)

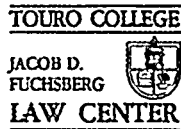
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STATE CONSTITUTIONAL JURISPRUDENCE: DECISION MAKING AT THE NEW YORK COURT OF APPEALS

Michael Hutter:

Thank you, Rob. Our segment this morning will lead off with State Constitutional Jurisprudence: Decision Making at the New York Court of Appeals. Our two speakers will be Vin Bonventre,¹ from Albany Law School, and Luke Bierman,² from Stockton State College. Both of them, as you know from the bibliographies and the material, as well as from reading their material, are two of the more highly regarded scholars with respect to Court of Appeals decision making, the trends in the decisions, and the judges themselves.

I think you are going to be highly enlightened by their discussions and by their comments with respect to where the

1. B.S., Union College; M.A., University of Virginia; J.D., Brooklyn Law School. Vincent M. Bonventre is a Professor of Law at Albany Law School.

2. B.A., Colgate University; Ph.D. State University of New York at Albany; J.D., College of William and Mary. Luke Bierman is a Professor at Stockton State College.

Court of Appeals has gone, where it is going and its basic decision making process.

We will start off by having Vin Bonventre make his presentation, followed by Luke Bierman, and then we will open it up for a question and answer period. Again, following up with respect to what Rob just said, I think we are very much encouraging the notion here of having questions asked back and forth. I just do not want to sit up here, and I think Vin and Luke do not want to sit up here and simply give a rote presentation and then sit down. We really do want to encourage this interactive discussion. So, our first speaker, then, will be Vin Bonventre.

Vincent Bonventre:

Thanks, Mike.

Is the New York Court of Appeals an ideological dog and pony show? That is not me talking, that is the Daily News.³ The Daily News wrote an editorial a couple of weeks ago referring to the Court of Appeals.⁴ I guess that I have to agree, the Court of Appeals certainly is a show for those of us who enjoy observing it and studying it.

Is it ideological? It certainly is ideological in the sense that the judges have particular philosophies and values that they bring to bear in the decision making. And with regard to dogs and ponies, there certainly are different philosophies and ideologies on the court. Depending upon what your perspective is, some would be deemed to be ponies and others would be deemed to be dogs.

Now, the Daily News really was participating in this blizzard of criticism by the Governor and others against the Court of Appeals for being too ideological.⁵ Of course what he meant was

3. *New York Courts: Guilty as Charged*, DAILY NEWS, Jan. 28, 1996, at 40 (discussing how the criminal justice system has been negatively impacted by the New York State Court of Appeals).

4. *Id.*

5. *See, e.g.*, Paul Schwartzman, *Highest State Court on Trial*, DAILY NEWS, Jan. 28, 1996, at 6 (portraying the New York State Court of Appeals as a "zealous protector of defendant's rights."); Liam Plevin, *Pataki Seeks to Loosen Rules on Search-Seizure*, NEWSDAY, Jan. 30, 1996, at A19 (focusing

that it was being too liberal.⁶ It was protecting, in the Governor's view, the rights of the individual more than it ought.

The Daily News ran this editorial: "New York Courts Guilty as Charged."⁷ Not only did they call the Court of Appeals this ideological dog and pony show, but in their full page editorial they also said, among other things, "this panel's interpretations of constitutional protections are so convoluted, its investigatory and evidential restrictions so complicated, even Oliver Wendell Holmes would have trouble deciphering them."⁸

Pataki, said that some of the Court of Appeals' decisions were mindless, irrational and far too liberal.⁹ The Wall Street Journal got into the act when they published an editorial in which they said, "[t]he liberal judges who make up the majority on the Court of Appeals, entirely appointed by former Governor Mario Cuomo, made clear that ideology drives their decisions."¹⁰

Well, the judges themselves have not been immune to criticizing one another. Judge Bellacosa recently accused his colleagues of institutional egocentricity because he did not agree with the majority's result in the 1991 decision, *People v.*

on Governor Pataki's proposed legislation which would no longer allow a criminal to "hide behind a technicality or an interpretation" relating to the Fourth Amendment); John Caher, *Court Rulings Conflict with Pataki's Agenda*, ALBANY TIMES-UNION, Jan. 28, 1996 at A1 (stating "[i]n 1995, the Court issued a smorgasbord of rulings that were philosophically at odds with the new Republican governor and his conservative agenda.").

6. See Vincent M. Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1165-66 n.11 (1994). "Liberal" generally signifies a preference for, and possibly an extension of, civil rights and liberties, equal protection or rights of the accused. "Conservative" on the other hand, signifies a preference for limits on the scope of protection provided for civil rights and liberties. *Id.*

7. See *supra* note 4.

8. *Id.*

9. John Caher, *Pataki Assails Court of Appeals. Liberal Rulings are 'Mindless' Safeguards for Criminals, He Says*, ALBANY TIMES-UNION, Nov. 2, 1995, at A1.

10. Peter Reinhartz, *Rule of Law: The Court New York Criminals Love*, WALL ST. J., Jan. 31, 1996 at A15.

Harris.¹¹ Even the current Chief Judge, Judith Kaye, in the 1990 decision, *People v. Bing*,¹² accused the majority of a power play because she did not agree with the court's decision to overrule a recent precedent.¹³ She was accusing the majority of simply using their new votes and the changes in membership of the court, to overrule a precedent they simply did not like. Now, in reality, of course, judges typically and perhaps out of necessity, inject their own personal values and principles, wisdom and philosophy into the cases. So, yes, the court is ideological like other courts are ideological.

Holmes has said it better than anyone else. He said that when you read a judge's decision, remember that it is often the unarticulated, the unconscious, the unacknowledgeable factors that really were decisive in the case.¹⁴ And Cardozo said, "if you take an honest judge, an honest judge that's trying honestly to look at the law," he says, "a judge can still only look at the law, see the law, through her own eyes."¹⁵

So, yes, I mean the court is ideological in that sense, but whether the court's decision making resembles a dog and pony show, something to be ridiculed, may well depend on the partisan

11. 77 N.Y.2d 434, 447, 570 N.E.2d 1051, 1059, 568 N.Y.S.2d 702, 710 (1991) (Bellacosa, J., dissenting) (denouncing the majority for "reject[ing] the analysis, wisdom and experience of the United States Supreme Court" and for "declar[ing] its deviation from [a] United States Supreme Court decision.").

12. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990).

13. *Id.* (stating that, suspect represented by counsel on pending charge, cannot, in absence of attorney, be brought in for questioning on a new unrelated charge, even if suspect is not represented on new charge and, in fact chooses not to be).

14. OLIVER WENDELL HOLMES, *THE COMMON LAW* 422 (1881). Holmes stated that judicial legislating has been largely "the unconscious result of instinctive preferences and inarticulate convictions." *Id.*

15. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 13 (1921) (stating "[w]e may try to see things as objectively as we please . . . [n]one the less, we can never see them with any eyes except our own.").

or ideological bent of the assessor. As one might say, it depends on whose ox is being gored.¹⁶

What I would like to do this morning is to look at facts, and I mean the barest facts, talking about the numbers, the decisional record of the court in recent years, and the voting records of the judges. Again, my focus is on numbers, for their precision and their objectivity, understanding, of course, that numbers themselves are inadequate and they are unable to tell the whole story, but the numbers are factual, they can not be denied and they do provide at least a partial picture of reality.

Specifically, I would like to look at the court's ideological decision in voting numbers for the last two complete years: 1994 and 1995. Then I would like to do some comparing and contrasting with years in the Wachtler era,¹⁷ in 1990 and 1991. These were, of course, prior to his downfall and prior perhaps to the events that lead to his downfall.¹⁸

Let us first take a brief look at the immediate ideological impact of Wachtler's departure, how a still throttled court behaved in his absence. I have looked at this before and it is quite extraordinary, it seems to me, what happened as soon as Wachtler departed. There was a dramatic change. There was a dramatic change that simply could not be missed in the court's voting in the year immediately following his departure, that is 1993. The court went from a voting record in state constitutional cases, the difficult ones, the controversial ones, the ones where the judges disagree with one another on issues that are deemed sufficiently important that they are willing to go public.

The court went from a record of twenty-three percent pro-individual rights¹⁹ for the last three years of the Wachtler era, to

16. *Exodus* 22:28 "[w]hen an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be clear."

17. Wachtler served as Chief Judge of the New York Court of Appeals from 1987 to 1992.

18. Judge Wachtler resigned from the bench in 1992.

19. Vincent M. Bonventre, *State Constitutional Adjudication at the Court of Appeals, 1990 & 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119,

fifty percent, more than double, fifty percent pro-individual rights in the immediate aftermath, that is 1993.

Now, perhaps, what we are seeing is, or what we saw was, pent up liberal ideological steam that was released when a Chief Judge who had a very strong pro-government record left the court. And, in fact, if we contrast Wachtler's record with Kaye's, during the Wachtler years, that is the last three years of the Wachtler era, Wachtler's record was sixteen percent pro-individual rights, Kaye's was fifty-four percent. So, sixteen versus fifty-four. Seems to me that is reflected in the dramatic change in the immediate post-Wachtler era from twenty-three percent to fifty percent, but the question is: Did this dramatic ideological change last?

Let us go to the ideological profile of the Kaye court in 1994 and 1993. Take a look at the decisional record, voting records of the judges, and take a look at the ideological spectrum of the court. Now, some have said, and I have seen it in the New York Law Journal, that the court has, at least since the immediate aftermath of Wachtler's departure, reverted to being somewhat conservative. And this is largely attributed to the appointment of Judge Levine²⁰ on the Court of Appeals who by all accounts is extraordinarily bright and extraordinarily influential and extraordinarily capable.

Now, if we look at all the state constitutional decisions of the Court of Appeals, 1994 and 1995, and I mean everything: divided, undivided, signed, memos, per curiam, everything, it is interesting. In 1994 and 1995, the court seemed to dip back to thirty-four percent pro-individual rights, and, in fact, in 1994 it

142 n.181 (1992). The terms "pro-government" and "pro-individual" conform to the terms "conservative" and "liberal" as they are commonly used in judicial studies. *Id.*

20. See James Dao, *Senate Confirms Judge Levine*, N.Y. TIMES, Sep. 8, 1993, at B6. Judge Howard A. Levine graduated from Yale Law School and subsequently spent four years as District Attorney of Schenectady County, ten years as a family court judge, and twelve years as a Judge for the Appellate Division. *Id.* He was unanimously confirmed on September 7, 1993 to the New York Court of Appeals, filling a vacancy created by Judith S. Kaye's appointment to Chief Judge. *Id.*

seemed to be twenty-nine percent. 1995 seemed to be forty percent. Thirty-four percent. At least that is a drop from fifty percent, but it seems to me that it is much more revealing than that, and much more consistent with the procedure here for us to look at the non-unanimous decisions. That is, again, where the issues seem to be troublesome enough, nettlesome enough, where the issues are important enough that the judges are willing to go public with their disagreement.

The story there is different and it is very revealing. In 1994 and 1995, of these divided state constitutional decisions involving fundamental rights and liberties, the court ruled forty-seven percent of the time for the individual, virtually identical to the immediate aftermath of Wachtler's departure.

If we look at '94 and '95 separately, it is interesting. In 1994, that is the first full year of Howard Levine's tenure on the Court of Appeals, the time from which, I think many of the observations were being made about his rightward pull on the court.

If you look at 1994, the court ruled thirty-one percent of the time for the individual. So there was a drop from 1993 to 1994, fifty percent to thirty-one percent, but then there was a rebound. Of course I use the term "rebound." I do not necessarily mean it was a good or bad thing. I think it is a good thing, but that is not what I am suggesting with the numbers. It went from thirty-one percent in '94 to fifty-eight percent in '95.

So that if you take the composite of '94 and '95 again, what we are talking about is forty-seven percent, again, virtually identical to the fifty percent immediately after Wachtler's departure. Still quite a contrast from the twenty-three percent pro-individual rights during the last three years of Wachtler's tenure.

Let us look at the individual voting records of the judges in these cases, and again compare them to the voting records in the immediate aftermath of Wachtler's departure. We find that the voting record in the last two years of virtually all the judges is identical, or nearly so, to what it was in the immediate aftermath of Wachtler's departure. Judge Kaye, fifty-nine percent pro-

individual rights immediately following Wachtler's departure. In '94 and '95, fifty-nine percent.

Judge Simons, forty-three percent pro-individual rights. During the immediate aftermath of Wachtler's departure, forty-four percent. Thus, '94 and '95 are virtually identical.

Judge Titone, eighty-two percent pro-individual rights. Following Wachtler's departure, in the last two years, the figure is actually sixty-seven percent but there is a statistical aberration there. Let me explain it this way: it was eighty-two percent in 1993 immediately after Wachtler left. In 1994, it was eighty-seven percent. In '95 criminal cases, it was eighty percent. Again, virtually identical. In the civil cases, however, it was down to thirty-three percent.

And it seems to me from looking at Titone's record over the last several years, that, that is an aberration. And it seems to me it may have something to do with the education cases²¹ and the lesbian adoption case.²²

21. *See City of New York v. State of New York*, 86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553 (1995). Plaintiffs, including New York City, and the Board of Education, brought suit against the State challenging the constitutionality of the States' property taxed based method of funding public education and held that as municipalities, plaintiffs lacked the legal capacity to bring suit against the State. *Id.* at 289, 655 N.E.2d at 651, 631 N.Y.S.2d at 555 (Titone, J., concurring); *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995). Plaintiffs' claim was based on a failure to provide a sound basic education to school children in New York city school districts as required by State Constitution. *Id.* at 312-13, 655 N.E.2d at 663, 631 N.Y.S.2d at 567. The court found that the state funding scheme was rationally related to a legitimate governmental interest, and did not violate either the Federal or New York State Constitutions. *Id.* at 319, 655 N.E.2d at 668, 631 N.Y.S.2d at 572.; *R.E.F.I.T. v. Cuomo*, 86 N.Y.2d 279, 655 N.E.2d 647, 631 N.Y.S.2d 551 (1995). Plaintiffs argued that there was a greater disparity in the amount of money allocated per student in property-poor districts in relation to students in property-rich school districts. *Id.* at 283-284, 655 N.E.2d at 648, 631 N.Y.S.2d at 552. Plaintiffs claimed that this disparity indicates a "gross and glaring inadequacy" in the New York school financing system which raises constitutional questions. *Id.* at 284, 655 N.E.2d at 648, 631 N.Y.S.2d at 552. The court held that plaintiffs' constitutional rights were not violated because they failed to show that students in the property-poor school districts were

Bellacosa, seven percent pro-individual rights in the year of Wachtler's immediate departure. He now is at twenty-five percent. There has been a change in Bellacosa, and perhaps it is because his soul mate and friend, Wachtler, is no longer at the court. I mean I am not sure. I am not sure if I could figure out that judge's psyche, but in any event he's gone from seven percent to twenty-five percent. That is not an insignificant change.

Judge Smith went from fifty-five percent in the last two years, to fifty-eight percent. Again, virtually the same.

Levine, twenty-two percent. The last two years twenty-two percent. He has not changed.

Ciparick was not on the court in the first year immediately following Wachtler's departure, but the last two years her voting record was sixty-three.

So, in short, every judge's voting record remains virtually identical except for Bellacosa. That is, we are just talking about comparing the immediate aftermath of Wachtler's departure and the last two years. Let me show what we are talking about in terms of a spectrum here with this aid. This is what we are talking about.

In '94 and '95, what you have is Titone and again it's sixty-seven percent, but I think if I removed the aberration, it's seventy-five percent. Again, these are all pro-individual rights.

Ciparick, sixty-three percent. Kaye and Smith, they are close at fifty-nine and fifty-eight. Then you have the court, the court, which is at forty-seven percent. And then you have Judge Simons, who is forty-four percent. And then you have probably Bellacosa and Levine. Bellacosa coming in at twenty-five and Levine coming in at twenty-two. That's the spectrum of the court.

receiving less than a "sound basic education." *Id.* at 284-85, 655 N.E.2d at 649, 631 N.Y.S.2d at 553.

22. *Matter of Dana*, 86 N.Y.2d 651, 660 N.E.2d 397, 636 N.Y.S.2d 651 (1995) (holding that under New York Domestic Relations Law, lesbian and unmarried heterosexual partners may adopt children).

Now, a few interesting things if we look at the alignments with the majority. First of all, Judge Kaye, during this period, is in line with the majority ninety percent of the time. Now, if her voting record is substantially more pro- individual rights than Wachtler's, well, that says something.

What about Levine? Levine at one end of the spectrum. Interestingly in 1994, the first full year he was at the court, and the first of these two years we are looking at, Levine's alignment with the majority or vice-versa was ninety-two percent. In 1995, it dropped to fifty-eight percent. Dropped from ninety-two percent to fifty-eight percent. Something is going on.

If we look at Judge Titone at the other end of the spectrum, in 1994, he was aligned with the majority or they with him only twenty-five percent of the time. In 1995, the second year, sixty-eight percent of the time. So much more aligned with Titone.

So what we have here is we have Kaye, and actually in both those years, 1994 was eighty-five percent alignment and 1995 was ninety-four percent alignment, so that is a total of ninety percent. It stays high. Kaye's alignment with the majority or theirs with her is high. Levine is on the decrease. Titone is on the increase.

What about the alignments and divisions among the judges themselves? Let us look at Chief Judge Kaye. Judge Kaye was aligned with Judge Simons, interestingly, eighty percent of the time. That is the highest of any alignment on the court during '94 and '95: Kaye and Simons.

The same number for Kaye and Ciparick, so she is equally aligned with Ciparick and with Simons eighty percent of the time. Her lowest alignment is with Bellacosa, forty-five percent of the time.

Now let us look at the extremes of the court. Titone and Bellacosa were near the extreme of the court over there. The lowest alignment on the court, thirty percent of the time. Those two in two years agreed with one another only in thirty percent of the cases. Titone with Levine, only forty-one percent of the time. So, as you would expect, the alignment is rather low.

What about this? What does this all mean? What about swing voters and the court as a whole? It seems pretty clear; there is a

pretty strong pro-government or conservative block over here. You have a pretty strong pro-individual rights pair over here. And then hovering around fifty percent, you have these three judges.

And the interesting thing is that you have Kaye and Ciparick agreeing with one another quite a bit. You have Kaye and Simons agreeing with one another quite a bit. And actually alignment shows that at least for 1995, Kaye agrees with Smith almost eighty percent of the time.

Let us compare that with what was going on in the Wachtler court, and now I am going to look at 1990 and 1991. And let me speed this up and let me tell you what the spectrum looked like in 1990 and 1991.

The bottom line for 1990 and 1991 was that the Court of Appeals ruled in favor of individual rights and divided cases those two years, twenty-two percent of the time. Twenty-two percent of the time as opposed to forty-seven. In 1994 and 1995 versus 1990 and 1991, twenty-two percent of the time as opposed to forty-seven percent of the time. In 1990, it was twenty-two percent of the time. 1991, it was twenty-one percent of the time. Virtually identical.

Let us look at how you compare '94 and '95 to '90 and '91. This is the spectrum of the court. You have Titone in '90 and '91. Titone, eighty-one percent pro-individual rights. Then you have the fifty percent mark. And then what you had, is you had Hancock,²³ Kaye, and Alexander bunched together at forty-eight, forty-seven, and forty-three. And then you had the court. The court was over here at twenty-two percent. Then you have Wachtler and Simons, nineteen percent, and sixteen percent. And then you had Bellacosa, nine percent.

23. See Vincent M. Bonventre, *Dedication to the Honorable Stewart F. Hancock*, 9 TOURO L. REV 545, 549 (1993). Judge Hancock's decision making is generally neither consistently pro-individual or pro-government. *Id.* His focus on fundamental fairness and basic reasonableness renders ideologically free and well balanced decisions. *Id.* Judge Hancock retired from the bench in December, 1993. *Id.*

Look at the way the court has changed. Look what you have got here. You had the strong block over here, only Titone is out here, three judges in the middle or just on the other side of fifty percent. What's going on? You have Titone by and large the same, right? Hancock is out of the picture. Alexander is out of the picture. Kaye goes from forty-seven percent to fifty-nine percent, so a little more pro-individual rights. Simons, look at Simons. Look at what has happened to Simons. Simons went from sixteen percent to forty-four. Very similar figure to what we saw in the immediate aftermath of Wachtler's departure.

Obviously Wachtler's departure or something happening at exactly the same time as Wachtler's departure has affected the voting of Simons. Wachtler is gone. And Bellacosa, look what has happened to Bellacosa. He went from nine percent to twenty-five percent. Again, something happened either because of Wachtler's departure or around the time of Wachtler's departure.

But this is what we are talking about. We are talking about a change in Judge Simons' voting and we are talking about a change in Bellacosa's voting. And what we are talking about is instead of a 'pro' block of three, we are talking about a pair. And instead of just one strongly pro-individual rights judge, we have got two. And instead of three centrist judges, for lack of a better term, that are just to the right of center, we now have three, two of which are to the left of center and one is very close to the center. We have a somewhat different court.

Last couple of remarks. Obviously, the ranting and the raving against the Court of Appeals has to be viewed, it seems to me, as the Governor and other partisans upset with the court and intending to do something about it. Of course what they could do about it is replace these judges that they don't like, and replace them with the ones that they do like.

Well, fortunately or unfortunately, they are not leaving too soon. Judge Simons is the first one who will be leaving. His term expires in 1996, and he must retire in 1997.²⁴ So we do not

24. Evan Davis, *New York Court of Appeals Roundup*, N.Y. L.J. 52 (Sep. 12, 1996). Judge Richard D. Simons' retirement will create a vacancy in the New York Court of Appeals when he retires on December 31, 1996. *Id.* Judge

know whether he's going to leave in 1996 or 1997. We do not know whether Pataki would extend it for a year.

In any event, he is going to be retiring during Pataki's first term. In addition, Simons is not on the liberal wing of the court. There probably will not be too much of a change no matter what the Governor does in replacing Simons.

Next one to leave: Judge Titone. His term ends 1998. He has to retire as a matter of age in 1999. We do not know whether the Governor, whether it is Pataki re-elected or whether it is the next Governor, would want to extend Titone for that extra year or just replace him at the end of his term. But, Titone would be the next one. Obviously if a Governor was to replace Titone with someone less pro- individual rights than Titone, and that is not difficult, if the Governor replaces Titone with somebody that is moderately pro-individual rights, that would be a change.

Say Governor Pataki is re-elected, he has got a second term. He replaces Titone, who I gather is the bane of his counsel's office. Judge Titone, if he is replaced by somebody who is as pro-government, as conservative, as Bellacosa, who the Governor admires, we are talking about a dramatic shift. This could change the complexion of the court.

Subsequent to Titone is Bellacosa himself. His term expires in the year 2000. He does not turn seventy for some years after that, but his term expires in 2000, which is the next gubernatorial term. Obviously, if the Governor reappoints him, whoever the Governor is, nothing changes. If perhaps it is a democratic liberal governor, who does not care for Bellacosa, and does not care for him enough so that he will replace him, even though Bellacosa will be eligible by age to stay on the court, if Bellacosa is replaced by somebody more liberal than him, that would change the complexion of the court.

So, what we are talking about is in the very near future Simons is the only one to leave in this term, but Titone, Bellacosa and

Simons has been a particularly important part of the Court, contributing many well written and analytically rigorous opinions during his tenure. *Id.* The Court will be at a loss if his replacement "lacks his intellectual firepower." *Id.*

immediately thereafter, Levine, will be coming up in the next gubernatorial term. If there is to be increasing scrutiny of the Court of Appeals' nominees, as apparently there was with Ciparick, who was deemed to be controversial, then we can expect partisan and ideological interest and concern. If one is partisan and if one is ideological, there is good reason for concern, but we can expect some interest and concern with the upcoming appointments.

The ideological and philosophical makeup of the court can certainly be altered, if not in the immediate future, then in the near future. And it can be altered quite dramatically. Stay tuned.

Thank you.

Michael Hutter:

The next speaker will be Luke Bierman.

Luke Bierman:

Good morning. When my wife found out I was coming back to Albany Law School she was very concerned. I did not go to school here, but having worked and lived in Albany for a long time I had many friends here. I would come over here to play basketball. Unfortunately, my basketball career ended on this floor, on that basketball court, when I broke my ankle. I am glad to see they put up some protection on the wall on which they did not have back in those old days. My wife was very concerned. If she knew we were actually on the same floor she would be appalled and concerned about me as only a wife can be because then there would be nobody to help her take care of the kids.

Vin's numbers tell part of the story, I think, as he suggested, at the New York Court of Appeals and with apologies to Paul Harvey I am sort of here to tell the rest of the story, I think.

It has really been about twenty-five years now since the new judicial federalism was recognized as judicial phenomenon, and in that twenty-five years attention was given to how state courts function. There are a couple of reasons. One is that state courts were seen as an alternative to an increasingly conservative United

States Supreme Court. Certainly that is the flavor we get from Justice Brennan's Harvard Law Review article²⁵ and certainly the perception that was out there, but also state courts were seen as interesting political institutions involved in policy formation that had particular institutional characteristics that could be studied to learn more about these institutions. Certainly what we see with studies like the Tarr & Porter²⁶ study about New Jersey, Ohio and Alabama. From this attention over the last twenty-five years we have learned quite a few things about state courts, things we did not know before. For instance, state courts are not necessarily saviors from a conservative United States Supreme Court. State courts themselves can be quite conservative. Professor Latzer and Professor Bonventre certainly have made that clear to us. And we have also seen that state courts, when confronted with particular issues of state constitutional law can act rather oddly, not the way they usually act.

Regarding this latter observation that state courts can act rather oddly, we see a lack of principled decision-making in state constitutional adjudication. Certainly Professor Gardner suggested that in some of his writings and others.²⁷ Professor Galie and Professor Bonventre have suggested and observed this lack of consistency that is not present in other kinds of decision-making necessarily that state courts do.

We have also seen that despite this independent state constitutional adjudication there is nonetheless an emphasis in interpreting state constitutions on federal constitutional law.

25. William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313 (1986).

26. GEORGE A. TARR & MARY C. PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988) (examining the activities of the Alabama, Ohio and New Jersey Supreme Courts from the end of World War II to the mid-1980's with a discussion focusing on the interaction between state supreme courts and other political institutions).

27. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762 (1991) (discussing the movement, led by Justice William Brennan, "advocating state independence in constitutional decision making.").

Even the state judges themselves have recognized the problems that state courts confront in state constitutional adjudication. Judge Kaye, of course, in 1992 in the *Scott* and *Keta* cases²⁸

28. *People v. Keta*, 142 Misc. 2d 986, 538 N.Y.S.2d 417 (Sup. Ct. 1989), *rev'd*, 165 A.D.2d 172, 567 N.Y.S.2d 738 (2d Dep't 1991), *appeal granted*, *People v. Scott*, 77 N.Y.2d 912, 572 N.E.2d 628, 569 N.Y.S.2d 945 (1991), *rev'd*, *People v. Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1991), *remanded*, *People v. Keta*, 185 A.D.2d 994, 591 N.Y.S.2d 782 (2d Dep't 1992); *People v. Scott*, 169 A.D.2d 1023, 565 N.Y.S.2d 576 (3d Dep't 1991), *appeal granted*, *People v. Scott*, 77 N.Y.2d 966, 573 N.E.2d 588, 570 N.Y.S.2d 500 (1991), *rev'd*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992), *remanded*, *People v. Keta*, 185 A.D.2d 994, 591 N.Y.S.2d 782 (2d Dep't 1992). In *Scott* and *Keta* the New York Court of Appeals ruled that article I, § 12 of the New York Constitution can afford greater protection against unreasonable searches and seizures than the Fourth Amendment of the United States Constitution. In *Scott*, the Chenango County Supreme Court convicted the defendant of criminal possession of marijuana after law enforcement officials entered the defendant's open field where he was growing the contraband. 169 A.D.2d at 1024, 565 N.Y.S.2d at 576. Reversing the Appellate Division's affirmation of the conviction, the New York Court of Appeals held that the search and seizure were unreasonable. *Id.* at 1026, 565 N.Y.S.2d at 578.

In *Keta*, the Queens County Supreme Court suppressed evidence of stolen vehicles in the defendant's possession obtained through a "routine" government inspection. 142 Misc. 2d at 993, 565 N.Y.S.2d at 422. The Appellate Division reversed holding that the search was legal. 165 A.D.2d at 183, 567 N.Y.S.2d at 745. The New York Court of Appeals held that the search violated Article I, §2 of the New York Constitution and suppressed the evidence. 79 N.Y.2d at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930. The case was remanded to the Appellate Division where it was affirmed without opinion. 185 A.D.2d at 994, 591 N.Y.S.2d at 782.

The Fourth Amendment of the United States Constitution provides:

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by an oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Article I, section 12 of the New York State Constitution provides:

The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by an oath or

wrote, “[p]erhaps more than any other issues, state constitutional law cases over the past decade have seemed to fracture the court. In state constitutional law cases we have been uncommonly divided.”²⁹

What is it then about state constitutional cases that promote this uncharacteristic dissent and disagreement at the New York Court of Appeals? And perhaps the first question is whether it really is uncharacteristic? What I sought to do in the paper that I wrote³⁰ examines the court of appeals’ decision-making in its plenary case load compared to what I call the judicial federalism cases, one, to identify whether there are differences in these particular subject areas, and also to try to identify any characteristics or contributions to any differences that may exist.

Before we look at the plenary case law and the judicial federalism cases, I think it is important to recognize as sort of setting a parameter that the court of appeals decides almost all of its cases without any dispute.³¹ By that I mean there are literally hundreds of cases every year that the court of appeals decides.³² These cases include applications in criminal cases and the motions in civil cases that the court of appeals denies.

There appears to be a general consensus about the court of appeals’ decision-making. Just think what one wayward judge could do to that court in criminal applications. If he started granting applications left and right, the court would be inundated

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

N.Y. CONST. art. 1, § 12.

29. *Scott*, 79 N.Y.2d at 503, 593 N.E.2d at 1346, 583 N.Y.S.2d at 938 (1992) (Kaye, J., concurring). *See, e.g.*, *People v. Dunn*, 77 N.Y.2d 19, 564 N.E.2d 1054, 563 N.Y.S.2d 388 (1990), *cert. denied*, 501 U.S. 1219 (1991) (holding a reasonable suspicion that illegal drugs are present in an apartment is sufficient to support the police exercising a warrantless search).

30. LUKE BIERMAN, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at The New York Court of Appeals*, 12 *TOURO L. REV.* 633 (1995).

31. *Id.* at 639.

32. *Id.* at 671 (explaining that the New York Court of Appeals decided 618 cases during the 1994-95 term).

and it is up to one judge to make the decision. Even new judges seem to comport quite quickly to the standard operating procedures. We do not do that.

In the civil case load on motions, two judges could very easily inundate the court with cases. Their case load remains constant, around 300, 250 in that general range. It would be quite easy for one or two rebellious judges to simply inundate the court with work, but we do not see that. In fact what we see is that most cases are decided consensually and civilly.

This is the practice we see in the plenary case load. We look at the plenary case load, what we see is much consensus and civility among the judges. I attribute that to what I characterize as horizontal pressures, which are internal dynamics that affect the way the court interacts or the judges interact among themselves. In the judicial federalism cases,³³ we see something different. We see no -- or a lack of consensus, not no consensus, but much less consensus, much less civility. The cases are resolved with much more discordancy.

I suggest this is related to an outside pressure, that of the United States Supreme Court, in vertical tension that is exerted, rather than the more prevalent horizontal pressures that are present in the court's plenary case load. What I did is look at five years of the plenary case load and identified judicial federalism cases prior to Chief Judge Kaye's observation at the end of the '92 term.³⁴

What I looked at was the '87 to '92 terms at the court of appeals. I also looked at the most recent complete term: '94, '95. That is the first term since the turnover in the early '90's with the same natural court for a full term. In other words, there were notes in the first term where there were no changes in personnel. That is the most recent term that has been completed.

The addition of three new judges during that later term will help us to see whether any characteristics were time bound or

33. See LUKE BIERMAN, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403 (1995).

34. See BIERMAN, *supra* note 30, at 671.

whether there was some crossover that was not time bound to a particular era or particular terms. The plenary case load I defined, and I looked at all the cases decided with either opinions or memoranda, sort of the general idea of what the plenary case load is, cases that were dealt with by the court at least greater than just the motions and applications.

And the judicial federalism cases I defined as cases where the court was uniquely and clearly presented with issues of state constitutional adjudication against a federal constitutional doctrine.³⁵

What should the standard be under the state constitution? Let me turn first to the plenary case load. What I found is that in the plenary case load most cases were decided with a single opinion.³⁶ During the '87 to '92 terms this occurred between seventy-eight percent and eighty-seven percent of the time.³⁷ Around eighty, eighty-five percent of the time the court is deciding cases in one opinion.³⁸

With regard to 1994-95, right around the same amount, eighty-three percent.³⁹ One opinion for the court. The court speaking as unanimous in one opinion about eighty, eighty-five percent of the time.⁴⁰

Looking at it a little differently, the cases where all the judges agreed to a particular outcome, might be concurrences, but the outcome they agree about is even more.⁴¹ The agreement in 1987 to 1992 runs as high as ninety percent in 1994. In 1995, it was about eighty-six percent.⁴² What we see is a great deal of consensus. I do not know about you, but I have trouble agreeing

35. BIERMAN, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at The New York Court of Appeals*, 12 *TOURO L. REV.* at 640.

36. *Id.* at 634.

37. *Id.* at 638-39.

38. *Id.* at 639.

39. *Id.*

40. *Id.*

41. *Id.* at 671.

42. *Id.*

with my wife what to have for dinner most nights. These folks are deciding cases consensually in the plenary case load around eighty-five percent of the time.⁴³ They are agreeing to a majority statement, they are agreeing to the rationale, and in ninety percent of the time, almost ninety percent of the time, they are agreeing to the outcome.⁴⁴

This suggests that there are high rates of consensus and high rates of civility at the court of appeals. These rates are as high as ever seen at the United States Supreme Court, which occurred in the early 1800's under John Marshall, where there was around eighty-five percent unanimity.

The continuation of these high rates suggest that this high consensus, is not time bound. This is not something that was just present for a particular group. It also does not seem to be related to how the judges were chosen, since some of the judges during the 1987 term and through the 1992 term had been elected, at least initially, Wachtler,⁴⁵ for instance, and it also suggests that it is not related to jurisdictional pressures, such as the change in 1985 when the court got significantly greater discretion over its case load.

I would point out that in other time periods that I looked at, there was similar consensus at the court of appeals during the early '80's. So, again, we see some of the suggestion that this is not time bound. If it is not time bound, my observation would be that it is something about the court itself.

There are some horizontal pressures, some internal expectations, about how the court of appeals is supposed to act that contributes to this high rate of consensus and civility at the court. One of these factors I would suggest is leadership. The court of appeals has traditionally had quite strong Chief Judges. Cardozo,⁴⁶ during his time period, the early twentieth century,

43. *Id.*

44. *Id.*

45. See Bierman, *supra* note 30, at 637, n. 12, 646 (noting that Chief Judge Sol Wachtler resigned following his arrest on federal felony charges).

46. Benjamin N. Cardozo was appointed to serve as Chief Judge of the New York Court of Appeals in 1926 and was appointed by President Hoover in 1932 to the United States Supreme Court.

there was little dissent at the court of appeals.⁴⁷ Most cases were decided consensually and, as people have observed, there was not a whole lot of hostility in what few dissents there were. Consensus and civility.

Chief Judge Fuld⁴⁸ in his articles and writings about dissent indicated they were expected to be few. You were supposed to present a uniform appearance for institutional strength to the court.

Breitel⁴⁹ was characterized as offering what Wachtler in his tribute said “rough fondling” in order to promote a united front for the court to reach particular results, unanimous results.⁵⁰

Wachtler, during the ‘87-‘92 term, was seen as a Chief Judge highly committed to consensus and civility on the court as important for institutional factors. He was recognized as a charming, eloquent, dominant force, at least at the beginning of the term as Chief Judge. His personality permeated the court, but perhaps more importantly, during this time period that I looked at, he was very senior on the court. He had served fourteen years as an associate judge, two years as Chief Judge, when the next most senior judge on the court had been there only four years, Simons,⁵¹ having been appointed in ‘83, this being 1987. There was much opportunity for leadership from the Chief Judge consistent with how the court of appeals was supposed to act.

47. See A REFERENCE GUIDE TO THE UNITED STATES SUPREME COURT 271 (1986).

48. Stanley H. Fuld was appointed to the New York Court of Appeals as an Associate Justice in 1967 and was appointed Chief Justice in 1967.

49. Chief Judge Charles D. Breitl joined the New York Court of Appeals in 1966 and retired in 1978 after serving, for five years, as chief judge.

50. Sol Wachtler, *A Chief Judge Remembers*, N.Y. L.J., January 8, 1992, at 2. In an essay written for a memorial speech for former Chief Judge Breitl, former Chief Judge Wachtler explained “[o]nce when I complained about [Breitl’s] persistent methods he said I should not mistake harshness for a lack of affection and regard, he said he was guilty of no more than ‘rough fondling’.” *Id.*

51. Judge Richard D. Simons was appointed to the New York Court of Appeals in 1983.

In addition, there was significant opportunity for influence among the judges, how they interacted, as William Brennan has been suggested as being influential at the United States Supreme Court.⁵² There was an ability to persuade people to reach a particular result.

Vin has suggested during the earlier period there was a three judge bloc. My work also suggests during this period there was a very strong bloc between Wachtler, Simons and Bellacosa that made it easier for the others to come to agreement with them.⁵³

Wachtler was sort of the elder statesman on the court. He had been there the longest, strong intellect, popular among the court, at least at the beginning. Simons, the respected senior associate judge, and Bellacosa, as a friend of the Governor, and the Chief Judge and criminal law commentator. A significant variety of pressures from within to render influence upon the other members of the court. And perhaps most importantly are the concepts associated with socialization, pressures to conform their conduct to particular norms of how the court of appeals operates.

The court of appeals has traditions about doing things in particular ways, and certainly civility, consensus and deference are among those. There is traditionally high rates of affirmance, deference to other courts, to the lower courts and few dissents. What few dissents there were offered in more general tones. There was not a lot of brow beating in the dissents.

This can be seen from the experiences of the judges between '87 and '92. Five of the seven judges during this period were lower court judges, four of them at the appellate division.⁵⁴

52. See *supra* note 30, at 648 (explaining that "Justice William Brennan's 'stature' derives from 'the way he enabled others charged with writing an opinion for the Court to bring a majority together or hold it together . . . and in the way he led so much of the discussion within the Court on the issues that served as the cornerstones of major Supreme Court pronouncements.'").

53. *Id.* (discussing Judge Bellacosa, Bierman states, "[h]is preferences during the 1987-92 terms placed him on a conservative block with Wachtler and Simons.") *Id.*

54. See BIERMAN, *supra* note 30. As career judges in the New York State judiciary, the court of appeals judges during the 1987-92 and 1994-95 terms have had extensive experience in the lower echelons of the state judiciary. Of the ten court of appeals judges during these terms, six have served on the

There is a professional maturity that occurred for these judges in the judiciary with the traditions of the court of appeals.

They were deferential to each other as lower court judges, deferential to the court of appeals itself as lower court judges, and the lower appellate courts in New York in particular have high rates of unanimity, as high as ninety-eight percent in some cases. In other words, there is this idea that they are supposed to be enacted in this manner: consensually and civilly.

One of the seven, Judge Kaye, had been a lawyer who had to comport herself as a practicing lawyer, no judicial experience when she first came to the court, to follow the processes that are affiliated with being a lawyer and arguing as a litigator to a court.⁵⁵

The one who is different, whose professional experiences was different, was Judge Bellacosa.⁵⁶ He had a dissimilar experience with collegiality, unlike the others. His professional experience was in non-judicial leadership roles. He was a law clerk to a presiding justice. He was an academic dean at a law school in a leadership role, and perhaps importantly he was chief counsel and clerk to the court of appeals and the Chief Administrative Judge.

Each of these kinds of experiences did not provide him with the same kind of experiences that the others had in collegiality and socialization to the prevailing factors at the court of appeals. We see that in uncharacteristic dissents by Bellacosa. Uncharacteristic for the court of appeals. Using, for instance, in *Boreali*,⁵⁷ an exclamation mark. We usually do not see judges use exclamation

Appellate Division, New York's intermediate court, and three others have served as judges on New York's state trial courts. *Id.* at 653-54.

55. Chief Judge Judith S. Kaye was appointed to the court of appeals as an associate judge in 1983. In 1993, she became the first female Chief Justice of the New York Court of Appeals.

56. Judge Joseph Bellacosa was appointed to the New York Court of Appeals in 1987.

57. *Boreali v. Axelrod*, 71 N.Y.2d 1, 19, 517 N.E.2d 1350, 1360, 523 N.Y.S.2d 464, 474 (1987) (Bellacosa, J., dissenting). Judge Bellacosa stated that "[i]f the greater power exists, the lesser, as responsibly exercised . . . should not be forbidden!" *Id.*

points in opinions. Bellacosa did that shortly after he joined the bench.

In *Luperon*,⁵⁸ a more recent case, Judge Bellacosa, dissenting from the dismissal of indictment, accused the majority of burying their heads like ostriches in the sand.⁵⁹ This isn't the collegial kind of language that you expect from a court that has high civility. So these horizontal pressures promote the uniformity, the consensus and civility that we see in resolving most cases, the plenary case load.

If we turn to the judicial federalism cases,⁶⁰ we see different decision-making characteristics. In the judicial federalism cases during this period, '87 to '92, there is only about twenty-five percent unanimity, consensus. That is far different from the almost ninety percent we saw in the plenary case load.

In the '94-'95 term, taking the education cases,⁶¹ we see in the main education case four different opinions from six judges.⁶² That is highly unusual in the court of appeals. If there is a dissent, there is one dissent. It usually does not operate in that

58. *People v. Luperon*, 85 N.Y.2d 71, 647 N.E.2d 1243, 623 N.Y.S.2d 725 (1992).

59. *Id.* at 84, 647 N.E.2d at 1250, 623 N.Y.S.2d at 742 (Bellacosa, J., dissenting) ("The majority twists the holdings and application of those cases and dangles a distinction without any legal differences as a justification for the courts, burying their heads like ostriches against the realistic appraisal of what is 'going down' in these cases") *Id.* at 87 n.1, 647 N.E.2d at 1252 n.1, 623 N.Y.S.2d at 744 n.1.

60. "In the five terms between 1987 and 1992, the court of appeals decided 30 judicial federalism cases." BIERMAN, 12 TOURO L. REV. at 640. "Judicial federalism cases are those in which the court of appeals specifically addressed whether to adopt a federal constitutional doctrine or to define a distinct rule as a matter of state constitutional law." *Id.* at 638.

61. *See City of New York v. State of New York*, 86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553 (1995); *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565, (1995); *Reform Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo*, 86 N.Y.2d 279, 655 N.E.2d 647, 631 N.Y.S.2d 551 (1995).

62. *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995) (Judge Ciparick wrote the majority opinion, Judge Levine filed a concurring opinion and Judges Simons and Smith each filed dissenting opinions).

way. It is very different from how the court of appeals resolves the plenary case load, indicating that Chief Judge Kaye's comments were quite accurate. The court approaches these cases differently.

So what is it? I would suggest that it is vertical tensions from the Supreme Court that are not usually present. Usually there is no tension in the plenary case load from the outside. Usually the court of appeals perceives itself as the final arbiter of state law. With tort law, contracts and the interpretation of state statutes, the New York Court of Appeals generally does not go outside of New York to resolve those issues. It attempts to resolve those issues as the preeminent state court in the country. Certainly citation studies show that the court of appeals during this century has been the most influential court, rather than the other way around. The court does not need to and generally does not go outside to resolve questions of state law.

State constitutional questions should be decided in much the same way. And they are uniquely New York. It does not matter what other people have to say. But the judicial federalism cases⁶³ place the court of appeals in an unusual situation. They consider state constitutional law within the context of federal constitutional doctrine and direction from the United States Supreme Court. In this aspect, the court of appeals is not considered, perhaps, rightly or wrongly, the top of the judicial pyramid.

If we think about how courts generally are presented, we have the Supreme Court up top and then sort of the dual court system that we recognize with the State Supreme Court below it and the state intermediate appellate courts and state trial courts and the United States Court of Appeals on the other side below the Supreme Court and the trial and the federal district court below that. The idea being that the state supreme court is sort of identical to the United States Court of Appeals. I am sure you can all think of charts that you have seen, standard textbooks, that represent the court system that way.

63. *See id.*

One of my students gave me a document he took out of a business law course. It shows the hierarchy of the law. I can just give it to you. The United States Constitution is way up here and then there are treaties and federal statutes below that. Federal administrative law below that. Federal common law below that. Finally we get to state constitutions, state statutes, state administrative law and state common law way at the bottom.

We know this is sort of not the way it really works. There is really more of a dual process. If we are going to represent these things, maybe the United States Constitution should be half a block over from the State Constitution, the United States Supreme Court half a block ahead of State Supreme Courts, because they are independent with regard to state law, but this seems to get lost.

We see that in some of the writings at the court of appeals. For instance, in *Immuno AG v. Moor-Jankowski*,⁶⁴ it is a case that was trying to decide the extent to which a letter to the editor expressing an opinion is subject to an action for defamation. The court of appeals originally decides the letter was insulated from action under federal and state constitutional law.⁶⁵

The case gets appealed to the Supreme Court.⁶⁶ The Supreme Court vacates and remands⁶⁷ with a direction for further

64. 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, 500 U.S. 954 (1991). The New York Court of Appeals concluded that "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution." *Id.* at 249, 567 N.E.2d at 1278, 566 N.Y.S.2d at 914. The court held that the immediate context and the broader social context in which a published statement was made should be considered in determining whether the statement is one conveying opinion or fact. *Id.* at 256, 567 N.E.2d at 1270, 566 N.Y.S.2d at 918. This case further articulates New York's historical interest in providing the environment for the free exchange of ideas. *Id.* at 250, 567 N.E.2d at 1270, 566 N.Y.S.2d at 914.

65. 77 N.Y.2d at 252-53, 567 N.E.2d at 1280, 566 N.Y.S.2d at 916 (finding that letters to newspapers may be the only available opportunity for public citizens to freely write and express their ideas).

66. *Immuno AG v. Moor-Jankowski*, 497 U.S. 1021 (1990) (vacating judgment and remanding the case to the New York Court of Appeals as a matter of comity so that it may be reconsidered in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)).

consideration in light of a subsequent Supreme Court decision.⁶⁸ The court of appeals goes back and uses United States Constitutional Law first and then as an independent ground for State Constitutional determination they decide that the federal standard provides protection but the state standard is even more protective.⁶⁹ The majority justifies the dual constitutional analysis because the United States Supreme Court mandated it.⁷⁰ It said remand and reconsider.⁷¹

Simons' concurrence in this case suggests that the court of appeals is really little more than an intermediate appellate court in the federal decision-making process.⁷² The court of appeals in this perspective is not seen at the top of the heap in the national judicial hierarchy. It takes marching orders from the Supreme Court.

This tension from the outside is not usually associated in the plenary case load. The court of appeals does not decide cases with regard to outside pressure, for example, by looking at what

67. *Immuno AG*, 497 U.S. at 1021.

68. *Milkovich*, 497 U.S. 1 (1990) (holding that there is no separate constitutional privilege for statements that may be opinions and that statements on public matters must be proved false before they are actionable by requiring a determination of whether they are matters of opinion or fact).

69. *Immuno AG*, 77 N.Y.2d at 248, 567 N.E.2d at 1277, 566 N.Y.S.2d at 913 (explaining that "the Supreme Court under the Federal Constitution fix[es] only the minimum standards applicable throughout the Nation, and the State courts supplement[s] those standards to meet local needs and expectations.").

70. *Id.* at 239, 567 N.E.2d at 1272, 566 N.Y.S.2d at 914 (stating that "[o]n plaintiff's petition, the United States Supreme Court granted certiorari, vacated our judgment, and remanded the case for further consideration . . .").

71. *Id.*

72. *Id.* at 257, 567 N.E.2d at 1282, 566 N.Y.S.2d at 918 (Simons, J., concurring). Justice Simons explains that although the court of appeals is the highest court in the state, in the federal judicial system it acts as an appellate court, stating that "[w]hen the Court [of Appeals] reviews a question of Federal constitutional law, however, it acts as part of a larger judicial system embracing not only New York but the Nation as a whole. When Federal questions are presented, its institutional functions are subordinated to the Supreme Court and it acts, in effect as an intermediate court." *Id.* at 260-61, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921.

is Wyoming doing. They do not usually do that. The tension is being introduced from above and outside. We see it even in other cases, even cases that are said to be highly supportive of independent state constitutionalism.

The *Scott* and *Keta* cases,⁷³ for example, are the two cases that dealt with questions about the open fields doctrine administrative search.⁷⁴ The searches are permissible without a warrant under the Federal Constitution.⁷⁵ The question was what is permissible under the New York State Constitution.⁷⁶ The court of appeals decided under the state constitution that these are unconstitutional searches without a warrant and the majority relied on unique state protection for citizens.⁷⁷

73. See *supra* note 28.

74. *People v. Scott*, 79 N.Y.2d 474, 478, 593 N.E.2d 1328, 1330, 583 N.Y.S.2d 920, 922 (1995) (citing *Oliver v. United States*, 466 U.S. 170 (1984)). The open fields doctrine provides "that in areas outside the curtilage, an owner of 'open fields' enjoys no Fourth Amendment protection. This is so . . . even for secluded lands and notwithstanding efforts of the owner to exclude the public by erecting fences or posting 'No Trespassing' signs." *Id.*

Citing *New York v. Burger*, 482 U.S. 691 (1987), the court of appeals noted that the Supreme Court held that provisions of the Vehicle and Traffic Law statutes that provide for warrantless administrative searches of auto dismantling shops do not violate the protection of the Fourth Amendment against unreasonable searches and seizures. *Scott*, 79 N.Y.2d at 492-93, 593 N.E.2d at 1339, 583 N.Y.S.2d at 931.

75. *Id.* at 482-83, 593 N.E.2d at 1333, 583 N.Y.S.2d at 925. The Supreme Court allowed open field searches based on the literal language of the Fourth Amendment which provides protection to the people "in their persons, houses, papers and effects." *Id.* (citing *Oliver*, 466 U.S. at 177). In allowing warrantless administrative searches, the Supreme Court "stressed that the state had a substantial interest in regulating the vehicle dismantling industry" *Id.*

76. *Id.* at 495-96, 593 N.E.2d at 1341, 583 N.Y.S.2d at 933. The New York Court of Appeals is not "bound by decisions of the Supreme Court construing similar provisions of the Federal Constitution" when interpreting State Constitutional provisions. *Id.*

77. See generally *Scott*, 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920. Under the New York State Constitution both open-fields searches and warrantless administrative searches have been held to be unconstitutional. N.Y. CONST. art. I, § 12.

This is the case in Bellacosa's dissent where he accuses the majority of rejecting uniformity of federal and state law, discarding the Supreme Court's definition, and propelling the court in an articles of confederation type argument.⁷⁸

The concerns noted the discordancy of the state constitutional adjudication but defends it anyway. However, the way the court of appeals defends it, although perhaps eloquent on some levels, relies on the Supreme Court, by saying it is okay for state courts to decide state constitutional questions independently in some instances.

Why? Because states are laboratories. Laboratories for what? The federal government. That does not ring true to strong independent state constitutions that the idea that the federal government inhibits state constitutionalism.

In the recent term where we saw the education cases,⁷⁹ namely, *Campaign for Fiscal Equity v. State of New York*,⁸⁰ in which, of course, there was a challenge to the public school funding under the state constitution education clause,⁸¹ and the Federal and State Equal Protection Clauses.⁸² The Federal Equal

78. *Id.* at 506-7, 593 N.E.2d at 1348, 583 N.Y.S.2d at 941 (Bellacosa, J., dissenting).

79. *Reform. Educ. Fin. Inequities Today (R.E.F.I.T.) v. Cuomo*, 152 Misc. 2d 714, 578 N.Y.S.2d 969 (1991), *appeal transferred*, 80 N.Y.2d 801, 599 N.E.2d 689, 587 N.Y.S.2d 285 (1992), *aff'd*, 199 A.D.2d 488, 606 N.Y.S.2d 44 (1993), *aff'd*, 86 N.Y.2d 279, 655 N.E.2d 647, 631 N.Y.S.2d 551 (1995); *City of New York v. State of New York*, 84 N.Y.2d 812, 647 N.E.2d 120, 622 N.Y.S.2d 914, *aff'd*, 86 N.Y.2d 286, 655 N.E.2d 649, 631 N.Y.S.2d 553 (1995), *aff'd*, *Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

80. 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (holding that under a rational basis review, the state's educational financing system, based on funding from property taxes, was rationally related to its legitimate interest in controlling education on a local level).

81. N.Y. CONST. art. XI, § 1. Article XI, section 1 provides in pertinent part: "The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." *Id.* This section is often referred to as the "Education Clause."

82. U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No state shall . . . deny to any person within its jurisdiction

Protection challenge was rejected by the court five to one, no Federal Equal Protection clause.⁸³ The state equal protection challenge was also rejected by the court four to two, but it was resolved in terms and with the language of Federal Constitutional precedent in the dissent.⁸⁴

Smith's dissent uses language of the Federal Constitution, discriminatory intent, discriminatory in fact, and relies heavily on all of the United States Supreme Court cases dealing with this.⁸⁵

equal protection of the laws." *Id.*; N.Y. CONST. art. I, § 11. This section provides in pertinent part: "[N]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

83. *Campaign for Fiscal Equity*, 86 N.Y.2d at 319, 655 N.E.2d at 668, 631 N.Y.S.2d at 572 (Smith, J., dissenting) (relying on *Nyquist*, the majority concluded that the plaintiffs' allegations that the state's school financing scheme violated the Equal Protection Clauses of the Federal and State Constitutions should be dismissed, where Judge Smith found that plaintiffs stated a valid equal protection claim under the Federal Constitution).

84. *Id.* Judges Simons, Titone, Bellacosa and Levine concluded that the action alleging that the State's school financing scheme violated the Equal Protection Clause of the State Constitution must be dismissed in light of the court's decision in *Levittown Union Free Sch. v. Nyquist*, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982), where the court adopted the reasoning of *San Antonio School Dist. v. Rodriguez*, 411 U.S. 1 (1973). In *Levittown*, the court of appeals determined that the rational basis test was the appropriate standard of review under the Federal and the New York State Constitutions for an equal protection claim against a state school's funding system. *Levittown*, 57 N.Y.2d at 44, 439 N.E.2d at 366, 453 N.Y.S.2d at 651. In *Rodriguez*, the United States Supreme Court found that "[s]ubstantial interdistrict disparities in school expenditures . . . still exist . . ." *Rodriguez*, 411 U.S. at 15. The United States Supreme Court further held that "[t]he constitutional standard under Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest . . ." *Id.* at 55 (citing *McGinnis v. Royster*, 410 U.S. 263, 270 (1973)). Accordingly, the majority in *Campaign for Fiscal Equity* recognized that rational basis review should be used in determining claims of equal protection. *Campaign for Fiscal Equity*, 86 N.Y.2d at 320, 655 N.E.2d at 688, 631 N.Y.S.2d at 572.

85. *Id.* 86 N.Y.2d at 344-49, 655 N.E.2d at 683-86, 631 N.Y.S.2d at 587-89. In reaching its decision, the court of appeals relied on case law handed down from the United States Supreme Court. *See Arlington Heights v. Metropolitan Hous. Corp.*, 429 U.S. 252, 264-65 (1977), *cert. denied*, 434 U.S. 1025 (1978), *aff'd*, 616 F.2d 1006 (7th Cir. 1980) (stating that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact . . ." where "[p]roof of racially discriminatory intent

This is a state constitutional question. And these differences can also be seen in the sort of disrespect or perhaps lack of understanding of state constitutional adjudication that can be seen in the way that the court got rid of or rejected the state constitutional equal protection claim.⁸⁶

Judge Ciparick wrote an opinion for the court, which is identified as the majority opinion.⁸⁷ In that opinion Judge Ciparick rejects, or there is a paragraph rejecting, the state equal protection claim, an argument that Judge Ciparick does not even agree with.⁸⁸ She is with the dissent on the state equal protection claim.⁸⁹ They throw this resolution to the state equal protection issue in Ciparick's opinion that she does not even agree with.⁹⁰

It is just sort of this weird kind of resolution of an issue in one paragraph without a great deal of discussion. However, it is part of a majority statement that the person writing the majority

or purpose is required to show a violation of the Equal Protection Clause"); see also *Washington v. Davis*, 426 U.S. 229, 242 (1976) (stating that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the constitution"). Additionally, the New York Court of Appeals relied on *People v. New York City Transit Auth.*, 59 N.Y.2d 343, 350, 452 N.E.2d 316, 319, 465 N.Y.S.2d 502, 505 (1983) (stating that a cause of action, under the New York State Constitution, for an equal protection violation, requires a showing of "purposeful discrimination [a]s a necessary element").

86. *Campaign for Fiscal Equity*, 86 N.Y.2d at 320, 655 N.E.2d at 668-69, 631 N.Y.S.2d at 572-73 (finding that the plaintiffs failed to establish discriminatory intent which is necessary in an equal protection cause of action based upon disproportionate impact upon a suspect class).

87. *Id.* at 333, 655 N.E.2d at 676, 631 N.Y.S.2d at 580.

88. *Id.* at 319, 655 N.E.2d at 668, 631 N.Y.S.2d at 572. "Judge[s] Smith and [Ciparick] respectfully disagree [with the dissent] and would sustain the . . . cause of action under the State Constitution . . ." *Id.* Judges Smith, in dissent, and Ciparick, in the majority, agreed that "New York's historical and constitutional commitment to public education establishes as an integral and substantial right of every citizen in our State, and a heightened level of scrutiny should be applied to review the . . . financing [of] public education." *Id.* at 355, 655 N.E.2d at 689, 631 N.Y.S.2d at 593.

89. *Id.*

90. *Id.*

doesn't even agree with.⁹¹ That's hardly greatly respectful of state constitutional adjudication. It hardly bodes well for intelligent, independent state constitutionalism, and it reflects, again, the focus that the United States Supreme Court plays on resolving state constitutional issues.

The irony is that the New York Court of Appeals does have complete control over state constitutional issues. The court can resolve it however it wants. We see this done in the resolution of the education clause issue in that case where they resolve the education clause issue without discussing the other states or the Federal Constitution.⁹² They treat the State Constitution as an independent source not subject to influence, even though this is an issue that has been dealt with in many courts across the country. They treat the issue as their own, which they do not do in these particular judicial federalism issues.

So what we see is that in the plenary case load, there are horizontal pressures from within the court, things like leadership, influence, and socialization that produce widespread consensus and civility. In the more narrow judicial federalism cases we see tensions exerted from the outside. We see the United States Supreme Court exerting influence and the judges not really knowing or understanding or exercising the kind of independence that they usually are able to show in resolving state law questions. They ignore the realities of state constitutional adjudication.

The New York State Constitution predates the Federal Constitution and the United States Supreme Court has no authoritative power over state law. The independence of states requires unique and independent state approaches which the New York Court of Appeals has so far been unable to really come up with.

91. *Id.* at 355, 655 N.E.2d at 689, 631 N.Y.S.2d at 593.

92. *See generally Campaign for Fiscal Equity*, 86 N.Y.2d at 337, 665 N.E.2d at 678, 631 N.Y.S.2d at 582 (indicating in dissent that the state contributions in New York public school system exceeded those of states when compared against the fiscal contributions of other states toward their respective public schools).

One conclusory paragraph on the state equal protection cases: the opinion of the judge who does not agree with the result is hardly showing independent respect for state constitutionalism. As states continue to deal more with important issues under the State Constitution, particularly in death penalty cases, it is necessary for the courts to come to grips with the issue in a way that they have not done thus far.

Thanks.

Michael Hutter:

Thank you. I would like to open it up for questions, comments from the audience.

Barry Latzer:

I have some questions for you Luke. I think you are leaving out a part of the story that gives me some sympathy for the court. First of all, let us take the *Scott* and *Keta* cases,⁹³ which are among the list of new federalism cases that you deal with. These cases are search and seizure cases, so you are dealing with an area of the law where the New York State provision reads virtually the same as the Fourth Amendment of the United States Constitution.⁹⁴ You are dealing in an area of the law where the United States Supreme Court has made a number of rules already and laws already established. You are dealing in an area of the law where the law is almost totally confused and very difficult to figure out if you just stop with the federal constitutional rule.

In light of all that, I do not blame the judges on the court of appeals for fighting about whether they should now add their two cents and change the law by coming up with some different state constitutional rule.

It seems to me if you consider the fact that the state provisions and the state Bill of Rights⁹⁵ are similar to the Federal

93. *See supra* note 28.

94. *Id.*

95. N.Y. CONST. art. 1, §§ 1-18.

Constitutional Bill of Rights,⁹⁶ and consider the fact there is already Federal Constitutional Law established in this area, and the fact that law is already a mess and confused enough, it seems to me that it is perfectly understandable that there should be dissents and conflict on the court of appeals before going out on a limb and create new law in this area.

The point of my remark is that you seem to a little too hard on the court. I think it is perfectly understandable that they do not treat state constitutional law in a vacuum because it does not exist in a vacuum. It exists in a situation where you already have federal constitutional law on the subject.

Luke Bierman:

My concern is not that they do not treat it in a vacuum. My concern is that they seem to be able to do that in other kinds of cases and they seem to recognize the primacy of New York independence. We get to decide the case.

My concern is that they begin from the premise of there is this federal law out there, this Federal Constitutional Law out there we somehow have to deal with. If it is so confusing or mucked up why do not they just say "We are going to say what it is for New York, we do not care what anybody else has done," which is sort of what they do in other instances, and the other issues, other cases. They do not deal with constitutional issues so much. This is New York. This is the way we deal with the problems.

That they do not seem to do. They begin from this idea of there is all this federal stuff out there and we need to deal with it. Do they? Aside from the floor, the minimum, that is established, beyond that, do they need to talk about it? If it is mucked up, as you suggest, why do not they straighten it out as New York law?

Barry Latzer:

May I respond?

Michael Hutter:

96. U.S. CONST. amend. I-X.

Yes. Most certainly.

Barry Latzer:

My answer to that, at least in the criminal procedure area, is that the courts in New York and the police in New York and the defense attorneys and prosecutors in New York have to follow the federal constitutional rules until the New York Court of Appeals changes those rules. And if you do change them, it unsettles the law. It really changes things. It confuses things, it makes things more difficult.

They are not writing on a blank slate here. It's not as if they are coming in and making law in an area where there has been no law. They are changing it. I guess that's the key to the whole thing. They are really changing the law. We are not talking about an area where there is no law, we are talking about an area where there already is law.

Luke Bierman:

That has not stopped courts in other areas. The United States Supreme Court in the last thirty years has changed the law a couple of different ways and police had to comport their behavior and others had to comport their behavior. That is what courts do. They make policy.

Peter Galie:

I am going to follow up on Barry's question. As someone has written in defense of state independence, your model seems to go in the other extreme. You seem to be suggesting that I want the New York Court of Appeals to act as if New York were the only place and there were no other states or federal government.

For example, you say they did not cite state precedents in the education cases. My understanding is that the state courts have always cited other states, looking to sister states for information, which is relative. As to the federal precedents you seem to

suggest that we want the court to look at its own case load, its own history, forget the rest of the nation.

You talk about putting one's head in the sand.⁹⁷ We cannot ignore the tremendous impact the Supreme Court had on the national consensus about rights. The difficulty the state courts have is they must function in that context, whatever the theoretical argument is about Vanaugh or the independence of State Constitution. That is what creates a problem.

Let me suggest the other problem and why I have some sympathy with the court of appeals even though I have criticized it. Let me suggest why I think the court is not going to work in the way you would like it to work. The primacy model assumes that we start with the State Constitution.⁹⁸ If we can settle on state grounds we do not even look at the federal question. That is the first step. Second, we do our own analysis and we pretend there are three tiers of scrutiny⁹⁹ and protection did not exist because that would constitute an infection. We are going to look at it independently and anew. We want to do New York analysis. Then we use our own precedence and decide the case on state grounds if we can do so consistent with federal law, and we stop right there.

97. See *supra* note 59 and accompanying text.

98. See Daniel Gordon, *Good Intentions--Questionable Results: Florida Tries The Primacy Model*, 18 Nova L. Rev. 759, 761 (1994).

Under the primacy model, a state court develops its own independent doctrines under the state constitution and turns to federal law only when state doctrine does not resolve the issue. *Id.* Thereby avoiding utilization of the Federal Constitution until the state constitution fails to protect an activity protected by the Federal Constitution. *Id.* Furthermore, state courts applying a primacy approach remove themselves from reliance on the Federal Constitution as the basic protector of individual rights. *Id.* This has the effect of avoiding the relegation of state constitutions to the level of protecting rights only when the Federal Constitution fails to do so. *Id.* As a result, state courts look at state constitutional law and decide federal questions only when state law is "not dispositive." *Id.*

99. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that discrimination against any group based on race will merit strict scrutiny, even if that group has never been the subject of widespread discrimination).

Do you really expect state courts to start doing that in every one of these areas of rights or Bill of Rights or other areas? I mean courts are simply not going to do that. I think there are good reasons, some of which have been suggested by Barry.

Luke Bierman:

What I am suggesting is that it is closer to what they actually do in other situations. In a case called *Armstrong v. Simon and Schuster*,¹⁰⁰ a defamation case dealing with standards that we apply for defamation. The court of appeals said, because it is not a constitutional issue in other states, they do not look to other states for defamation.¹⁰¹ The court said that we are going to resolve the standard and we are going to resolve this issue with standards well established in our law.¹⁰²

They do not look to see what Wisconsin is doing. They do not look to see what Texas is doing, or Montana. They approach it from their own perspectives and I am not so much offering a model that I would like to see, however, I think what I am trying to do is suggest that this is the way they are doing it and that has confused things or has caused problems or has promoted this

100. 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477 (1995). A criminal defense attorney representing defendants allegedly involved in a scheme of illegal insider trading, brought suit against the writer, editor and publisher of the book "Den of Thieves." *Id.* Plaintiff sought relief from damages arising from an allegedly defamatory paragraph about his role in insider trading scandals on Wall Street. *Id.* at 376, 649 N.E.2d at 826, 625 N.Y.S.2d at 478.

101. *Id.* at 376, 649 N.E.2d at 826, 625 N.Y.S.2d at 478. The *Armstrong* court states that the state courts of other states have "different standards for measuring the sufficiency of claims of defamation by implication," however, the court of appeals subsequently followed the New York standard. *Id.* at 381, 649 N.E.2d at 829, 625 N.Y.S.2d at 481-82.

102. *Id.* The New York Court of Appeals concluded that "a case of allegedly false statements of verifiable fact, with inferences flowing from those facts, [the plaintiff] bears the burden of proving the alleged falsity as well as the other elements of his claim." *Id.* at 381, 649 N.E.2d at 829-30, 625 N.Y.S.2d at 481-82.

discord because we do not see this analysis in these other kinds of cases.

We do not see it in the general case load, when they certainly could go out and look at what other states are doing when they decide what the elements of negligence are, what the elements of emotional distress, what the elements of contract law for action are. They do not do that. I think that's reflected in the importance they have placed on themselves.

Peter Galie:

They do that when the law in the state is not sufficiently precedent. You make a key point here. That is a non-constitutional area of law. The point is in the area of individual rights we have a powerfully special circumstance in which state courts must function in a way they do not have to function when it comes to tort law or negligence or malpractice or things of that sort. I mean I think that is just reality. One other point I will make and I will shut up about that. You talk about unique state traditions. You know, of course, there is a secret conversation we had about this last night, I admit it. To say simply look at the unique state tradition, you use that phrase, you know that means nothing.

Luke Bierman:

I do not mean that the way I think you are taking it. My point is that it is independent. They can do whatever they want with it.

Peter Galie:

You mentioned something about how the state constitutions pre-existed the national constitution. If you look at New York State, our constitution certainly did predate the federal

constitution but our Bill of Rights did not.¹⁰³ The Bill of Rights was adopted in 1821 and the debates make it very clear that they based it on the federal model and we have changes specifically made imitating the federal model. So, if you want to talk about the state history what you are really suggesting is an indication we ought to be following the federal model.

Luke Bierman:

You are not trying to sell your book,¹⁰⁴ are you?

Peter Galie:

I will shut up on that one.

Vincent Bonventre:

Let me respond first of all, about this stuff about uniqueness of New York or its charter, whether it is post-dated or predated. I do not think that gets us anywhere. I do not think this kind of quasi-textualism argument you are making gets us anywhere. I mean you say the provision in the New York State Constitution is the same as the Federal Constitution. So what? What does that have to do with anything? The provisions in neither of the constitutions answers the question of whether there should be an open field doctrine or whether there should be a warrant for administrative searches. It is just not there.

103. See Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1, 12 (1996) (noting that written by John Jay, New York adopted its first constitution in 1777, which was later used as a model for the Philadelphia Convention). See also Meredith S. Katz, *Attorney-General of the State of New York v. One Green Four Door Chrysler: Does the Punishment Fit the Crime*, 12 TOURO L. REV. 715, 723 (1996) (noting that in 1846, New York State adopted a Bill of Rights in its constitution).

104. Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (Fordham University Press, 1996).

Now you say the Supreme Court has interpreted the Fourth Amendment¹⁰⁵ and it has given answers. And my response to you is, yes, and so? If you are going to say that is one court which has provided an answer, you might say, well, there are other courts that maybe also addressed that question or will address that question and why is it the court of appeals ought to rely on the federal Supreme Court's interpretation of the Fourth Amendment?¹⁰⁶ If it is because the Supreme Court's decision is wise, that is fine, however, that is an independent determination of the court of appeals. The court of appeals independently decided whether the Supreme Court's ruling is wise.

If the court of appeals ought to follow the Supreme Court because of the Court's authority, they have not. They do not have to tell New York what its constitutional provision means regardless of what the words are. If it is that the Supreme Court is doing the same thing, and they are kind of good at it, of course they are not doing the same thing. They simply are not.

Even Rehnquist at his nomination hearings,¹⁰⁷ and confirmation hearings to be Chief, was asked about, well, people are complaining that the Supreme Court is not the primary guardian of rights and liberties anymore, not the conscience of the country anymore.¹⁰⁸ There are all these state courts out there providing more protection than the Supreme Court. Rehnquist says that is exactly the way it is supposed to be.¹⁰⁹ He says we are not the primary guardians, we are not supposed to be the one primarily responsible for safe guarding rights and liberties.¹¹⁰

He says more specifically, you heard it, it is a cliché now, that in his view the Federal Constitution is construed by the Supreme Court provides a minimal level.¹¹¹ I do not think Rehnquist just

105. U.S. CONST. amend. IV.

106. *Id.*

107. 12 MERSKY & JACOBSON, THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1986 (1989).

108. *See generally id.*

109. *Id.*

110. *Id.*

111. *Id.* at 451. Justice Rehnquist stated:

means minimal level that it is the floor level, that states can not go below it.¹¹² Rehnquist also means a low level, he means a low level of rights.¹¹³ The Supreme Court is supposed to insist on a low level of rights because the Supreme Court doesn't want to interfere with state sovereignty.¹¹⁴ That is because in Rehnquist's view, and I think the view of many of the justices of the Supreme Court, if not a majority of them, is that the Court is always concerned about federalism, about state sovereignty, about the state's authority to be independent.¹¹⁵

Now, if the court of appeals wants to rely on the federal Supreme Court decisions because they think uniformity is good, well, then, hell, I think that Luke is right, then explain it. Say that's what we are getting at. Do not start making excuses as to why we are following them or abiding by them or why we are not.

If uniformity is good, tell us why it is good. I have not seen the argument at the court of appeals. What about the court of appeals' oath to the State Constitution? Does that mean anything? Does the State Constitution mean anything? Does it have any independent character? If it does not, why do we have it? Why bother having those provisions that supposedly protect rights?

The Federal Constitution certainly lays down one rule for all 50 States, and if some States want a more stringent prohibition against searches and seizures than that provided by the Fourth Amendment, it just makes sense that they ought to have it. If some States are content with the Federal provision, which everybody has to live up to, it seems to me that makes sense for them to have that. I think it is a very healthy development.

Id. Additionally, Senator Mathias questioned Justice Rehnquist, "So you would view the protections in the Federal Constitution as the floor and not as the ceiling?" Justice Rehnquist replied, "Oh, absolutely." *Id.*

112. *Id.*

113. *Id.*

114. U.S. CONST. amend. X. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people." *Id.*

115. See generally 12 MERSKY & JACOBSON, THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-1986 (1989).

And so I guess whether we are talking about textualism or we are talking about the Supreme Court's decision-making, my response is so what? New York is talking about a different territory, different population. It's not bound by and it does not need to worry about what Wyoming thinks about its decision. New York decides for itself.

Barry Latzer:

The question is not whether the New York Court of Appeals has the authority to interpret the State Constitution the way they want, you know we do not disagree on that. The issue is: what is the reason why there is dissention on the court of appeals in the new federalism cases? That is Professor Bierman's point that there is more disagreement in the new federalism cases.

So the question is why is there more disagreement? My answer is because here we have a controversial area of law and here we have an area of law where the United States Supreme Court has established legal rules and principles. And now the court of appeals is being asked to reject, to repudiate, those legal rules and principles established by the United States Supreme Court. I would say that realistically that has to be a source of conflict on the court of appeals. That is the source of conflict.

If you are asked to step out as a state judge and repudiate a rule established by the United States Supreme Court, I think you would think twice about it, too. That is the reality of it. By the way, I do not believe you are correct that the court of appeals does not take that into account formally when they make decisions.

In *P.J. Video*,¹¹⁶ I believe, when they were announcing their interpretive guidelines for state constitutional law, did they not say there that they take into account and have great respect for what the United States Supreme Court has said on the questions?

116. *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986), *cert. denied*, 479 U.S. 1091 (1987) (holding that the New York State Constitution imposes stricter standards for the issuance of a search warrant than does the Federal Constitution).

If they have, then that means they have formally and officially acknowledged the role of the United States Supreme Court.¹¹⁷

I think both of you are being very unrealistic about the environment in which the state courts are operating. They are not operating in a vacuum. If this were an area where the Supreme Court had never said anything or rights had not yet been incorporated into due process, and the Supreme Court was speaking only for the federal government, then I would think you are a hundred percent correct, the court of appeals should just ignore everybody else and decide Article 1, Section 12¹¹⁸ the way they think it ought to be decided. However, that is not the real world.

We have three decades, since the '60's, of the United States Supreme Court speaking on these questions and developed an entire body of law. I think before you repudiate that, a judge, it is legitimate for a judge to think twice about repudiating that part of that body of law.

Vincent Bonventre:

But, you know, when the court of appeals renders an independent decision, it's not repudiating the Supreme Court's decision, it's doing a different thing.

Barry Latzer:

It is repudiating the doctrine. It can not repudiate the Supreme Court just as the Supreme Court cannot really repudiate what the court of appeals is saying. However, the court of appeals is rejecting the doctrine, the rules, and the principles that the United States Supreme Court has established.

If you were on the court, would you not think twice before you did that? I would.

Vincent Bonventre:

117. *Id.* at 301-02, 501 N.E.2d at 560, 508 N.Y.S.2d at 911.

118. N.Y. CONST. art. I, § 12.

I would not.

Barry Latzer:

I do not think there is anything wrong with the judges of court of appeals fighting about it. I think it is understandable. That is my point. My point is the source of the conflict is the fact that they are repudiating established Federal Constitutional law, the doctrine, now, not the law itself.

Luke Bierman:

Why do we not see in other areas, with regard to state issues, non-constitutional state issues? They are unanimous ninety percent of the time.¹¹⁹ They are not looking to other states for direction on issues that arise. This is a court under the new jurisdictional scheme that is supposed to be taking the most contentious and important cases. Those cases that, in theory, a country with a national law system, in many ways, should be seen all over the place. We do not see that with regard to those cases.

Barry Latzer:

But you have answered your own question. If New Jersey makes defamation law, it is only good in New Jersey. And if New York makes defamation law it is only good in New York. But if the Supreme Court says something about the First Amendment¹²⁰ which implicates defamation law, it is the law everywhere unless rejected by the states on independent state

119. See Bierman, *supra* note 30, at 639-40.

120. U.S. CONST. amend. I. The First Amendment provides in pertinent part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Id.

grounds. That is the answer to your question. The answer is that New York does not have to follow New Jersey but it does have to follow the Supreme Court until they reject them.

Vincent Bonventre:

The Supreme Court's ruling, of course, is only binding as a floor. And so you still have a state tribunal which is obliged to determine whether that floor is where the state's law ought to be. And if it does not agree that the state's law ought to be at the floor, I do not see how that is repudiating the Supreme Court.

Barry Latzer:

It is repudiating the doctrine. The day before the *Scott* and *Keta* cases¹²¹ were decided, did you need a warrant to search open fields for marijuana in New York? The answer is you did not. In fact, not only did the United States Supreme Court say you did not need a warrant,¹²² even the New York Court of Appeals said you did not need a warrant.¹²³ I have forgotten the name of the case, but there was a previous case which the New York Court of Appeals ruled on the very question.¹²⁴ They said, themselves, you did not need a warrant to search an open field.¹²⁵

Therefore, the law was clearly established in New York, beyond question, that you did not need a warrant to search open fields. The day after the *Scott* and *Keta* cases¹²⁶ you did need a warrant. Should that lead to a debate and a fight on a court? I

121. See *supra* note 28 and accompanying text.

122. See *supra* note 74 and accompanying text (finding that a warrantless search is allowed because an owner of open fields enjoys no Fourth Amendment protection).

123. See *People v. Reynolds*, 71 N.Y.2d 552, 523 N.E.2d 291, 528 N.Y.S.2d 15 (1988) (holding that a warrantless search of an open field, even without probable cause, was justified as a property owner does not have a reasonable expectation of privacy in open fields).

124. *Id.*

125. *Id.*

126. *Id.*

think so. They are changing the law. You know what I would compare? I would compare the new federalism cases to the non-new federalism cases where they are making major changes in the law.

This is what I would suggest to Professor Bierman if he wanted to do a follow up, and let us see how much dissention and conflict there is in those non-new federalism cases where they are making significant changes in the law. My wager is you will find just as much conflict. That would be my hypothesis.

Michael Hutter:

Comments on the comments? Other additional questions?

Audience Member:

I would like to steer the discussion to something else, Professor Bonventre, you brought up in my mind. You appeared to express some concern that what might occur within the next few years of appointments could become increasingly a political mirror of what has happened. Did I perceive what you said or are you concerned that people are going to start--

Vincent Bonventre:

I am not concerned. I think that would be healthy if the court of appeals' nomination process were a little more honest than it is now.¹²⁷ Except for Ciparick's hearing,¹²⁸ the court of appeals'

127. N.Y. JUDICIARY LAW § 63 (McKinney 1996) (detailing the functions of the Commission on Judicial Nomination in considering candidates for appointment to the office of judge of the court of appeals by evaluating the qualifications of candidates for appointment and, as vacancy occurs, recommending to the governor those persons who are well qualified to hold such judicial office).

128. *Hearings Before the New York State Senate Standing Committee on Judiciary on the Nomination of the Honorable Carmen Ciparick as Associate Judge of the Court of Appeals*, Dec. 15, 1993. See also Gary Spencer, *Conservative Look to 1994 Rulings: Prosecutors Have Reason to Be Encouraged*, N.Y. L.J., Oct. 3, 1994, at S2. (stating that Judge Ciparick was elevated to the state's highest court on January 4, 1994, but that her

hearings to date have largely been rubber stamped and we end up knowing nothing about these people.

I mean they are asked the obligatory questions. Do you think judges should make law? No, I do not. Do you think judges should legislate? No, I do not. Will you simply apply the law? Yes, I will. As though there is any particular law that is so clear that they are going to be making law the very first day they step into the hall on Eagle Street.¹²⁹ I think, until the Ciparick hearing,¹³⁰ by and large these nomination hearings are a charade. I would welcome those nomination hearings being a little more insightful than they are right now.

I am certainly not suggesting they ought to go to the extent that the United States Senate judiciary hearings have gone with Bork¹³¹ and some others.¹³² I think that would be a disaster, but certainly there are legitimate questions to ask these people.

confirmation was highly contentious as 25 of 59 New York state senators voted against her conformation as a reaction to Judge Ciparick's controversial opinion in *Hope v. Perales*, 150 Misc. 2d 985, 571 N.Y.S.2d 972, (Sup. Ct. 1991), *aff'd*, 189 A.D.2d 287, 595 N.Y.S.2d 948 (1993), *rev'd*, 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994) (Judge Ciparick holding that the State Constitution protects a woman's right to an abortion)); Gary Spencer, *Ciparick Faces Sharp Questions from Senators*, N.Y. L.J., Dec. 16, 1993, at 1 (questioning by "frustrated" state senators and assailed right-to-life advocates over Judge Ciparick's landmark abortion rights decision); Gary Spencer, *Ciparick Named to Court of Appeals: Supreme Court Justice is First Hispanic Nominee*, N.Y. L.J., Dec. 2, 1993, at 1 (nominated by Governor Mario Cuomo, Carmen Beauchamp Ciparick is the second woman and the first Hispanic woman on the state's highest court).

129. The New York Court of Appeals is located at 20 Eagle Street, Albany, New York.

130. See *supra* note 128 and accompanying text.

131. *Hearings Before the Committee on the Judiciary United States Senate on the Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st Sess. (1987). The nomination of Bork to the Supreme Court of the United States stirred a heated political battle. *Id.* Robert H. Bork graduated University of Chicago Law School where he was the managing editor of the *Chicago Law Review*. *Id.* at xi. Bork later served as Solicitor General. *Id.* After his service as Solicitor General, Bork returned to private practice only to leave when President Reagan appointed him to a judgeship on the United States Court of Appeals. *Id.* at xii.

Especially when we are talking about this, and, if Pataki¹³³ gets re-elected and, he is going to replace Titone,¹³⁴ should the public know, and, should the Senate Judiciary Committee know what that nominee thinks about the court of appeals' decisions, what the nominee thinks the role of the judiciary, the role of the state court is? Whether he thinks the court of appeals should presume the validity of Supreme Court decisions or whether he or she believes the court of appeals should be independent? Whether that judge's philosophy is more pro independent individual rights or pro government in the very open difficult, controversial cases? Sure. I think the Senate is entitled to know and we are entitled to know.

Luke Bierman:

On July 1, 1987, President Reagan announced his intention to nominate Judge Bork to be an associate Justice of the Supreme Court of the United States. *Id.* Soon after, the Judiciary Committee, led by Joseph Biden, announced that confirmation hearings would commence in September when Congress returned from its summer recess. *Id.* Liberals opposed Bork, especially on his positions on constitutional rights of free speech and privacy. *Id.* at xiii. Conservatives subsequently attacked the liberals stressing Judge Bork's exemplary credentials. *Id.* The nomination hearing began on September 15, 1987, before the Senate Judiciary Committee. *Id.* at xiv. Compared to prior nomination hearings, Bork's nomination hearing took place for nearly five days with many acrimonious questions and testimony requiring over 750 pages. *Id.*

On October 6, 1987, after listening to over one hundred witnesses, the Senate Judiciary Committee voted to recommend that the Senate reject Judge Bork's nomination. *Id.* Judge Bork continued his valiant efforts to become Justice Bork but "[o]n October 23, 1987, the Senate voted to reject the nomination of Judge Bork to become an Associate Justice of the Supreme Court of the United States by a vote of 58 to 42" *Id.*

132. See, e.g., *Hearings Before the Committee on the Judiciary United States Senate on the Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., 1st Sess. (1991).

133. George E. Pataki was elected governor of New York State in 1994.

134. Joseph Vito Titone was appointed to the New York State Court of Appeals in 1985.

A couple of things. First, even if Pataki is defeated in '98, his influence will be felt because he will have four appointments to the Commission on Judicial Nomination¹³⁵ in addition to the Republican nominees, the Republican appointees to that commission. Even if he is defeated, there is certainly a possibility for the influence remaining for a Titone appointment.

Second thing. It was not unusual, in the earlier years of this century, anyway, at the appellate division, anyhow, for judges to come and go. People would serve five years and then they wouldn't be redesignated and then you would see them again five years later reflecting the Governor making the appointment. Titone not being reappointed, Bellacosa not being reappointed, depending on who the Governors are, when we have judges who are younger than their fourteen year term, the politicization is something that is not unique or is not foreign from New York's judicial appointment process.¹³⁶

One more thing. I just finished reading all of the Senate confirmation hearings. Fourteen appointments, actually only twelve I could get, the Senate does not have two. Professor Bonventre is being much too generous of the kinds of questions that were asked. Some of the hearings lasted as long as thirty minutes, if that, and half of it is introducing the committee. Some of the questions were things like, "Did you bring anybody to talk on your behalf?" Those kind of questions. "Who do we have here to talk?" There is nobody.

Ciparick's is unique.¹³⁷ That is for the fourteenth appointment, there is finally a negative vote.¹³⁸ Of course the negative vote that occurred is only because the abortion cases she had written.¹³⁹ There is really no telling inquiry as there had been

135. *See supra* note 127 and accompanying text.

136. N.Y. JUDICIARY LAW § 63 (McKinney 1996).

137. *See supra* note 128

138. *Id.* (citing to a letter accompanying Judge Ciparick's confirmation hearing, Mr. O'Brien stated that for the reasons discussed at the nomination hearing of Judge Ciparick, she should not be confirmed).

139. *Id.*

previously. You may be charitable in the assessment what these confirmation hearings are really like.

Peter Galie:

One thing I noticed is that you did not detect any difference in the character and collegiality of the court as a function of the mode of selection. We did go through a change in about 1977, so that one would have hypothesized, at least one would have potentially thought, that it might make a difference of the character of the people of the court. Since you make some point about the background in some of the judges that you did not find out I think was revealing. I thought I would mention that.

Vince, first of all, you know I am not going to just arbitrarily select some rights issues out and say we are not going to count those, they are aberrations. That causes all kinds of problems. Independent of that, do you exclude those when you do the bloc analysis, the voting record?

Vincent Bonventre:

No, it was not.

Peter Galie:

You did not exclude those. The final point about your data is that since the real heart of the controversy of the court seems to be not individual rights, but criminal procedure rights, it is fair to say that, it might have been. What you did, at least later, was to split the rights between criminal and non-criminal and look at the record of the criminal. I think that position--

Vincent Bonventre:

I have. It is virtually the same. The same kind of change from the Wachtler era¹⁴⁰ to the era immediately following his departure, and then to these two years. It is the same.

Luke Bierman:

I did that for a couple years earlier and it does not change.

Barry Latzer:

Is there a liberation hypothesis that you are developing, Professor Bonventre? You alluded to this Wachtler leaving.

Vincent Bonventre:

Wachtler was a towering figure at the court of appeals. I mean lots has been written about him. Lots of us worked at the court. Without telling any tales out of school, I think it would be perfectly fair to say this was a man who was extraordinarily influential and persuasive for whatever reason. This is a man who wanted consensus and by and large he got it.

If you look at how the court voted, especially when you contrast how the court voted throughout most of Wachtler's tenure, and you contrast that with how it voted during Cook's¹⁴¹ tenure, and then even the first two years of Wachtler, when he was on the liberal kick, it was a very liberal court. And then all of a sudden after two years of Wachtler it became a very conservative court just like Wachtler did. Wachtler became conservative, the court became conservative. First two years he was very liberal, they were liberal. After that he became conservative, they became conservative. He took that court with him.

140. See 31 N.Y.2d v (1973). Sol Wachtler was elected to the bench on November 7, 1972.

141. See 35 N.Y.2d v (1975) Lawrence H. Cooke was elected to the bench on November 5, 1974.

It is possible something else was going on at exactly the same time that resulted in the court voting largely like Wachtler. When he was liberal they voted like him. When he was conservative, they voted like him. I can tell you having been there, this was a man who was extraordinary.

Barry Latzer:

Do you see Chief Judge Kaye having similar influence in the voting blocs that you studied or not yet?

Vincent Bonventre:

Not quite like Wachtler and all the rumblings are -- no. It is just not the same dynamics at all.

Michael Hutter:

When you start talking about turning points, now, what you alluded to, the recent criticism of the courts, unprecedented at least in my lifetime, how do you see this boding the court, taking this into account?

As perhaps -- say, for example, you have a case before the court, you are trying to extend an individual right granted, have a right recognized, where you are trying to have an individual right taken away, how do you see the court now in light of the criticism that the court has gone overboard on individual rights, how do you see the court reacting to this, if at all?

Vincent Bonventre:

I think with some judges it just will not affect them at all. They will go about doing their job, however well or poorly they have been doing it before or after the criticism. I think there are judges, unquestionably, like Judge Titone, who are so upset at the criticism, not because he does not think there should be criticism, but because he thinks the criticism is totally unfair. And I think judges like Titone are going to dig in their heels, and

they are going to be damned if another branch is going to tell them what to do, tell him or his colleagues what to do.

On the other hand, I do not doubt that there are judges that perhaps do not have Titone's personality and back bone that might start bending because of this criticism. This is perfectly legitimate, whether we agree with the criticism or not, perfectly legitimate for the chief executive of the state to say to the high court, "Hey, guys, you are going too far. It does not make any sense." That is what we write about. Why shouldn't the Governor say that? He ought to be saying that. And it seems to me that the judges have to take that into account, at least considering the fact an equal branch of government is telling them they are not doing their job right, whether it affects their decision or not, but they should be considering it.

Michael Hutter:

I think that gets back to the point that was made earlier by the two of you, Luke especially, lack of principled decision-making with the court. Is this something that is result-oriented decision-making? Do you see this now perhaps happening because of the criticism?

Luke Bierman:

That is not necessarily new. You have written about how they decide way too many cases; less so in the last few years.

Whether it is the Governor yelling and screaming or it is just the way they are, what I am concerned about is the Governor yells and screams, and we see there are changes.

We do not have papers at the court of appeals the way we do at the Supreme Court many years later. It becomes more difficult to try to figure out what is going on. These things are important not just to us, but to the citizens of the state. Seems to me that they should know this stuff, it should be out there more prominently than it is.

Vincent Bonventre:

I mention the possibility of a judge or two digging in his or her heels. Anything is possible. A judge incurring favor with the Governor. He could make one of them chief at some point.

Michael Hutter:

At least three judges have their fourteen year terms coming up and they will have another fourteen years.¹⁴²

Vincent Bonventre:

That is right.

Mr. Kerman:

Michael Kerman with the Department of State. Have there been earlier scandals involving the court as juicy as Wachtler's and has there been a period of criticism immediately thereafter?

Vincent Bonventre:

I remember being asked that question. There was a real scandal. Somebody on the court who was stealing or -- it was years ago. There was a problem with Fuchsberg.¹⁴³ He was accused of having sat on cases in which he had a vested financial interest.¹⁴⁴ Then he was also accused of somebody else writing his papers. But before that, in the last century, there actually was a judge who was to be impeached.

Luke Bierman:

142. In 1981, Hon. Howard A. Levine was elected to the court of appeals. Hon. Judith S. Kaye and Hon. Richard D. Simons were appointed to the court by Governor Cuomo in 1983. In 1985 Hon. Vito J. Titone was appointed to the court by Governor Cuomo followed by Hon. Joseph W. Bellacosa in 1987.

143. *In re Fuchsberg*, 426 N.Y.2d 639 (N.Y. Ct. Jud. 1978).

144. *Id.*

I remember reading about it. The end of the last century, the beginning of this century.

Vincent Bonventre:

They are rare, very, very rare in the history of the court.

Mr. Kerman:

Did they lead to any increased criticism of the court such as we are having now?

Vincent Bonventre:

Are you suggesting that Wachtler's debacle led to the criticism?

Mr. Kerman:

Yes. I am suggesting that.

Vincent Bonventre:

I was very glad to criticize the court before Wachtler left.

Luke Bierman:

There has been criticism. In the early years of the century the worker's compensation cases caused all kinds of problems. That was a big deal. Criticism of the court is nothing new and it should not be. They are a political institution and we should criticize and praise the political institutions when it's appropriate.

Mr. Kerman:

Has the scandal opened up the judicial selection process to make that more contentious as exposing the court to some humanity questions?

Vincent Bonventre:

I do not know. I have not seen that.

Michael Hutter:

Along those lines, has Governor Pataki made any new appointments to the court of appeals' Screening Committee at this point?

Luke Bierman:

I actually have requested that information from the Commission and counsel and have not gotten any response. The way the Commission is structured there are appointments every year. The Governor gets one each year. I requested that information. I cannot answer. I have not seen any news reports.

Michael Hutter:

Our time is up. I would like to thank very much Vin Bonventre and Luke Bierman and the audience's obvious rapt attention to their talks. They have been very enlightening.

Thank you very much again.