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When is the New York Court of Appeals Justified in Deviating from Federal Constitutional Interpretation?

Honorable Richard D. Simons*

Professor Barry Latzer:

The next topic is entitled: "When is the New York Court of Appeals justified in deviating from federal constitutional interpretation? Our presenter is in a particularly good position to answer that question, since he served on the New York Court of Appeals. He served during a period in which the court, I think, began to acknowledge the New York State Constitution perhaps more than any time in its history, certainly any time more than its recent history. Judge Richard D. Simons received his Bachelor's Degree from Colgate University, and an LLB Degree from the University of Michigan Law School, and an Honorary Law Degree from the University of Albany Law School. After time in practice, he spent most of his legal career serving on the bench in one capacity or another. He was first elected Justice of the New York Supreme Court. You will notice that a Supreme Court judge in New York is called a "Justice," and then when he gets to the highest position in the state he is demoted back to "Judge." Judge Simons served as Justice of the Supreme Court for many years.¹

Judge Simons was appointed as a Justice in the Appellate Division where he served in both the Third and Fourth Departments.² From there, he was appointed Associate Judge of the New York Court of Appeals, the highest state court in New York by Governor Mario Cuomo.³ We are delighted to have him

* Judge Richard D. Simons, Judge New York Court of Appeals (retired January 1997).

¹ See Patrick M. Connors, *Dedication to the Honorable Richard D. Simons*, 13 TOURO L. REV. 587-88 (1997). Judge Simons served for eight years on the New York State Supreme Court. *Id.*

² *Id.*

³ *Id.* at 589.

with us and it is obvious that he continues to be active by trying to influence the lawmaking process in New York State. He is the Chairman of the New York State Bar Foundation, a member of the American Law Institute, and a Fellow of the American Bar Foundation. So please give a warm welcome to Judge Richard D. Simons.

Judge Simons:

Thank you, Professor Latzer. Many have noted your observation about Justices of the Supreme Court and Judges of the Court of Appeals and explained it by stating there is no justice in the Court of Appeals. Earlier this morning you were discussing substantive law in New York. I would like to take you to another area, one that has concerned me increasingly as I served on the Court of Appeals: the procedural aspects of state constitutional law. The problem is not significant when you talk in terms of the free speech clause, which differs textually from the United States Supreme Court provision. When the court examines provisions that are exactly the same or very similar, however, how does the Court of Appeals determine when it will depart from interpretation of the language made by the United States Supreme Court? Furthermore, if the court decides that a departure should be made, how does the court justify the departure? For example, refer to the search and seizure provision Article 1, section 12 of the New York State Constitution.⁴ It is exactly the same as the search and seizure prohibition contained in the Fourth Amendment⁵ because it was

⁴ N.Y. CONST. art. I, § 12. Article I section 12 of the New York State Constitution provides in pertinent part:

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

Id.

⁵ U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part:

copied directly from the Federal Constitutional provision. There is no difference in language.

How may the New York Court of Appeals take a search and seizure case before it, resting on federal and state grounds, knowing that the federal court has said the right of privacy interest is superseded by the state interest in permitting that search, and say that the New York Constitution prohibits such a search? How does it justify that kind of a departure from Supreme Court precedent? Justifying such inconsistency is important because the credibility and legitimacy of any court depends upon the principled basis upon which its decisions rest. Hence, if the court is going to disagree with the Supreme Court, there should be a legitimate basis for the disagreement. The Court of Appeals may not merely assume that its analysis of the problem is better than the analysis of the nine people down in Washington.

For many years this was not a particularly important problem. The Court of Appeals established and decided many cases based upon the state constitution. Someone mentioned *Sharrock v. Dell Buick-Cadillac*⁶ earlier which found procedural differences under the state constitution. The right to counsel⁷ is a typical example

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

Id.

⁶ 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978). The New York Court of Appeals held that:

[S]ections 200, 201, 202 and 204 of the Lien Law, insofar as they empower a garageman to conduct an ex parte sale of a bailed automobile, fail to comport with traditional notions of procedural due process embodied in the State Constitution, as they deprive the owner of the vehicle of a significant property interest without providing any opportunity to be heard.

Id.

⁷ N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the

in which the New York State right to counsel is much broader than the federal right to counsel⁸. These differences were limited. When appeals presented both federal and state grounds, the Court of Appeals held routinely, almost by rote, say that whatever action was challenged was either valid or invalid under both the federal and state constitution. As the law began to develop, we reviewed cases where we invoked the state constitution without much analysis.

In *People v. Class*⁹, a case involving a search for a Vehicle Identification Number on the automobile, was first decided in our court on both state and federal grounds. The United States Supreme Court ultimately reversed our order saying there was no violation of the Fourth Amendment. The case was then remanded to our court, and with little discussion or analysis, it was decided that the search was unlawful based on the state constitution.

Moving a little bit further, we had cases under the search and seizure law in which we disagreed with the Supreme Court but in doing so we just relied on stare decisis. When the United States Supreme Court decided *Gates*¹⁰ and *Leon*,¹¹ the Court's decision

nature and cause of the accusation and be confronted with the witnesses against him." *Id.*

⁸ U.S. CONST. amend. VI. This amendment states in pertinent part: "In all criminal prosecutions . . . [one shall] have the Assistance of Counsel for his defence." *Id.*

⁹ 63 N.Y.2d 491, 473 N.E.2d 1009, 483 N.Y.S.2d 181 (1984), *overruled* by *New York v. Class*, 475 U.S. 106 (1986) (holding that a police search for a Vehicle Identification Number and the subsequent seizure of a gun was constitutional as the defendant lacked a reasonable expectation of privacy in the vehicle). On remand, the New York Court of Appeals held that "[w]here . . . the State Constitution has been violated, we should not reach a different result following reversal on Federal constitutional grounds unless respondent demonstrates that there are extraordinary or compelling circumstances. That showing has not been made." *People v. Class*, 67 N.Y.2d 431, 433, 494 N.E.2d 444, 445, 503 N.Y.S.2d 313, 314 (1986).

¹⁰ See *Illinois v. Gates*, 462 U.S. 213, 217 (1983) (holding "that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations.").

directly conflicted with rules that we had established for several years about the search and seizure law in New York State. We disagreed with the Supreme Court, declaring the searches unlawful using the authority of our earlier decisions and invoking *stare decisis*. In essence, we stated that we would rely on our rules under the state constitution and not use the of rules established by the United States Supreme Court in *Gates*, *Leon*, or similar cases.

It became apparent after a while, at least to me, that this was not going to work. With the personnel of the Supreme Court changing; with the direction of the Supreme Court decisions changing, it was very clear that there were going to be some radical -- maybe radical is too strong a word -- there were going to be some differences in our view of what the law should be and the Supreme Court's view of what the law should be. I thought it was important that we make some determination of a methodology, an analysis that we would follow, to establish a structure and try to anchor a body of law that we would follow, and could guide our lower court judges.

When deciding to invoke the state constitution as opposed to the Federal Constitution, scholars have generally pointed out three different approaches. The first approach is the primacy method. This method assumes that the state constitution is superior in time and status to the Federal Constitution, so every case should be approached initially by analyzing the state constitutional provision and deciding it on that ground if possible. Certainly, the state constitutions were earlier in time in the original thirteen states. I do not know about applying the method in the other states of the union, but we can legitimately say in New York that our constitution is older and New York should be entitled to look first at its state law. That has some problems in my view because it

¹¹ See *U.S. v. Leon*, 468 U.S. 897 (1984) (holding that the Fourth Amendment exclusionary rule should not be applied to deny the prosecution the use of evidence based on a search warrant ultimately found to be invalid). "Evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 919.

implicitly assumes that the federal constitution would allow this conduct. But it is settled law of these areas that the states may never go below the floor established by the Federal Constitution. State constitutions may grant more protections than the federal constitution provides, but states may never grant less protection than federal provisions afford individuals. The Federal Constitution is the supreme law of the land.

The second method used is the dual analysis method. The court analyzes cases under both federal and the state provisions and if the conduct is protected under either one, then the challenging party prevails. The unfortunate consequence of this method is the insulation of any federal interpretation from Supreme Court review. The Court of Appeals finds itself stating what the federal constitution says on certain subjects, but under *Michigan v. Long*,¹² that determination may never be reviewed in the Supreme Court, so it remains in the body of law, though it may not be authoritative. The other consequence is that half of the opinion is dictum, because half of it is not needed.

The third view is a supplemental or interstitial approach in which the court first examines the Federal Constitution. If the issue is not covered or protected by the Federal Constitution, then the court moves on to the state document, and tries to determine if the conduct is addressed and, if so, to determine the consequences. The New York Court of Appeals has at one time or another, and each individual judge has at one time or another, adopted and rejected every one of these three approaches. We have not been able to make up our minds about how to proceed when we review these issues. I do not think that is necessarily fatal, but it does leave a gap in the analytical process of state constitutional cases.

If there is any trend, I think the trend is to analyze the case first on the grounds of the Federal Constitution, and then, if the problem is resolved, indicate that the Court need go no further because the conduct is protected. There are two or three recent

¹² 463 U.S. 1032 (1983).

cases where that has been done. In *Grumet v. Cuomo*,¹³ the court struck down a provision relying upon the *Kurtzman* test¹⁴. The Court did not decide whether the proposal would pass constitutional muster under the state constitution.¹⁵

When the court reaches the subject of how the analysis will proceed, assuming it decides that it is going to analyze it on state grounds, it must be determined how to proceed. The first serious attempt to lay out some formulation on that question was made in *People v. P.J. Video*.¹⁶ That case suppressed pornographic materials as a violation of the Fourth Amendment.¹⁷ The Court of Appeals first suppressed the evidence declaring the seizure unlawful. The case was then appealed to the United States Supreme Court.¹⁸ The Supreme Court held that there was no Fourth Amendment violation.¹⁹ When the case came back to us on remand, we suppressed the pornographic materials again.²⁰ In

¹³ 90 N.Y.2d 57, 681 N.E.2d 340, 659 N.Y.S.2d 173 (1997) (holding that singling out the Village of Kiryas Joel religious community for special treatment violated the Establishment Clause).

¹⁴ See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The test measures whether governmental action is permissible pursuant to the Establishment Clause of the United States Constitution. *Id.* “[F]irst, the action must have a secular purpose; second, it must not have a principal or primary effect that advances or inhibits religion; and third, it must not foster excessive governmental entanglement with religion.” *Id.* at 612-13.

¹⁵ See *Grumet v. Cuomo*, 90 N.Y.2d 57, 181 N.E.2d 340, 659 N.Y.S.2d 173 (1997).

¹⁶ *People v. P.J. Video, Inc.*, 65 N.Y.2d 566, 483 N.E.2d 1120, 493 N.Y.S.2d 988 (1985).

¹⁷ *Id.* at 572, 483 N.E.2d 1124, 493 N.Y.S.2d 992.

¹⁸ *New York v. P.J. Video, Inc.*, 474 U.S. 868 (1986). The Supreme Court stated that the New York Court of Appeals’ construction of its prior decisions concerning this area that a warrant requirement for films and books encompasses a higher standard of probable cause. *Id.* at 874. However, the Court has never required such a standard. *Id.* The Court reversed and remanded to the New York Court of Appeals, holding “that, evaluated under the correct standard of probable cause, the warrant was properly issued and the videocassettes of the five movies should not have been suppressed.” *Id.* at 878.

¹⁹ See *New York v. P.J. Video, Inc.*, 474 U.S. 868 (1986).

²⁰ *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). The court stated that “[t]he legal reasoning supporting

reinstating the suppression order on state grounds, the court tried to set out some parameters, to create a structural analysis that should be made in analyzing these cases²¹ to find a principled basis for distinguishing the state constitutional language.

Once again, we were dealing with exactly the same words; so why should the Court of Appeals say they meant one thing when the United States Supreme Court says they meant something else? The case involved a non-interpretive problem, where the language is the same, you cannot fall back on differences in the texts of the language of the provision.²² The Court has to find some basis for distinguishing the two clauses. We stated that the court should look first at the State statutory or common law to see how the particular right involved was treated. Second, it should determine whether the state has historically protected the right.

our views, our understanding of principles of federalism, and this State's legal and cultural traditions all lead us to conclude that we should depart from the Federal rule stated in this case." *Id.* at 309, 501 N.E.2d at 564, 508 N.Y.S.2d at 916. The court held that "this warrant application did not demonstrate the probable cause required under the provisions of article I, § 12 of the State Constitution and accordingly, on reargument following remand from the United States Supreme Court, we affirm the order of the County Court." *Id.*

²¹ *People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). Listing the factors, the court stated:

This perception of 'the average New Yorker' involves a mix of factors peculiar to this State, including our legal traditions and our cultural and historical position as a leader in the educational, scientific and artistic life of our country, as well as a recognition that New York is a State where freedom of expression and experimentation has not only been tolerated, but encouraged.

Id.

²² *Id.* at 303, 501 N.E.2d 560, 508 N.Y.S.2d 911. In a discussion of a noninterpretive analysis, the court stated that:

A non-interpretive analysis attempts to discover, for example, any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right.

Id.

Third, it should be determined whether the state constitution identifies the right as one of particular state or local concern, and in the fourth, the Court should examine whether there exists a distinct attitude in the state for the protection of the particular right. Those inquiries are similar to inquiries that other state courts have used in trying to find some methodology for reviewing state questions.²³

The effort is to try and make the result hinge on something different about New York State rather than merely have it hinge on when the seven judges of the New York Court of Appeals look

²³ See, e.g., *West v. Thompson Newspapers*, 872 P.2d 999 (Utah 1994). The court stated:

There are at least four models for determining when and under what circumstances courts should base decisions on their own constitutions where there are related or similar federal constitutional provisions . . . primacy approach, [whereby] a state court looks first to the state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive . . . interstitial approach [which] establishes a presumption that federal law is controlling and reaches state constitutional issues only when the case cannot be resolved on federal grounds alone . . . dual sovereignty approach analyze[s] both federal and state grounds for the decision, even where the case can be resolved on federal grounds alone . . . lockstep approach [which] does not allow independent interpretation of a state constitution, effectively ceding interpretative authority for the state's constitution to the United States Supreme Court.

Id. See also *State v. Badger*, 450 A.2d at 347 (Vt. 1982) (stating “[there is] great potential for great friction between the state and federal judiciaries, and concomitant damage to the authority, efficiency, and finality of the United States Supreme Court.”); *State v. Hunt*, 450 A.2d 952 (N.J. 1982). The New Jersey Supreme Court promulgated seven situations whereby a state could arrive at a different conclusion than the federal judiciary:

- (i) textual differences in the federal and state constitutional provisions, (ii) legislative history of state provision indicating that it should be interpreted differently, (iii) state law predating United States Supreme Court decisions, (iv) structural differences between the state and federal constitutions, (v) subject matter of peculiar state interest, (vi) particular state history or traditions, and (vii) public attitudes in the State.

Id. at 965-67

at a question differently than do the nine judges of the United States Supreme Court. The subjective distinctions and viewpoints are philosophical approaches, not legal approaches.

The formula that we set out in *P.J. Video* certainly was not perfect, but it was our attempt to find some basis, some type of analysis that we could follow, recognizing that litigants were increasingly realizing that we were willing to fall back on the state constitution. For many years, cases would come before us and we would almost salivate over getting a chance to review them on state grounds, but nobody would ever plead that the challenged conduct violated the state constitution, so we could not proceed on state grounds.

We followed the formula that was set forth in *P.J. Video*²⁴ for a while. Some prominent cases were *People v. Alvarez*,²⁵ *People v. Kohl*,²⁶ *People v. Harris*,²⁷ but after a relatively brief period of

²⁴ 68 N.Y.2d 296, 501 N.E.2d 556, 508 N.Y.S.2d 907 (1986). The court stated:

[N]otwithstanding an interest in conforming our State Constitution's restrictions on searches and seizures to those of the Federal Constitution where desirable, this court has adopted independent standards under the State Constitution when doing so best promotes "predictability and precision in judicial review of search and seizure cases and the protection of the individual rights of our citizens."

Id. (quoting *People v. Johnson*, 66 N.Y.2d 398, 488 N.E.2d 439, 497 N.Y.S.2d 618 (1985)).

²⁵ 70 N.Y.2d 375, 515 N.E.2d 898, 521 N.Y.S.2d 212 (1987). The court stated:

We have long recognized that while this court is, of course bound by the decisions of the Supreme Court in matters of Federal law, "in determining the scope and effect of the guarantees of fundamental rights of the individual in the Constitution of the State of New York, this court is bound to exercise its independent judgment and is not bound by a decision of the Supreme Court of the United States limiting the scope of similar guarantees in the Constitution of the United States."

Id. at 378, 515 N.E.2d at 899, 521 N.Y.S.2d at 213. (quoting *People ex rel. Arcara v. Cloud Books*, 68 N.Y.2d 553, 557, 503 N.E.2d 492, 494, 510 N.Y.S.2d 844, 846 (1986)).

²⁶ 72 N.Y.2d 191, 527 N.E.2d 1182, 532 N.Y.S.2d 45 (1988). The court stated:

time, a majority of the members of the court found it too constricting. They rejected the *P.J. Video* formulation, agreeing to a statement in Chief Judge Kaye's concurring opinion it was not a binding analysis, but merely something to be considered. So I cannot tell you now how the court will approach state constitutional analysis today, or, if it does decide to do so, how that analysis will come out.

From my own point of view, I think of a judicial system that is integrated from the Supreme Court on down to the trial level, thus it comes naturally to me to use a supplementary approach, to look first to the federal law and look for a gap before approaching the question under state law. If the federal constitution resolves the question, I would not go any further. Many courts and judges would, preferring to analyze another way. Whether we approach state constitutional law in this matter or not, I think it is imperative that some analytical approach be developed so that the lower courts, as well as lawyers and litigants can know how these questions are to be reviewed and determined. There should be some articulable basis for a disagreement with the highest court in the land beyond a differing view of the law. That kind of analysis leads to instability, and it leads to the kind of criticism and loss of prestige that we have seen resulting from some Supreme Court decisions. Once the personnel of the Court changed, the judges merely

In determining whether to exercise independent judgment under the New York State Constitution to provide greater protection than the due process floor set by the [United States] Supreme Court, we first look to the texts of the Constitutions. If the provision at issue differs from that of its Federal counterpart, we examine the historical basis for the distinction. If the rationale for the differing text is not material to the analysis, then we look further to see whether there are fundamental justice and fairness concerns of the State which are left unaddressed under prevailing Federal law and which are therefore warranted under the independent broader State protection.

Id. at 197, 527 N.E.2d at 1185, 532 N.Y.S.2d at 48 (citations omitted).

²⁷ 77 N.Y.2d 434, 570 N.E.2d 1051, 568 N.Y.S.2d 702 (1991). The court held "that the [United States] Supreme Court's rule does not adequately protect the search and seizure rights of citizens of New York." *Id.* at 436, 570 N.E.2d at 1052-53, 568 N.Y.S.2d at 703-04.

recycled some of their older dissents and made them into majority opinions supported by new personnel in the Court. I do not think a court can sustain that kind of conduct over an extended period of time. But I will cite to you *Payne v. Tennessee*²⁸ and *United States v. Dixon*²⁹ to illustrate my criticism.

I think that the Court of Appeals confronts a similar risk unless it has some systematic method of taking on these questions. It puts itself in a position where it is questioned merely for disagreeing with the Supreme Court, because it does not like what the Supreme Court said. There is nothing to stabilize the law except the judge's personal analysis of the case, which may be very good, it may indeed be fine; but it nevertheless is merely a different view of the law than the Supreme Court may have taken. And I give you one illustration of how some articulable basis can be used, but has not been used in the past.

*People v. Scott*³⁰ was a case involving airplane searches. It came to the Court of Appeals following the decisions of the United States Supreme Court, which had held aerial searches were not unlawful.³¹ I think the public, who probably does not think the evidence should be suppressed in any event, can accept the fact that the United States Supreme Court is ruling for an entire nation and some cases it is considering may have firearms or drugs located on ranches, that in some cases are almost as big as states. I think that you might understand that the Supreme Court said we are not going to foreclose aerial searches because we have these problems in some but not all states. Moreover, I think the public might accept the fact that the Court of Appeals, looking at the same question, might say we do not have any ranches and farms that encompass thousands and thousands of acres here. We think that the expectation of privacy in New York State overrides the public interest in allowing area

²⁸ 501 U.S. 808 (1991).

²⁹ 509 U.S. 688 (1993).

³⁰ 79 N.Y.2d 474, 593 N.E.2d 1328, 583 N.Y.S.2d 920 (1992) (holding that where "landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted, that they will be free from unwanted intrusions is reasonable.").

³¹ See *Oliver v. United States*, 466 U.S. 170 (1984).

searches.³² That is the kind of reasonably objective articulable basis for interpreting the similar provisions differently that I think the public will accept. This is the kind of basis that would stabilize the court's decisions. When we differ with the Supreme Court that is the kind of approach that the Court of Appeals should use. Hopefully, it will. These are works in progress, and it takes a long time to develop something similar to a common law method. I think it is important, and I hope that the Court will approach state constitutional questions with that goal in mind. The question has been on the back burner in recent years, but it will arise again. Constitutional questions continue to arise, and the Bar has become more familiar with the fact that the state constitution is a great source for relief. I am concerned that the court approaches these continuing questions with those thoughts in mind.

Professor Latzer:

Since we are a bit ahead of schedule and we have the benefit of having Judge Simons with us, I thought we would detour from the plan and take some questions or comments from the audience.

The Audience:

Judge, you mentioned that by deciding the case under the state constitution, the Court of Appeals can insulate itself from Supreme Court review. You seem to indicate you did not think that was a justification for the Court of Appeals to decide a case under the state constitution. I was wondering if you could say whether or not that is generally shared by the court.

³² *Id.*

Judge Simons:

I did not mean to put it quite that way. There are many people who would say that where parties argue constitutionality on both federal and state questions, why not decide both state and federal grounds? The law cannot develop, however, if the New York State Court of Appeals decides a federal question and then states we are not going to let the Supreme Court review it (i.e. under the rule of *Michigan v. Long*).³³ Nevertheless, in the *Immuno* case,³⁴ this was a dispute the court had. After the court's original decision in *Immuno*, the case went to the United States Supreme Court³⁵ and that Court remanded the case directing the Court of Appeals to review the case in light of the Supreme Court's intervening decision in *Milkovich*.³⁶ The Court asked us to make a federal analysis so they could look at it again.³⁷ We decided the appeal on state grounds preventing the Supreme Court from reviewing our decision, but in the process we said this is what *Milkovich* means.³⁸ I do not think that is the way the law should

³³ 463 U.S. 1032 (1983).

³⁴ *Immuno A.G., v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129, 549 N.Y.S.2d 938 (1989).

³⁵ *Immuno A.G., v. Moor-Jankowski* 497 U.S. 1021 (1990). The United States Supreme Court granted the writ of certiorari, vacated the judgment, and remanded to the New York Court of Appeals for further consideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). *Id.*

³⁶ 497 U.S. 1 (stating that "a separate constitutional privilege for 'opinion' was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by the first Amendment. . . .").

³⁷ *Immuno*, 497 U.S. at 1021.

³⁸ *Immuno*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). The Court of Appeals stated:

Milkovich, however, puts an end to the perception – as it turns out, misperception – traceable to dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, that, in addition to all other Federal constitutional protections, there is a "wholesale defamation exemption for anything that might be labeled 'opinion.'" Thus, statements of opinion relating to matters of public concern are today

develop institutionally. If we are going to decide federal law, we ought to allow the highest federal court in the country to say whether we are right or wrong. In addition, we should not decide federal law and then say you cannot or you will not take this up, because for our purposes we are deciding it on state grounds.

Professor Robert F. Williams:

I was just going to say that I share your opinion, Judge Simons, that more and more things are going to be coming to the state courts because of the expansion of the United States Supreme Court. I am very much interested in the First Amendment³⁹ as it applies to freedom. We lost the compelling-interest test⁴⁰ and we lost the Restoration Act⁴¹ which puts us into the state courts. Moreover, I am wondering if you have any insight on the New York Constitution⁴² and the religious freedom rights, especially in light of the latest developments at the federal constitutional level?

no less subject to constitutional protection, but speech earns no greater protection simply because it is labeled "opinion."

Id. at 242-43, 567 N.E.2d at 1273, 566 N.Y.S.2d at 909.

³⁹ U.S. CONST. amend. I. The First Amendment states: "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.*

⁴⁰ See *Employment Division v. Smith*, 494 U.S. 872, 884 (1990) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents is to hold the [Sherbert] test inapplicable to such challenges."); *Sherbert v. Verner*, 374 U.S. 398 (1963). The *Sherbert* test states that "governmental actions that substantially burden a religious practice must be justified by a compelling state interest." *Id.*

⁴¹ See *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997) (holding that the religious Freedom Restoration Act of 1993 [hereinafter RFRA] exceeds Congress' power). RFRA "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden is '(1) in the furtherance of a compelling state interest; and (2) the least restrictive means of furthering that . . . interest.'" *Id.*

⁴² N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part:

Judge Simons:

I guess the short answer is no. I think the Court of Appeals, during the time that I was there, (and I have not been there since January), has struggled a little bit because it knew *Lemon v. Kurtzman*⁴³ was questionable authority. However, we had several cases that came before us where we had to go back to it. Indeed, we had a case just before I left regarding Alcoholic Anonymous programs in the state prisons.⁴⁴ However, I do not remember if that case was presented on state grounds,⁴⁵ my memory just fails me there, but there is that concern. I think the court, as a whole, welcomes the chance to expound on the state constitution. As I said earlier, many times lawyers just do not give thought to the state constitution and I think there is a great segment of the Bar that does not even know there is one.

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Id.

⁴³ 403 U.S. 602 (1971).

⁴⁴ *Griffin v. Coughlin*, 88 N.Y.2d 674, 673 N.E.2d 98, 649 N.Y.S.2d 903 (1996).

⁴⁵ *Id.* at 88 N.Y.2d at 714-15, 673 N.E.2d at 123, 649 N.Y.S.2d at 928.

The court did not address an independent state grounds action but stated that:

[I]t is our conclusion that petitioner has failed to make an adequate record to state a claim for an Establishment Clause violation. The petition cites nothing of a religious nature about this particular ASAT program or its practices other than the fact that it is modeled after the principles of A.A. which make references to 'God' and a 'Higher Power.' We hold that under the facts and limited record in this case, the inclusion of the 12-step A.A. component into the ASAT program did not make the program a religious exercise and, therefore, did not violate petitioner's rights under the Establishment Clause of the 1st Amendment.

Id.

Professor Williams:

That is actually what I wanted to ask you. New Jersey has said that it will follow this fact or criteria approach. However, I have been slightly critical of that in academic literature, and I think it is a terrific mechanism to educate the Bar. Would you think that even though the New York Court of Appeals does not always follow the Supreme Court that the New Jersey Supreme Court does not follow it all the time either? Alternatively, maybe with the current makeup of the bench, the court is not quite sure how it is going to analyze a decision unless it relies on practicing lawyers coming before the court. Also, would you not think the most effective way to brief and argue a case would be using these kind of factors, the text, the ones that you listed from *P.J. Video*. If lawyers would apply these factors, such as, a showing of different texts or the sort of history of treatment of the problem within the state has been different, then these advocacy tools would be extraordinarily effective. My criticism has been when courts limit themselves and say we will not disagree unless one of them is shown. However, whenever I do cases in New Jersey, I sure try to follow those factors as best I can. So it would be a good avenue for lawyers; do you think?

Professor Latzer:

The question, as I understand it is, even if the courts do not follow all the factors in these methodologies that they lay out before doing state constitutional law, is not the benefit in having the Bar follow these factors in preparing their briefs in appeals to the high courts?

Judge Simons:

There is no question that that is so. The cases, in some instances would come up to us argued almost on an equitable basis, because there was no type of legal analysis to make.

Different judges perceive the equities differently, and there was no route signs for them to follow. That is the very thing that concerns me. I do not contend that the outline I made in *P.J. Video* is the best, or the only outline or method that should be used; but it is a method. Having been an intermediate court judge myself, I knew the difficulty of trying to discern what the Court of Appeals meant. Many times cases came up that had tried to use the *P.J. Video* structure, and they were very understandable and intelligible. You could see what the court was thinking; you could see some basis for the result they were reaching. As Professor Williams says, I think a strong argument can be made by for using these tools, not taking the position that these are controlling, but that these are the considerations and the concerns that this court should take into account when it makes a decision on differentiating similar provisions of the two constitutions.

The Audience:

Do you think the Court of Appeals is likely to use horizontal federalism in determining the meaning of state constitutional provisions, that is looking to see the output of sister states in local constitution?

Judge Simons:

I do not remember any cases in which we did so in the past. We may have used *Cf* cites,⁴⁶ or some reasoning in some other state court decisions. Moreover, because state constitutional texts differ, I do not know of any trend underway to do that in the future; but as with any kind of analysis there are your sister court

⁴⁶ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (16TH ed. 1996). "Cited authority *supports a proposition different from the main proposition but sufficiently analogous to lend support*. Literally, "*cf.*" means 'compare.' The citation's relevance will usually be clear to the reader only if it is explained. Parenthetical explanations (rule 1.5), however brief, are therefore strongly recommended." *Id.*

decisions, which are helpful for analysis and comparison, and I think they do shed a light on these questions.

Professor Latzer:

Judge Simons, thank you so much.

Judge Simons:

Thank you.

