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Albany Law Review Presents
The Thirteenth Annual
Chief Judge Lawrence H. Cooke
State Constitutional Commentary
Symposium
Part of the Edward C. Sobota '79
Memorial Lecture Series

State Courts in the Trump Era

April 25, 2019

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Agenda

5:30pm – 6:00pm	**Registration**
6:00pm - 6:10pm	**Introductions** Connie Mayer, Associate Dean for Academic Affairs; Raymond and Ella Smith Distinguished Professor of Law Albany Law School Hon. Jonathan Lippman, Former Chief Judge New York State Court of Appeals; Of Counsel Latham & Watkins LLP
6:10pm - 7:30pm	**Panel Presentation:** Judicial Federalism – state court decision-making independent of corresponding U.S. Supreme Court rulings; Judicial Independence generally; The Role of Law Schools in educating students in independent state court decision-making, especially in the areas of constitutional law, civil rights and liberties, and criminal procedure; CLE's; Technology—state courts in the vanguard of protecting privacy from advancing technological intrusions; ICE in state courthouses; Criminal Justice Reform; Voting Rights; and Corruption—enforcing anti-corruption and ethics laws against individuals and enterprises, private and official ***Moderator:*** Hon. Jonathan Lippman Former Chief Judge of New York State Court of Appeals ***Panelists:*** Hon. Rowan D. Wilson, Associate Judge New York State Court of Appeals; Of Counsel Latham & Watkins LLP Hon. Lawrence K. Marks, Chief Administrative Judge New York State Unified Court System Hon. Christine M. Clark, Associate Justice Appellate Division Third Department Ronald K. Chen, Rutgers University Professor, Distinguished Professor of Law and Judge Leonard I. Garth Scholar Rutgers Law School Professor Vincent M. Bonventre Justice Robert H. Jackson Distinguished Professor of Law Albany Law School
7:30 – 8:00pm	**Audience Questions and Answers**
8:00pm	**Reception**

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SPEAKER BIOGRAPHIES

Hon. Jonathan Lippman

The Honorable Jonathan Lippman is the former Chief Judge of the New York State Court of Appeals. During his tenure on the Court of Appeals, Judge Lippman created the Task Force to Expand Access to Civil Legal Services and established a mandate for law students to complete 50 hours of pro bono work prior to graduation. Before serving as Chief Judge of New York's highest court, Judge Lippman served as the Presiding Justice of the New York State Supreme Court, Appellate Division, Third Department and the Chief Administrative Judge of the New York State Court System. Judge Lippman has received countless awards, including the William H. Rehnquist Award for Judicial Excellence. He received his B.A. and J.D. from New York University and currently serves as Of Counsel at the law firm of Latham & Watkins in New York City.

Hon. Rowan D. Wilson

The Honorable Rowan D. Wilson is an Associate Judge for the New York Court of Appeals. Judge Wilson began his career serving as a judicial law clerk to the Honorable James R. Browning–Chief Judge of the United States Court of Appeals for the Ninth Circuit. After his clerkship, Judge Wilson joined Cravath, Swaine & Moore. During his time in private practice, Judge Wilson served on the boards of several charitable and not-for-profit organizations and handled several pro bono matters. After only five years at Cravath, he made partner and held this position until his appointment to the Court of Appeals in 2017. He received his A.B. from Harvard College and J.D. from Harvard Law School.

Hon. Lawrence K. Marks

The Honorable Lawrence K. Marks currently presides as the Chief Administrative Judge of the New York State Court System, where he oversees the administration of the statewide court system. Judge Marks previously served as the First Deputy Chief Administrative Judge, Administrative Director of the Office of Court Administration, Special Counsel to the Chief Administrative Judge, and the OCA's Deputy Counsel for Criminal Justice. Before joining the court system, Judge Marks worked as a supervising attorney with the Legal Aid Society in New York City, a litigation associate with Hughes, Hubbard & Reed and law clerk to U.S. District Judge Thomas C. Platt. Judge Marks graduated from SUNY Albany and Cornell Law School.

Hon. Christine M. Clark

The Honorable Christine M. Clark currently sits as an Associate Justice of the New York State Supreme Court, Appellate Division Third Department, where she was appointed in 2014. Justice Clark began her legal career in private practice at the law firm of Dreyer Boyajian before becoming an Assistant District Attorney in Schenectady. After working as an ADA, Justice Clark was appointed as a Schenectady City Court Judge and was later elected to permanently hold the position in 2005. In 2010, she was elected to the Schenectady County Family Court bench, where she served for 2 years. Then, Justice Clark became the second woman ever elected as a Supreme Court Justice from the Fourth Judicial District. Judge Clark earned her B.A. from Columbia University and J.D. with honors from Albany Law School.

Professor Ronald K. Chen

Professor Ronald K. Chen is currently a University Professor, Distinguished Professor of Law and the Judge Leonard I. Garth Scholar at Rutgers Law School. Professor Chen earned his A.B. from Dartmouth College and J.D. with high honors from Rutgers Law School, where he served as the editor-in-chief of the *Rutgers Law Review*. After school, he clerked for the Honorable Leonard I. Garth of the Third Circuit and then was associated with Cravath, Swaine & Moore, before joining the Rutgers faculty in 1987. From 2006 to 2010, while on leave from the law school, Professor Chen served as the Public Advocate of New Jersey in the administration of Governor Jon S. Corzine. From 2013–2018, Professor Chen served as Dean of Rutgers School of Law—Newark, and after the merger with Camden, as Co-Dean of the combined Rutgers Law School. Aside from his time with Rutgers, Professor Chen has been an active leader in the American Civil Liberties Union where he serves on the National Board, the National Executive Committee, and as of 2017, as General Counsel.

Professor Vincent M. Bonventre

Professor Vincent Bonventre is the Justice Robert H. Jackson Distinguished Professor of Law at Albany Law School, where he also serves as the faculty advisor to the Albany Law Review. Prior to entering academia, Professor Bonventre served two tours in the Army in Military Intelligence and in the Judge Advocate General's Corps. He then clerked for Judge Matthew J. Jasen and Judge Stewart F. Hancock at the New York Court of Appeals. In between those clerkships, Professor Bonventre was selected by Chief Justice Warren Burger to serve as a Supreme Court Judicial Fellow. He is the founder and director of the Center for Judicial Process, and the author of the New York Court Watcher blog. Professor Bonventre received his B.S. from Union College, J.D. from Brooklyn Law School, and M.A.P.A. and Ph.D. in Government from the University of Virginia.

ARTICLES

THE LIFE AND LEGACY OF CHIEF JUDGE LAWRENCE H. COOKE: "TRULY AN EXEMPLARY LIFE. A LIFE WELL LIVED"[1]

*Jay C. Carlisle II**†
*Anthony DiPietro***

INTRODUCTION

It is an appropriate tribute to the late Chief Judge of New York, Lawrence H. Cooke, that this article be devoted to a man who many leaders of the bench, bar, and academia consider to be the greatest

* Jay C. Carlisle II is one of the founding professors of Pace University School of Law. He is a commissioner for the New York State Law Revision Commission, an elected Life Fellow of the American Bar Foundation, and a referee for the New York State Commission on Judicial Conduct. Mr. Carlisle is also senior counsel at Collier, Halpern, & Newberg, LLP.

† Chief Judge of New York Lawrence H. Cooke was my friend, mentor, and colleague for twenty-five years. I was a member of his Task Force on Women and the Courts and one of the drafters of the Task Force final report, which was featured on the front page of the *New York Times*. After Chief Judge Cooke retired from the Court of Appeals in 1984, he practiced law until Pace Law School hired him in 1989 as a distinguished professor of law. "Professor" Cooke was on our faculty until 1992 and was consistently rated by our students as a superb teacher.

The Chief was a member of the Court of Appeals for ten years. He made his mark both as a jurist and administrator. The Chief was a diligent defender of human rights, writing many opinions demonstrating his concern for the constitutional rights of defendants, free speech, and the protection of persons against discrimination. His proudest success was bringing court backlogs under control, disposing of 2.4 million cases in 1983, an increase of 500,000 from 1979. Chief Judge Cooke always followed the high road and did so with incredible charm, humor, and decency. He passed away on August 17, 2000, at the age of 85, in Monticello, New York. I continue to miss him and am grateful to the *Albany Law Review* for publishing this article.

** Anthony DiPietro, Esq., is a criminal defense attorney representing individuals in complex federal and state post-conviction litigation. Mr. DiPietro graduated from Pace University School of Law, *magna cum laude*. His law office is located in White Plains, New York. The authors wish to thank several former law students of Professor Carlisle's Advanced Civil Procedure course at Pace University School of Law (Spring 2013): Agatha Rudz, Susan Carmichael, Britney Edwards, Janice Castro, and Jessica Yanefski, for their help and contributions to this article.

[1] Judith S. Kaye, *In Memoriam: Lawrence H. Cooke: 1914-2000*, 72 N.Y. ST. B. ASS'N J. 50, 51 (2000).

jurist to ever serve on New York State's highest court. Chief Judge Cooke, better known as Larry, served with honor and distinction as an associate judge of the Court of Appeals, and later as Chief Judge.[2]

Lawrence H. Cooke was a man "motivated by love—for his family, for the law, for people and life in general."[3] He led a full and meaningful life that exemplified fundamental virtues of peace, integrity, and fairness.[4] While growing up in Monticello, New York, a town on the foothills of the Catskill Mountains, his parents taught him that dedication and hard work was required in order to be successful.[5] His father, a former District Attorney for Sullivan County, showed him that public servants must always "take the high road"[6] in their affairs and never be obligated to anyone.[7]

Chief Judge Cooke once wrote that he considered his father "the personification of virtue. He was a man of common sense and logic—with his feet always solidly on the ground."[8] Chief Judge Cooke's father's teachings influenced his work ethic, which resulted in him working up to eighteen hours per day to fulfill his judicial duties.[9] Chief Judge Cooke recognized that his time on the court was a "sacred mission" in order to provide litigants a full and fair process.[10]

In 1981, during a keynote address, Chief Judge Cooke stated: "Justice is the great commodity."[11] He explained that leaders should always be guided by principles of justice and equality. In this regard, Chief Judge Cooke explained that great historical leaders appreciated this concept, noting as an example that Abraham Lincoln understood "the . . . important idea that the law represented . . . the idea of fairness;" Thomas Jefferson "exalted the

[2] *Id.* at 50.

[3] Laurie Stuart, Editorial, *Goodbye Judge Cooke*, RIVER REP. (Aug. 24, 2000), http://www.riverreporter.com/issues/00-08-24/editorial.htm.

[4] Chief Judge Cooke sought justice throughout his judicial career in its purest form. *See, e.g.*, Anthony Kane et al., *Tribute to Former Chief Judge Lawrence H. Cooke*, 70 N.Y. ST. B. J. 46, 46 (1998).

[5] *See* Kane et al., *supra* note 4, at 46.

[6] Martha Middleton, *Mr. Chief Activist, Cooke Is on a 'Sacred Mission,'* 69 A.B.A. J. 431, 431 (1983).

[7] *Id.* ("Justice [is] always the great virtue: all of us have a great duty to render justice and fairness to our neighbors in everyday affairs.").

[8] Lawrence H. Cooke, *Waste Not, Wait Not—A Consideration of Federal and State Jurisdiction*, 49 FORDHAM L. REV. 895, 895 (1981).

[9] *See* Middleton, *supra* note 6, at 431.

[10] *See id.* ("When I lay down my head at night time or finally, I want to say I've done everything I can.").

[11] Lawrence H. Cooke, *Remarks of the Chief Judge of the State of New York*, 2 PACE L. REV. 231, 243 (1982).

concept of 'equal and exact justice to all;'" and Frederick Douglass observed that "[t]he lesson which the American people must learn . . . is that equal manhood means equal rights."[12] Following this approach himself, Chief Judge Cooke left a legacy defending equal justice and fundamental fairness for all people.

I. BACKGROUND

At the age of twenty, Chief Judge Cooke graduated *cum laude* from Georgetown University,[13] and later received the John Carroll Award.[14] Upon graduating from Georgetown, Chief Judge Cooke was accepted into Harvard Law School, where he began his legal education.[15] He later transferred and graduated from Albany Law School.[16] Chief Judge Cooke also received honorary LLB or LLD degrees from Albany Law School, Union University, Siena College, Brooklyn Law School, New York University, Pace University, and Syracuse University.[17]

After graduating from Albany Law School, the Chief worked at the law office of John Lyons, a well-known Sullivan Country trial lawyer.[18] In 1947, he became the Chairman of the Sullivan County Board of Supervisors.[19] After working for John Lyons, Chief Judge Cooke went into private practice and in 1953, ran for County Court Judge.[20] A year later, Cooke was elected as Sullivan County Judge, Surrogate and Children's Court Judge.[21] In 1961, Cooke was named to the New York State Supreme Court, followed by an appointment to the Appellate Division, Third Department, in 1969.[22] He was elected to the Court of Appeals as an associate judge in 1974,[23] and in 1979, was appointed Chief Judge.[24] Chief Judge Cooke served on New York's highest court with novel admiration from his colleagues, and is remembered as one of the most influential and celebrated

[12] *Id.* at 243–44.
[13] Kane et al., *supra* note 4, at 46.
[14] *Hon. Lawrence H. Cooke*, TIMES HERALD-REC. (Aug. 19, 2000), http://choicesmhc.com/files/monticello/history/cookethr.htm.
[15] Kane et al., *supra* note 4, at 46.
[16] *See id.*
[17] *Hon. Lawrence H. Cooke*, *supra* note 14.
[18] Kane et al., *supra* note 4, at 46.
[19] *Hon. Lawrence H. Cooke*, *supra* note 14.
[20] *Id.*
[21] *Id.*
[22] Kane et al., *supra* note 4, at 47.
[23] *Id.*
[24] *Id.*

jurists.[25]

During his tenure on the bench, Chief Judge Cooke wrote many instructive opinions on criminal law and procedure,[26] New York Practice, the right to free press, guardianship, and victim rights.[27] The Chief authored significant opinions relating to the development of the state's independence and the progression of New York's Constitution.[28] Chief Judge Cooke's recognition of the state's judicial sovereignty allowed the state court to independently control fundamental issues, including searches and seizures and procedural due process rights.[29] He was regarded as "a giant who helped ensure that, while the United States Supreme Court changed directions and its role, the New York Court of Appeals would continue to be an independent force and a national leader in safeguarding our rights and liberties."[30]

According to Chief Judge Cooke, each decision he authored was designed to provide sufficient notice and guidance to future litigants. He explained that his rulings were:

> [A] yardstick that you can use for conduct in the future, so that when you pronounce a decision in a case, you can take that yardstick and measure it into a future case, so people know what they can do and what they have a right to do and

[25] *See, e.g.*, *A Dedication to Chief Judge Lawrence H. Cooke*, 53 FORDHAM L. REV. 145, 145, 154 (1984) (providing a dedication from the editors themselves, as well as from others in the legal community); *see generally* Hon. William J. Brennan, Jr., *A Tribute of Chief Judge Charles S. Desmond*, 36 BUFF. L. REV. 1, 3 (1987) (recognizing the New York Court of Appeals as a leader in state constitutionalism).
[26] *A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 154 ("Perhaps the area of the law where Chief Judge Cooke's voice speaks most distinctly and compellingly is that of the constitutional requirements in the criminal justice process.").
[27] *Id.* at 155 ("To list all the topics on which he has contributed authoritatively to the growth of the law would be virtually to recapitulate the syllabus of [the legal] profession.").
[28] *See, e.g.*, People v. P. J. Video Inc., 501 N.E.2d 556, 559–60 (N.Y. 1986) ("State courts are bound by the decisions of the Supreme Court when reviewing federal statutes or applying the federal Constitution. Under established principles of federalism, however, the states also have sovereign powers. When their courts interpret state statutes or the state Constitution the decisions of these courts are conclusive if not violative of federal law. Although state courts may not circumscribe rights guaranteed by the federal Constitution, they may interpret their own law to supplement or expand them.").
[29] *See, e.g.*, People v. Skinner, 417 N.E.2d 501, 502 (N.Y. 1980) (holding that the right to counsel attaches in a noncustodial setting once counsel has instructed the police not to question the defendant in his absence); People v. Rogers, 397 N.E.2d 709, 710 (N.Y. 1979) (holding that once an attorney has entered the proceeding, a defendant in custody may not be questioned further in the absence of counsel); People v. Settles, 385 N.E.2d 612, 614 (N.Y. 1978) (holding that a defendant under indictment and in custody may not waive the right to counsel unless the waiver is made in the presence of the defendant's attorney).
[30] Vincent Martin Bonventre, *Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History*, 71 ALB. L. REV. 1051, 1051 (2008).

what they shouldn't do.[31]

Distinguished Professor Vincent M. Bonventre of Albany Law School explained that Chief Judge Cooke was a judicial giant, who "led his colleagues on the court, and held the way for state supreme courts throughout the nation to take their constitutional guarantees seriously. Indeed, the body of his opinions is a veritable call to arms to enforce fundamental law of the state in service of fundamental freedoms."[32]

While Chief Judge, Cooke also "served as Chairman of the Conference of Chief Judges and became President of the National Center for State Courts in 1982."[33] In 1986, President Reagan appointed the Chief to chair the State Justice Institute.[34] In 1987, Chief Judge Cooke received the Distinguished Service Award from the National Center for State Courts.[35] In appreciation of his service, the Sullivan County Courthouse was renamed the Lawrence H. Cooke Sullivan County Courthouse.[36] In the latter part of his career, the Chief was also "of counsel to the Albany law firm of Couch, White, Brenner and Feigenbaum[,] and served as a member of the Board of Directors of the First National Bank of Jeffersonville."[37]

Chief Judge Cooke also utilized his status within the legal community to advocate for reform and protection of women's rights.[38] Notably, he advocated for changes to protect the rights of rape victims, whom he had felt "[we]re outside the effective protection of the law."[39] In addition, Chief Judge Cooke put into effect a rule that prohibited reimbursement for expenses of business transacted in facilities that discriminated on the grounds of gender and race.[40] While acting as Chief Judge, he also appointed a twenty-three member panel, the Women in Law Task Force,[41] to

[31] Kathy Schofield Zdeb, *The Chief*, ALB. L. SCH. UNION U. MAG., Spring 1995, at 8.

[32] *Id.* at 8–9.

[33] *See Hon. Lawrence H. Cooke*, *sup-ra* note 14.

[34] *See* Joyce Adolfsen & Lou Adolfsen, *Lawrence Henry Cooke*, HIST. SOC'Y N.Y. CTS., http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-courtappeals.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-court-appeals/cooke-lawrence.html (last visited Apr. 13, 2017).

[35] *See Lawrence Henry Cooke: Lawyer, State Chief Judge*, PRABOOK, http://prabook.com/web/person-view.html?profileId=59287# (last visited Mar. 28, 2017).

[36] Kane et al., *supra* note 4, at 48.

[37] *Hon. Lawrence H. Cooke*, *supra* note 14.

[38] Adolfsen & Adolfsen, *supra* note 34.

[39] *Id.*

[40] Robert B. McKay, *Six Short Tears of Meritorious Service as Chief Judge*, *in A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 153.

[41] At the time, a report by a special state task force that studied the courts for almost two years concluded that bias against women in the New York State court system was so pervasive that women were often denied equal justice. *See* Jeffrey Schmalz, *Pervasive Sex Bias Found in Courts*, N.Y. TIMES (Apr. 20, 1986), http://www.nytimes.com/1986/04/20/nyregion/pervasive-sex-bias-found-in-courts.html ("The [twenty-three]-member panel—set up in May 1984 by Lawrence H. Cooke, then the state's Chief Judge—concluded that female lawyers were 'routinely' demeaned and treated patronizingly by male judges and attorneys. The panel also found that the credibility of female witnesses was sometimes questioned because women were viewed by some judges as emotional and untrustworthy. Calling the situation grave, the panel said some judges did not understand the nature of family violence and blamed the victims for it.").

[42] *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 15, 15 (1987) [hereinafter *Women in the Courts Task Force*] ("The New York Task Force on Women in the Courts has concluded that gender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment[,] and equal opportunity.").

[43] UNIFIED COURT SYS. OFFICE OF COURT ADMIN., SUMMARY REPORT: NEW YORK TASK FORCE ON WOMEN IN THE COURTS 1 (Mar. 1986), http://www.nycourts.gov/ip/womeninthecourts/pdfs/ny-task-force-on-women-in-the-courts-summary.pdf (including information relating to the Task Force's objective, investigation, and findings); *Women in the Courts Task Force*, *supra* note 42.

[44] Tom Rue, *Chief Judge Lawrence H. Cooke—"Justice is a Very Fragile Commodity,"* River Rep., April 24, 1995.

[45] *Hon. Lawrence H. Cooke*, *supra* note 14.

[46] *Id.*

[47] *Id.*

[48] *Id.*

research gender inequalities[42] in the court system.[43] In 1982, Chief Judge Cooke was the only man to have ever been admitted as an honorary member of the New York State Women's Bar Association.[44]

During his professional career, Chief Judge Cooke was also active within his community. He served as President of the Monticello Fire Department, Sullivan County Volunteer Firefighters Association, and the Hudson Valley Volunteer Firefighters Association.[45] The Firemen's Association of the State of New York presented him with the Golden Trumpet Award.[46] Chief Judge Cooke was a member of St. Peter's Roman Catholic Church, and praised by many religious organizations for his outreach to the community—receiving the Golda Meir Memorial Award from the Jewish Lawyers Guild and the Torch of Liberty by B'nai B'rith.[47] Chief Judge Cooke was also honored as the keynote speaker for the International Jewish Jurists and Lawyers Convention in Jerusalem.[48]

II. PROFESSOR OF LAW

Chief Judge Cooke will be remembered for his many contributions to several law schools located in New York. Among his many

contributions, the Chief served as a founding board member of two publications produced by Albany Law School[49] and taught at Pace University School of Law from 1988 to 1991.[50]

During this time, he served as a mentor to law students and was influential throughout their studies.[51] Former Pace students recalled that it was an honor to have the former Chief Judge of the New York Court of Appeals as a professor: "Judge Cooke enhanced Pace Law School's reputation and enriched the lives of all who had the privilege to have him as their teacher."[52]

Likewise, many students at Albany Law were instructed by Chief Judge Cooke's guest lectures.[53] He would routinely lecture classes on various subjects, seeking to take an active and positive role in the development and direction of law students.[54]

> He spoke with the students, sharing his thoughts and feelings, his vision and convictions, his hopes and expectations for them and their chosen profession. He would call upon them to "search for justice, to render justice, the ennobling feature" of a career in the law—"to help the community and rectify the wrongs that come your way and to support those that need your help."[55]

Despite his distinguished resume, students were most amazed by Chief Judge Cooke's humble approach. He reminded students that he was just a "man." The Chief taught students that they should respect members of the bench, but never be afraid to speak and advocate for their clients.[56] One former student stated that Chief Judge Cooke "was a truly humble man and humanized himself, and gave us a different perspective as to who a Judge is. Every day, when I am advocating a case at trial, or upon a motion/appeal, I

[49] Vincent Martin Bonventre, *Tribute to Chief Judge Lawrence H. Cooke*, 64 ALB. L. REV. 1, 2 (2000) (noting that Chief Judge Cooke helped the *Albany Law Review* plan and inaugurate its *State Constitutional Commentary* issue, and helped create the *Government Law & Policy Journal*).

[50] Rue, *supra* note 44.

[51] In addition to teaching at Pace, Chief Judge Cooke also visited other law schools to speak with students about law, life, and ethics. *See* Vincent Martin Bonventre, *Professional Responsibility*, 43 SYRACUSE L. REV. 505, 521 (1992). Cooke was lauded as a model of professional responsibility and recognized for his teaching that a lawyer should always remember: "When in doubt take the high road." *Id.* at 522.

[52] Letter from Jacqueline Hatter, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Aug. 29, 2012) (on file with author) ("Judge Cooke was a brilliant jurist and teacher, as well as a kind and good-hearted person.").

[53] Bonventre, *supra* note 49, at 2.

[54] *Id.*

[55] *Id.*

[56] Interview with Anthony Pirrotti, Jr., Esq. (2012).

remember the life lesson he gave us."[57] Another former student recalls Judge Cooke telling his class: "You must argue with a fire in your belly!" when advocating for what is fair and just.[58]

Chief Judge Cooke always tried to influence his students to take an active role in the legal community and to strive for self-betterment as a legal practitioner.[59] He instructed his students to always be ethical and passionate about their work. He also offered the advice that lawyers should avoid ethical problems and "when in doubt take the high road."[60] Former students of Chief Judge Cooke recounted that their "best memories of the class, however, relate[d] not to Lawrence Cooke the jurist, but Lawrence Cooke the man."[61]

Chief Judge Cooke's admiration was so widespread that many students at Pace even petitioned the dean of the law school upon notice that he was retiring from teaching. The students sent several hundred letters to the dean of the law school demanding that all efforts be employed to keep Chief Judge Cooke.[62] To his students, his presence became an integral part to their legal education and life.[63]

III. NEW YORK COURT REFORM

In the 1970s and 1980s, New York's court system was considered one of the most active and expensive systems in the world.[64] By 1981, New York City's Supreme Court had 22,796 indictments and over 173,288 criminal defendants were arraigned on misdemeanor charges, requiring 331,580 courtroom appearances to process felony

[57] *Id.*

[58] Letter from Steven Habiague, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Sept. 2, 2012) (on file with author).

[59] Interview with Joseph Ruhl, Esq. (2012) ("Judge Cooke's photograph, which is a replica of his portrait on display in the New York State Court of Appeals, is on the wall in my office at Wilson Elser, with a personal handwritten note from Chief Judge Cooke. When I look at it, I am reminded of the amazing person, who inspired me to strive to be an excellent lawyer and colleague, and to be involved in activities for the betterment of the legal profession.").

[60] Bonventre, *supra* note 49, at 3.

[61] Interview with Joseph Ruhl, Esq. (2012) ("Before the course began, I—as well as other members of the seminar—received a large package in the student mail. The package was from Chief Judge Cooke and contained the course book that he had purchased for the students of the class at his own expense. It was a simple and generous gesture that has stayed with me since that time. It was indicative of the type of person Judge Cooke was—selfless and generous. I still have the course book in my reference library.").

[62] Bonventre, *supra* note 49, at 2.

[63] Letter from Richard Baum, Esq., to Jay Carlisle, II, Professor of Law, Pace Law Sch. (Aug. 16, 2012) (on file with author) ("He was a very scholarly [and] honorable man. He truly believed in ethics and the honor and value of our profession.").

[64] Robert B. McKay, *Six Short Years of Meritorious Service as Chief Judge*, 53 FORDHAM L. REV. 151, 152 (1984).

defendants and 673,685 appearances to handle misdemeanors.[65] In 1983, New York State handled more than 2,300,000 actions and proceedings, and approximately 2,400,000 dispositions.[66]

Chief Judge Cooke found that the organization of the New York court system was "a nightmare for court managers, [an] inconvenience to judges, and much expense to the taxpayer. Most importantly, the senseless hodgepodge is inefficient and causes court delay." [67] Chief Judge Cooke also found that the instability of the court led to sentencing disparities throughout the state, including disparate sanctions,[68] divergent outcomes,[69] and controlling feudal "duchies."[70] He saw "that complacency and indifference had undermined the effectiveness and fairness of the state judicial system."[71] The large backlog of cases, the judges coming to work late and leaving early, and the discrimination against women and minorities in the courthouses were cries for help from the judicial system that Chief Judge Cooke answered with hard-hitting reforms.[72]

Chief Judge Cooke believed that a strong central administration with uniform rules would provide the proper structure for an effective court system. He expressed:

> [T]he administrative function involves management of the court system—equipping a court with all that is necessary and helpful that it might perform its acts of adjudication well. . . . It is not an arbitrary . . . exercise; rather it is use of power authorized by the people to make courts more efficient in satisfying society's needs.[73]

In 1981, Chief Judge Cooke proposed a judicial rotation plan, which would be "a concerted movement designed to achieve improvement in the judicial structures and methods."[74] Using section 26 and section 28 of Article VI of the New York State

[65] Nicolas Pileggi, *Judges at War*, NEW YORKER, Apr. 19, 1982, at 19.
[66] McKay, *supra* note 64, at 152.
[67] Lawrence H. Cooke, *Structural Reform of the Judicial System*, *in* NEW YORK STATE TODAY: POLITICS, GOVERNMENT, PUBLIC POLICY 161, 167 (Peter W. Colby ed., 1985).
[68] *See* Cooke, *supra* note 11, at 245.
[69] *See id.*
[70] Cooke, *supra* note 67, at 163.
[71] *Sullivan County Historical Society History Maker Award 1998: The Hon. Lawrence H. Cooke*, SULLIVAN COUNTY HIST. SOC'Y (June 1, 1998), http://www.sullivancountyhistory.org/index.php?option=com_content&view=article&id=61:lawrence-h-cooke&catid=47:history-makers&Itemid=59 [hereinafter *Sullivan County Award*].
[72] *See* Vincent Martin Bonventre, *Tribute to Chief Judge Lawrence H. Cooke 1914-2000*, 64 ALB. L. REV. 1, 1 (2000).
[73] Cooke, *supra* note 67, at 168.
[74] *Id.* at 162.

Constitution (the "Administration Supervision of the Courts"), Chief Judge Cooke designed a judicial rotation plan that assigned lower court judges as temporary judges in supreme court throughout New York.[75] He believed that the availability of more judges would alleviate the pressure of everyday court business and balance the workload.[76]

In addition, Chief Judge Cooke announced that a new two-step system would be instituted, requiring "all New York City Civil and Criminal Court Judges . . . to be screened by a select committee . . . to determine their qualification to sit as acting supreme court justices."[77] Following the screening, "assignment to the higher judicial posts would be made on a rotation basis from the lower court judges recommended by the committee."[78]

On September 21, 1981, the Office of Court Administration announced that a new plan for the operation of the temporary assignment to supreme court would be forthcoming in New York City.[79] In January 1982, Chief Judge Cooke's plan went into effect, and it initially faced criticism. Many critics felt that the reforms implemented by Cooke were an extreme abuse of power, working to reduce the judiciary's independence and undermine the appointment of qualified judges.[80]

On January 14, 1982, New York City District Attorney Robert Morgenthau challenged Cooke's plan and moved to enjoin him from making any temporary judicial assignments to New York City's Supreme Court. Chief Judge Cooke defended his position, stating:

> The citizens have voted and made up their minds. They chose central administration and continue to support it. The mandate is clear. The People want effective leadership. The People want modern methods and techniques and were not satisfied with the way things were. They want speedy trials. . . . They don't want one single case adjourned 113 times, or the average number of appearances per criminal case in New York City to be 15.2 times.[81]

The supreme court dismissed Morgenthau's claim that

[75] *See* Morgenthau v. Cooke, 436 N.E.2d 467, 468 (N.Y. 1982).
[76] *See* Cooke, *supra* note 67, at 164–65.
[77] *Morgenthau*, 436 N.E.2d at 468.
[78] *Id.*
[79] *See id.*
[80] *See* Marcia Chamber, *Bar Criticizes Plans to Rotate Acting Justices*, N.Y. TIMES (Nov. 8, 1981), http://www.nytimes.com/1981/11/08/nyregion/bar-criticizes-plans-to-rotate-acting-justices.html.
[81] Cooke, *supra* note 67, at 168.

administrative regulations had not been followed by Chief Judge Cooke in making temporary assignments.[82] The court noted that the "respondent [Cooke] possessed the requisite authority to place [his] announced plan into operation."[83]

Thereafter, Morgenthau successfully appealed the decision.[84] The appellate division ruled that the Chief Judge could not arbitrarily truncate certain administrative policies regulating temporary assignments.[85] The court held that "there was no compliance therewith prior to promulgation of the plan or at any time, and therefore that plan of temporary assignment is without effect and void in respect of the manner of promulgation."[86] The court observed: "The history of constitutional enactments in America teaches that every grant of power should ideally be hedged about by checks and balances to protect the body politic from absolute power."[87] Thus, the court required that Cooke's plan be adopted only after proper protocol, in which the Chief Judge, the Administrative Board of the Courts, and the Court of Appeals, agree and approve.[88]

Thereafter, Chief Judge Cooke appealed the appellate division's decision to the New York Court of Appeals, but was unsuccessful in obtaining a favorable outcome.[89] Despite his unsuccessful appeal, Chief Judge Cooke's envisioned reformation of the judiciary was still influential. While the Court of Appeals may have rebuked the Chief for not following the proper procedures to implement reform, they did not hold the procedures he proposed substantively unconstitutional.[90] Instead, the court boosted the morale of reformers and implicitly promoted their cause to seek change by outlining the process needed for the proposed reform to be enacted.[91]

Following the *Morgenthau* case, Chief Judge Cooke continued his efforts to push reforms that would improve the judiciary and expand

[82] Morgenthau *ex rel* People v. Cooke, 448 N.Y.S.2d 480, 482 (App. Div. 1982).
[83] *Id.*
[84] *See id.* at 481–82.
[85] *Id.* at 486 ("[T]he new rotation plan of temporary assignment of judges of the courts of the City of New York requires, as prerequisite to promulgation, the adoption of a standard and administrative policy in respect of the same, as well as consultation theretofore by the Chief Judge with the Administrative Board of the Courts and approval by the Court of Appeals[.]").
[86] *Id.*
[87] *Id.* at 484.
[88] *See id.* at 486.
[89] *See* Morgenthau v. Cooke, 436 N.E.2d 467, 476 (N.Y. 1982).
[90] *See id.*
[91] *See id.*

"the areas of personal freedom and offered protection to those too powerless to defend themselves."[92] He pushed for openness, fairness, and efficiency within the court, noting that a Chief Judge must be "somebody who will never forget that the courts belong to the people . . . [and] who will be anxious to improve the court system."[93]

Chief Judge Cooke created equal opportunity offices to prevent discrimination against women and minorities in the staffing of the judicial system, as well as a Court Facilities Task Force that assessed the conditions of the courthouses and instituted the use of computers to facilitate recordkeeping.[94] By the time Chief Judge Cooke left office in 1984, the New York State court system had the most advanced computer technology in the country.[95] Chief Judge Cooke was able to establish uniform court hours and vacations that provided efficient time management for court personnel.[96] He transferred more than two hundred upstate judges who had lighter workloads to New York City.[97] Further, he was able to bring in retired judges to aid in ruling on pretrial criminal motions, and he established arbitration panels and community dispute resolution centers to help resolve civil disputes.[98] Under Chief Judge Cooke's leadership, the court system stabilized.[99] His reforms resulted in a twenty-one percent reduction in the backlog of cases,[100] and he continued to quell the backlogs over time—disposing of 2.4 million cases in 1983 alone.[101]

Chief Judge Cooke also worked tirelessly with Judge Herbert B. Evans and Judge Robert J. Sise, both of whom were chief administrative judges for the Office of Court Administration, "to put in place other judicial administration reforms."[102] Together, they implemented:

> [M]erit screening[s] of criminal and civil court judges in New York City for temporary designation as acting supreme court

[92] *Sullivan County Award*, *supra* note 71.
[93] Geoffrey Taylor, *Chief Judge Reforms Huge State Court System*, POUGHKEEPSIE J., July 11, 1984, at 6.
[94] *See, e.g.*, Kane et al., *supra* note 4, at 47.
[95] *Id.*
[96] *Id.*
[97] *A Tribute to Chief Judge Lawrence H. Cooke*, 58 ALB. L. REV. 1, 3 (1994).
[98] *See* W. Ward Reynoldson, *To Chief Judge Cooke: Leader in Innovative Judicial Administration*, 53 FORDHAM L. REV. 149, 150 (1984).
[99] *See* McKay, *supra* note 64, at 152.
[100] *A Tribute to Chief Judge Lawrence H. Cooke*, *supra* note 97, at 3.
[101] McKay, *supra* note 64, at 152.
[102] *Id.*

> justices; . . . reform[s] of the sheriff's jury panel; utilization of retired judges; significant improvement and broadening of judicial education; and establishment of the nation's first state-court supervised mediation program.[103]

Remarkably, Chief Judge Cooke's quest for court reform remained with his successors after his retirement. His longtime friend, neighbor, and distinguished colleague, Chief Judge Judith Kaye, followed Chief Judge Cooke's promotion of court reform. In a symposium, entitled: "Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History," Judge Kaye chose to honor Chief Judge Cooke because of his efforts "[c]omitted . . . to fairness in life[] and . . . jurisprudence."[104]

IV. REPRESENTATIVE OPINIONS

A. Criminal Law and Procedure

Chief Judge Cooke wrote many leading opinions on criminal law and procedure as both Chief Judge and associate judge for the New York Court of Appeals.[105] He was a zealous advocate of state constitutionalism and was committed to protecting New York's judicial independence.[106] His judicial opinions sought to ensure judicial independence in the wake of an encroaching federal system.[107] Of significance, Chief Judge Cooke ensured that the protections afforded to criminal defendants under New York's Constitution would stand independent of those provided by the United States Constitution.[108]

[103] *Id.*; *see also Sullivan County Award*, *supra* note 71 ("There was increased reliance on mediation and arbitration to cut down on the number of court cases and judges who had to retire because of age were enabled to continue service to the state as hearing officers.") ("Sheriff juries, notorious for allowing people with 'clout' to avoid jury service, were done away with to increase the pool of potential jurors. A management program was instituted to secure better treatment of jurors.").

[104] Judith S. Kaye, *Judges on Judges: The New York State Court of Appeals Judges' Own Favorites in Court History: Chief Judge Lawrence H. Cooke*, 71 ALB. L. REV. 1055, 1057 (2008).

[105] *See A Dedication to Chief Judge Lawrence H. Cooke*, *supra* note 25, at 154.

[106] *See, e.g.*, *id.* at 155.

[107] *See id.*

[108] *See, e.g.*, People v. Skinner, 417 N.E.2d 501, 502 (N.Y. 1980) (holding that a defendant's statements should be suppressed, despite a valid *Miranda* warning and subsequent waiver, when the waiver was derived by police in a noncustodial interview of the defendant who obtained counsel specifically on the matter under investigation and whose lawyer had instructed the police not to question the defendant in his absence); People v. Cunningham, 400 N.E.2d 360, 361 (N.Y. 1980) ("[O]nce a suspect in custody requests the assistance of counsel, he may not be questioned further in the absence of an attorney. . . . [A]n uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to counsel has been invoked."); People v. Settles, 385 N.E.2d 612, 613 (N.Y. 1978) (holding that identification of a criminal defendant made during a pre-arraignment corporeal viewing should have been excluded where the defendant, in absence of counsel but after receipt of *Miranda* warnings, orally waived his right to have an attorney present at the lineup).

In addition, Chief Judge Cooke's opinions were consistent and evenhanded.[109] He remained steadfast in his commitment to protecting core principles, noting: "A defendant charged with the most heinous of crimes is still entitled to the fundamental fairness we conceive under the notion of due process."[110] He routinely directed that overreaching government activity was not to be tolerated, because "if not checked, [it was] certain to encourage lawlessness and destroy cherished freedoms."[111]

On several occasions, Chief Judge Cooke authored decisions directing that a criminal defendant's conviction be overturned based upon a finding that the trial proceeding was unfair. For instance, in *People v. Whalen*,[112] the defendant was convicted of rape in the first degree following a jury trial, at which he "proceeded on a 'mistaken identification' defense, and sought to establish an alibi."[113] Chief Judge Cooke reversed the defendant's conviction as a result of the prosecution's improper conduct during its summation, where the prosecutor had impermissibly sought to undermine the defendant's alibi evidence by characterizing it as a concoction that was recently fabricated to ruse the jury.[114] The prosecutor also misrepresented to the jury that no notice of the defendant's alibi was ever received by the prosecution before trial, although the defendant had properly served the prosecutor with notice of his alibi defense eight months beforehand.[115]

Chief Judge Cooke observed that the prosecutor not only violated ethical mandates when falsely representing what had occurred regarding the defendant's alibi notice, but also that the prosecutor's action "in itself violated the [Government's] obligation to seek justice, rather than conviction."[116] Chief Judge Cooke explained

[109] *See, e.g.*, People v. Isaacson, 378 N.E.2d 78, 85 (N.Y. 1978) ("No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." (quoting Sherman v. United States, 356 U.S. 369, 382–83 (1958) (Frankfurter, J., concurring))).

[110] *Isaacson*, 378 N.E.2d at 85.

[111] *Id.*; *see also id.* at 84 ("[The] court would be paying mere lip service to the principle of due process if it sanctioned the continuance of a prosecution in the face of [improper and reprehensible police conduct].").

[112] People v. Whalen, 451 N.E.2d 212 (N.Y. 1983).

[113] *Id.* at 213.

[114] *Id.* at 214.

[115] *Id.* at 213, 215.

[116] *Id.* at 215.

that the prosecutor "made himself a witness before the jury, expressly and falsely denying that notice had been given."[117] He concluded that such behavior "was completely unjustified, going far beyond any bounds of proper advocacy[,]"[118] and that "[t]he prosecutor's conduct during summation was [so] improper and prejudicial to defendant"[119] that a new trial was required in the interest of justice.[120]

In *People v. Blyden*,[121] Chief Judge Cooke also decided that a new trial was warranted when the trial court had denied a defendant's for-cause challenge on a juror who voiced hostility to racial minorities during voir dire.[122] He explained that the juror's general statements, claiming that he could put aside his feelings and remain impartial towards the defendant, were insufficient to ensure that defendant received a fair trial.[123] Chief Judge Cooke observed: "The costs to society and the criminal justice system of discharging the juror are comparatively slight, while the costs in fairness to the defendant and the general perception of fairness of not discharging such a juror are great."[124] He emphasized that a juror must convey an absolute ability to render an impartial verdict, and a "hollow incantation, made without assurance or certitude, is not enough."[125] He explained: "Where there remain[ed] . . . doubt in the wake of such statements, when considered in the context of the juror's overall responses, the prospective juror should be discharged for cause."[126] Chief Judge Cooke emphasized that a court cannot simply turn away from a juror's "hostility to racial minorities that cast serious doubt on his ability to render an impartial verdict," especially when someone's life and liberty are at stake.[127]

[117] *Id.* at 215–16.
[118] *Id.* at 216.
[119] *Id.* at 215.
[120] *See id.* at 216.
[121] People v. Blyden, 432 N.E.2d 758 (N.Y. 1982).
[122] *Id.* at 758. Chief Judge Cooke noted:

> In determining whether the trial court erred in refusing to discharge the challenged juror for cause, it is necessary to look first to CPL 270.20 (subd 1, par [b]), which authorizes a challenge for cause where the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial."

Id. at 759.
[123] *See id.* at 760–61.
[124] *Id.* at 760.
[125] *Id.*
[126] *Id.*
[127] *See id.* at 761.

B. Due Process Clause of The New York State Constitution

Chief Judge Cooke emphasized the court system's duty to address due process claims under the New York Constitution.[128] He sought to utilize New York's Constitution in order to expand upon rights afforded to both criminal defendants and civil litigants under the U.S. Constitution.[129] Chief Judge Cooke's rulings have influenced the decisions of his court successors, as explained in further detail below.[130]

Chief Judge Cooke advanced the development of New York's due process clause when the court decided *People v. Isaacson*, a case in which the police facilitated the cooperation of an informant by physical abuse and deception.[131] The police also instructed the informant to request that the defendant bring drugs into New York by claiming that the informant desperately needed money as a result of financial difficulties.[132] The informant was also instructed to tell the defendant to bring more than one ounce of cocaine.[133]

Chief Judge Cooke reversed the defendant's conviction, finding that the police's conduct was not tenable in a system constitutionally bound to accord defendants due process. Chief Judge Cooke constructed a four-factor test in addressing claims involving such police misconduct:

> (1) [W]hether the police manufactured a crime which otherwise would not likely have occurred, or merely involved themselves in an ongoing criminal activity; (2) whether the police themselves engaged in criminal or improper conduct repugnant to a sense of justice; (3) whether the defendant's reluctance to commit the crime is overcome by appeals to humanitarian instincts such as sympathy or past friendship, by temptation of exorbitant gain, or by persistent solicitation

[128] *See* People v. Gokey, 457 N.E.2d 723, 724–25 (N.Y. 1983) (holding that the New York State Constitution affords individuals a greater right of privacy than does the United States Constitution).
[129] *See, e.g.*, People v. Ferber, 441 N.E.2d 1100, 1101 (N.Y. 1982).
[130] *See, e.g.*, People v. Davis, 553 N.E.2d 1008, 1010–11 (N.Y. 1990) ("In New York, the right to counsel is grounded on this state's constitutional and statutory guarantees of the privilege against self-incrimination, [and] the right to the assistance of counsel and due process of law. . . . It extends well beyond the right to counsel afforded by the Sixth Amendment of the United States Constitution and other state Constitutions.").
[131] People v. Isaacson, 378 N.E.2d 78, 80, 81 (N.Y. 1978). The police had beaten and deceived its informant into thinking that he was facing a stiff prison sentence, which caused him to seek out the defendant. *Id.* at 81.
[132] *See id.* at 80 (showing that the court found that police instructed the informant to tell the defendant he was in trouble with the police and needed money to secure a lawyer).
[133] *See id.*

> in the face of unwillingness; and (4) whether the record reveals simply a desire to obtain a conviction with no reading that the police motive is to prevent further crime or protect the populace.[134]

Under this approach, Chief Judge Cooke found that the facts in *Isaacson*:

> [E]xposes the ugliness of police brutality, upon which was imposed a cunning subterfuge employed to enlist the services of an informant who, deceived into thinking he was facing a stiff prison sentence, desperately sought out any individual he could to satisfy the police thirst for a conviction, even of a resident of another state possessed of no intention to enter our confines.[135]

Chief Judge Cooke directed that "[n]o matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."[136] He further held that the police actions were so outrageous that a dismissal of the indictment was warranted.[137] In doing so, Chief Judge Cooke commanded that the state's due process clause guarantee respect for personal immunities that were "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[138] Chief Judge Cooke observed that he had a duty to foster "fundamental fairness . . . to the very concept of justice,"[139] and that the "court would be paying mere lip service to the principle of due process if it sanctioned the continuance of a prosecution in the face of the revelations of this record."[140] Many other courts in the United States, including the supreme courts of Florida and Minnesota, adopted the Chief Judge's four-factor approach in *Isaacson* when faced with similar allegations of outrageous government conduct.[141]

[134] *See id.* at 83.

[135] *See id.* at 84.

[136] *See id.* at 85. Chief Judge Cooke further expressed:

> Those who fear that dismissal of convictions on due process grounds may portend an unmanageable subjectivity. Such apprehension is unjustified for courts by their very nature are constantly called upon to make judgments and, though differences of opinion often surround human institutions, this is the nature of the judicial process.

Id.

[137] *Id.* at 85.

[138] *Id.* at 82 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

[139] *Isaacson*, 378 N.E.2d at 82 (quoting People v. Leyra, 98 N.E.2d 553, 559 (1997)).

[140] *Isaacson*, 378 N.E.2d at 84.

[141] *See, e.g.,* State v. Hunter, 586 So. 2d 319, 326 (Fla. 1991) ("[T]he majority opinion issued today is in general harmony with the principles announced by the New York court. Clearly, Florida's own due process, objective entrapment defense would prohibit similar conduct on the part of police and their informants in this state."); State v. Jensen, No. T9-02-4518, 2004 WL 193133, at *2 (Minn. Ct. App. 2004) ("When a defendant raises a due[ ]process issue on appeal relating to a drug crime, this court applies the four-factor test in *People v. Isaacson*."); State v. Theis, No. Co-93-1990, 1994 WL 396359, at *3 (Minn. Ct. App. 1994) ("In making this determination of [police] outrageousness, this court depends on *People v. Isaacson*.").

In *People ex rel. McGee v. Walters*,[142] Chief Judge Cooke also found that the due process clause of the New York State Constitution mandates that the accused be allowed to confront adverse witnesses in parole hearings.[143] Cooke observed that a parolee must be extended the same amenities as other citizens when seeking to impeach adverse statements offered at a parole revocation hearing, and such due process protections should not be narrowly tailored based upon the adversarial setting.[144] He explained that "[a]ny determination that dispenses with the need for confrontation requires consideration of the rights' favored status, the nature of the evidence at issue, the potential utility of cross-examination in the fact-finding process, and the state's burden in being required to produce the declarant."[145]

Twenty-seven years later, New York courts continued to follow the Chief Judge's rationale. In 2011, the New York Appellate Division, Second Department, relied extensively upon his decision in *McGee*, holding that a parolee's due process rights were violated when he was not afforded an opportunity to cross-examine his parole officer, who prepared a report and possessed personal knowledge of the alleged violations, during his revocation hearing.[146] The appellate division reaffirmed Chief Judge Cooke's finding that "a parolee has due process and statutory rights to confront adverse witnesses whose statements are offered at a parole

[142] People *ex rel.* McGee v. Walters, 465 N.E.2d 342 (N.Y. 1984).

[143] *See id.* at 343. In *People ex rel. McGee*, Chief Judge Cooke affirmed the lower court's decision that found that an impingement upon a parolee's right to cross-examine the author of status reports was violative of his due process rights, and such a violation could not be excused by entering the report as a business record. *See id.* at 343–44; *see also Isaacson*, 378 N.E.2d at 82 ("'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. It embraces fundamental rights and immutable principles of justice and use of the term is but another way of saying that every person's right to life, liberty and property is to be accorded the shield of inherent and fundamental principles of justice.").

[144] *See Walters*, 65 N.E.2d at 343.

[145] *Id.*

[146] *See* People *ex rel.* Rosenfield v. Sposato, 928 N.Y.S.2d 350, 351–52 (App. Div. 2011). In *Sposato*, the court granted a writ of habeas corpus, finding that the petitioner's due process rights were violated when he was afforded no opportunity to cross-examine a parole officer who prepared a report and who possessed personal knowledge of the alleged violations during his parole hearing.

revocation hearing."[147]

Furthermore, in *Matter of Quinton A.*,[148] Chief Judge Cooke addressed legislative enactments that provided mandatory placements on juvenile offenders under the state's due process clause.[149] The petitioner, a juvenile delinquent, argued that the mandatory nature of his restrictive placement denied him due process and equal protection of the law.[150] Specifically, the defendant challenged sections 743, 746, and 753 of the Family Court Act, which allowed restrictive placements for those juveniles found to have committed a designated felony act.[151] Chief Judge Cooke rejected the defendant's claim that mandatory placement in itself was unconstitutional, noting that "[t]he essence of procedural due process is that a person must be afforded notice and an opportunity to be heard before government may deprive him of liberty or a recognized property interest."[152] Chief Judge Cooke recognized that "restrictive placement is a deprivation of liberty which the state may not accomplish without first affording appellant due process of law."[153] However, he explained that "[s]ince family court may not order restrictive placement until after it affords a juvenile a statutorily required dispositional hearing on notice, the statute fully comport[ed] with procedural due process strictures."[154]

[147] *Id.* (quoting *Walters*, 465 N.E.2d at 343).

[148] *In re* Quinton A., 402 N.E.2d 126 (N.Y. 1980).

[149] *See id.* at 129. In *Matter of Quinton A.*, the petitioner was a juvenile delinquent who was found to have committed acts, which if committed by an adult, would have constituted felony crimes. *Id.* On appeal, the petitioner maintained that the mandatory nature of his restrictive placement denied him due process and equal protection of the law. *Id.* Chief Judge Cooke reversed and remitted the matter for a new hearing, holding that the Family Court Act "which provides for mandatory restrictive placement of the state's most violent juvenile offenders, is constitutional." *Id.* at 128. However, the court concluded that it was reversible error for the family court to admit inculpating statements made by petitioner and his alleged accomplice expressly stating that the accomplice's detailed statement could be used to supply critical details absent from petitioner's statement. *See id.* at 132.

[150] *See id.* at 129.

[151] *Id.* at 130 n.1.

[152] *Id.* Nevertheless, Chief Judge Cooke remanded the matter for a new hearing. He concluded that it was error for the family court to have admitted certain inculpating statements. *See id.* at 132.

[153] *Id.* at 130.

[154] *Id.* at 130 n.1. Chief Judge Cooke noted:

> [R]estrictive placement is a deprivation of liberty which the state may not accomplish without first affording appellant due process of law. But given a finding beyond a reasonable doubt, that appellant committed acts which would have been felonious if committed by an adult, appellant's liberty interest has been diminished to the point where utilization of a rehabilitative program requiring restrictive placement is not violative of due process unless the selection of that program lacks a rational basis or its application constitutes cruel and unusual punishment. Thus, the notion that, in the post[-]adjudicative stage, therapeutic treatment in the least restrictive setting is the cornerstone for an adjudication of juvenile delinquency is rejected.

Id. at 130 (internal citations omitted).

Chief Judge Cooke also rendered significant opinions relating to property rights under the due process clause of the New York State Constitution.[155] He issued a seminal opinion in *Sharrock v. Dell Buick-Cadillac*, holding that sections of New York's Lien Law, which authorized a garageman to foreclose his possessory lien for repairs and storage charges, were violative of New York's Constitution.[156] Chief Judge Cooke commanded that the state's due process clause required that a person be given notice and an opportunity to be heard before the state can allow the deprivation of a significant property interest.[157] He observed that "'when no more than private gain is directly at stake,' the opportunity to be heard is an indispensable bulwark against an arbitrary, and final, deprivation of property."[158] He declared that the purpose of the due process clause in the New York Constitution is to ensure that:

> [N]o member of the state [is] disfranchised, or deprived of any of his rights and privileges, unless the matter be adjudged against him upon trial and according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one [sic] else has a superior title to the property he possesses, before either of them can be taken from him.[159]

Chief Judge Cooke rested his decision solely upon the due process clause of the New York State Constitution, given that the federal Constitution did not require such protections.[160] He observed that the "historical differences between the federal and state due process clauses make clear that they were adopted to combat entirely different evils."[161] He explained that prior to the Fourteenth Amendment, the federal due process clause offered "virtually no protections of individual liberties," while "state Constitutions in general, and the New York Constitution in particular, have long safeguarded any threat to individual liberties."[162] He noted that

[155] *See, e.g.*, Sharrock v. Dell Buick-Cadillac, Inc., 379 N.E.2d 1169, 1178 (N.Y. 1978).

[156] *See id.* at 1171, 1177–78.

[157] *Id.* at 1176.

[158] *Id.* at 1178 (holding that sections of New York's Lien Law, which authorized a garageman to foreclose his possessory lien for repairs and storage charges, violated New York's Constitution).

[159] *Id.* at 1174.

[160] *See id.* at 1173 n.2.

[161] *Id.* at 1174.

[162] *Id.*; *see also* People v. Settles, 385 N.E.2d 612, 615 (N.Y. 1978) (expressing that the New

"independent construction finds its genesis specifically in the unique language of the due process clause of the New York Constitution, as well as the long history of due process protections afforded the citizens of this state and, more generally, in fundamental principles of federalism."[163]

Chief Judge Cooke explained the inherent differences between the due process clause of the federal Constitution and the due process clause in New York's Constitution, noting: "Conspicuously absent from the state Constitution is any language requiring state action before an individual may find refuge in its protections."[164] He proposed that the absence of an expressive direction, however, was held not to eliminate the necessity of state involvement but "[to] provide a basis to apply a more flexible state involvement requirement than is currently being imposed by the Supreme Court with respect to the federal provision."[165] Chief Judge Cooke explained that although certain acts may not constitute state action under the federal Constitution for purposes of establishing a due process violation, it could nevertheless constitute state action under the New York State Constitution.[166]

Chief Judge Cooke's opinion in *Sharrock* significantly impacted the courts' subsequent decisions regarding state constitutionalism.[167] For example, the U.S. Supreme Court in *Jones v. United States*[168] held that "the Eighth Amendment does not require that the jurors be instructed as to the consequence of their failure to agree."[169] Relying upon Chief Judge Cooke's instruction in *Sharrock*, the New York Court of Appeals rejected the Supreme Court's approach and reaffirmed that the due process clause of the New York Constitution required a higher standard of fairness than the federal Constitution.[170] The court explained: "[O]n innumerable occasions this court has given [the] state Constitution an independent construction, affording the rights and liberties of the citizens of this state even more protection than may be secured under the United States Constitution."[171] Following this rationale, the court found, irrespective of the holding in *Jones*, that a trial court's failure to give a proper deadlock instruction in the course of a capital proceeding violated New York's due process clause.[172]

C. Right to Counsel

Chief Judge Cooke wrote many significant judicial opinions relating to a criminal defendant's right to counsel. His opinions stressed the importance of protecting a criminal defendant's right to counsel at all stages of a criminal matter, and the court's duty to advance state law when questions arose concerning the nature and scope of the attorney-client relationship.[173]

York State Constitution provided a basis for the right to counsel well before the Supreme Court recognized comparable rights federally); People v. Staley, 41 364 N.E.2d 1111, 1113 (N.Y. 1977) ("[The New York courts] recognized that unreasonable delay in prosecuting a defendant constitutes a denial of due process of law." (citing People v. Winfrey, 228 N.E.2d 808, 812 (N.Y. 1967); People v. Wilson, 171 N.E.2d 310, 312–13 (N.Y. 1960))).

[163] *Sharrock*, 379 N.E.2d at 1173. As a result, the Second Department held that the very provision of the Uniform Commercial Code that had been upheld as constitutional by the U.S. Supreme Court in *Flagg Bros. v. Brooks* was unconstitutional under the provisions of the New York State Constitution. *See* Svendsen v. Smith's Moving & Trucking Co., 431 N.Y.S.2d 94, 95, 96 (App. Div. 1980). The court found that the provision violated the due process clause of the state Constitution as it was construed and applied in *Sharrock*. *See id.* In rendering its *per curiam* decision, the Second Department said: "As in *Sharrock* . . . , the state's authorization of *ex parte* foreclosure of the warehouseman's lien is violative of state due process as it deprives debtors of a significant property interest without a prior opportunity to be heard." *Id.* at 96.

[164] *Sharrock*, 379 N.E.2d at 1173. Chief Judge Cooke's well-reasoned approach "did not leave the barn door unlocked" in the face of three dissenting judges who advanced that the provisions of the state and federal due process clause should be held co-extensive. *See, e.g.*, *id.* at 1179–80, 1181 (Jasen, J., dissenting).

[165] *Id.* at 1174; *see also* People v. P.J. Video, Inc., 501 N.E.2d 556, 560 (N.Y. 1986) ("One basis for relying on the state Constitution arises from an interpretive review of its provisions. If the language of the state Constitution differs from that of its federal counterpart, then the court may conclude that there is a basis for a different interpretation of it. Such an analysis considers whether the textual language of the state Constitution specifically recognizes rights not enumerated in the federal Constitution; whether language in the state Constitution is sufficiently unique to support a broader interpretation of the individual right under state law; whether the history of the adoption of the text reveals an intention to make the state provision coextensive with, or broader than, the parallel federal provision; and whether the very structure and purpose of the state Constitution serves to expressly affirm certain rights rather than merely restrain the sovereign power of the state. To contrast, noninterpretive review proceeds from a judicial perception of sound policy, justice and fundamental fairness. A noninterpretive 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.").

[166] *Sharrock*, 379 N.E.2d at 1173.

[167] *See, e.g.*, *P.J. Video, Inc.*, 501 N.E.2d at 561 ("In the past we have frequently applied the state Constitution, in both civil and criminal matters, to define a broader scope of protection than that accorded by the federal Constitution in cases concerning individual rights and liberties.").

[168] Jones v. United States, 527 U.S. 373 (1999).

[169] *Id.* at 381.

[170] *See* People v. LaValle, 817 N.E.2d 341, 366 (N.Y. 2004).

[171] *Sharrock*, 379 N.E.2d at 1173. "[H]istorical differences between the federal and state due process clauses make clear that they were adopted to combat entirely different evils." *LaValle*, 817 N.E.2d at 366 (citing *Sharrock*, 379 N.E.2d at 1173).

[172] *LaValle*, 817 N.E.2d at 366.

[173] *See, e.g.*, People v. Settles, 385 N.E.2d 612, 615 (N.Y. 1978) ("[S]o valued is the right to counsel in this state, it has developed independent of its federal counterpart.").

In this context, Chief Judge Cooke routinely observed that protecting the right to counsel was of crucial importance to maintaining fundamental fairness in criminal proceedings, and he understood counsel's role as an important part to balance the playing field in an adversarial settings in which the state is a party.[174] In this regard, Chief Judge Cooke explained:

> [A] special solicitude for this fundamental right [to counsel] is based upon our belief that the presence of an attorney is the most effective means [the court has] of minimizing the disadvantage at which an accused is placed when he is directly confronted with the awesome law enforcement machinery possessed by the state.[175]

Chief Judge Cooke's opinions also established broader protections for a criminal defendant's right to counsel when such individuals were first subjected to law enforcement questioning and requested to waive their right to counsel.[176] He found that the protections offered by *Miranda* warnings might not always be sufficient to:

> [E]nsure that an accused will not "waive" an important constitutional right out of ignorance, confusion or fear, [so the Court has held] that, in certain situations, the right to counsel in New York includes the right of an accused to have an attorney present while he is considering whether to waive his rights.[177]

In this context, Chief Judge Cooke found that both an explicit and implicit request for counsel by a defendant should not be narrowly construed by law enforcement.[178] For example, in *People v. Buxton*,

[174] *See, e.g.*, People v. Skinner, 417 N.E.2d 501, 503 (N.Y. 1980). In *Skinner*, Chief Judge Cooke noted that an effective waiver of the right to counsel in the absence of a suspect's attorney "simply recognizes the right and need of an individual to have a competent advocate at his or her side in dealing with the State." *Id.*

[175] People v. Cunningham, 400 N.E.2d 360, 363 (N.Y. 1980).

[176] *See, e.g.*, People v. Buxton, 374 N.E.2d 384, 387 (N.Y. 1978). In *Buxton*, Chief Judge Cooke focused on the period of time that lapsed from the point in which the defendant was apprehended and when the police sought a waiver from the defendant. Because the defendant requested counsel "at the time of his arrest," the court held that upon returning to police headquarters, "the police may not immediately and actively seek a waiver of this right and then proceed to interrogate [a defendant] in the absence of counsel." *Id.*

[177] *Cunningham*, 400 N.E.2d at 363.

[178] People v. Kazmarick, 420 N.E.2d 45, 50 (N.Y. 1981) (Cooke, J., dissenting) ("[C]ommencement of the criminal proceeding *is the equivalent* of actual representation by counsel . . . [and] 'where an indictment has been returned, [the court] *equate[s]* the indictment with the entry of a lawyer into the proceedings and invoke[s] the requirement of counsel's presence to effectuate a valid waiver.'"); *Settles*, 385 N.E.2d at 617 ("The right to counsel is not dependent upon the speed with which an attorney can be retained nor does it pivot on the length of police delay in arraigning an indigent defendant so that counsel may be appointed.").

Cooke demanded that a defendant's indirect request for counsel was sufficient to require counsel's presence during police questioning.[179] Chief Judge Cooke rejected the state's contention that a "specific and clear request to interrogating officers that [the] defendant did not wish to speak with them" was required for the attachment of counsel.[180] He expressed that such a narrow tailoring of one's right to counsel would violate the defendant's constitutional rights[181] and pervert the notion of fundamental fairness.[182]

In *People v. Rogers,* Chief Judge Cooke also found that law enforcement officials may not purposely disregard counsel's "instruct[ion] . . . to cease further questioning," even if counsel is retained by the defendant on an unrelated charge.[183] He expressed

[179] *See, e.g.*, *Buxton*, 374 N.E.2d at 386–87. In *Buxton*, the defendant had requested that a third party obtain a lawyer for him while police apprehended him from his place of employment. *Id.* at 386. The defendant was taken to police headquarters where he was read his *Miranda* rights and notified of the charges brought against him. *Id.* The defendant was held in police custody for approximately two hours before witnesses were brought to the station to view the defendant, during which time he repeatedly requested assistance of counsel. *Id.* Subsequently, the defendant was questioned by the police and offered statements regarding the crimes with which he was charged. *Id.* The state argued that because the request was made to a third party, it was not a sufficiently "specific and clear request to interrogating officers that [the] defendant did not wish to speak with them until he had consulted with an attorney." *Id.*; *see also* People v. Bevilacqua, 382 N.E.2d 1326, 1329 (N.Y. 1978) (concluding that a violation of the right to counsel occurred in light of a bad-faith failure by police to notify the mother of an eighteen-year-old suspect who requested her mom's assistance, and subsequently concealed the defendant's location from her and the attorney she retained).

[180] *Buxton*, 374 N.E.2d at 386. The court noted that "it would be an absurd formality" to conclude that the defendant's request for representation was not valid because although made in the presence of the police, the request was directed at a third-party. *Id.*

[181] *Id.* at 386–87. Chief Judge Cooke noted that a statement "freely and voluntarily" given by the defendant to the police "without any compelling influence is . . . admissible in evidence." *Id.* at 387. However, a defendant, after asserting the right to remain silent, may subsequently be questioned and those statements admitted into evidence as long as additional *Miranda* warnings are given and "the subsequent statement is not the product of 'continued importunity or coercive interrogation in the guise of a request for reconsideration.'" *Id.* (quoting People v. Gary, 286 N.E.2d 263, 264 (N.Y. 1972)). Although a defendant's specific request for counsel renders further police interrogation improper, a statement made by the defendant may nonetheless be admitted in evidence if the statement is "a spontaneous admission or [the defendant] simply change[s] his mind and voluntarily make[s] a statement." *Buxton,* 374 N.E.2d at 387.

[182] *See Buxton,* 374 N.E.2d at 386.

[183] People v. Rogers, 397 N.E.2d 709, 711, 713 (N.Y. 1979). In *Rogers*, the defendant was taken to police headquarters upon an arrest for a robbery. *Id.* at 711. During his arrest, the defendant was twice read his *Miranda* rights—once at the time of arrest and again prior to questioning at the police station. *Id.* During custodial questioning, the defendant alerted the police that he was represented by counsel, but agreed to interrogation without his attorney present. *Id.* At this time, the defendant's attorney had contacted police headquarters and demanded that the questioning of his client cease. *Id.* Ignoring this request, the officers continued the interrogation, claiming that the defendant waived his right to have counsel present. *Id.*

that a waiver of the defendant's right to counsel in the absence of his attorney is not a constitutionally valid waiver,[184] and the state's failure to adhere to this approach would present severe ramifications.[185]

In *Rogers*, the defendant had been taken to police headquarters after being arrested for robbery.[186] At the time of his arrest, the defendant was twice read his *Miranda* rights.[187] During custodial questioning, the defendant alerted the police that he was represented by counsel, but agreed to interrogation without his attorney present.[188] At this time, the defendant's attorney had contacted police headquarters asking that the defendant not be questioned.[189] The officers ignored counsel's request, and continued the interrogation, asking about unrelated activities, relying upon the defendant's prior waiver.[190]

Chief Judge Cooke rejected the government's contention that the defendant's waiver was sufficient.[191] He explained that "it is the role of defendant's attorney, not the state, to determine whether a particular matter will or will not touch upon the extant charge."[192] He also emphasized:

> [I]t would be to ignore reality to deny the role of counsel when the particular episode of questioning does not concern the pending charge[, and it] cannot be assumed that an attorney would abandon his client merely because the police represent that they seek to question on a matter unrelated to the charge on which the attorney has been retained or assigned.[193]

Chief Judge Cooke's opinion in *Rogers* has remained influential and is controlling authority.[194] For over three decades, "[it] has

[184] *See id.* at 713.

[185] *See id.* at 710–11 (noting that a violation of counsel's command to police that questioning cease could lead to an exclusion of statements and/or a new trial if improperly admitted).

[186] *See id.* at 711.

[187] *See id.*

[188] *See id.*

[189] *See id.*

[190] *See id.*

[191] *See id.* at 711–12.

[192] *Id.* at 713; People v. Lopez, 947 N.E.2d 1155, 1160 (N.Y. 2011) ("The *Rogers* rule is eminently straightforward: when an attorney undertakes representation in a matter for which the defendant is in custody, all questioning is barred unless the police obtain a counseled waiver. *Rogers* therefore requires inquiry on three objectively verifiable elements—custody, representation[,] and entry.").

[193] *Rogers*, 397 N.E.2d at 713.

[194] *See Lopez*, 947 N.E.2d at 1158–59.

stood as a workable, comprehensible, bright line rule, providing effective guidance to law enforcement while ensuring that it is defendant's attorney, not the police, who determines which matters are related and unrelated to the subject of the representation."[195] To date, the courts have expressed the utmost praise for Chief Judge Cooke's approach in *Rogers*,[196] and have continuously disapproved of any attempt to undercut its application.[197] In 2011, the New York Court of Appeals continued to expressively adopt the holding of *Rogers*.[198]

Chief Judge Cooke also held in *People v. Settles* that "[t]he filing of an indictment constitutes the commencement of a formal judicial action against the defendant and is equated with the entry of an attorney into the proceeding."[199] In *Settles*, the police had issued a

[195] *Id.* at 1160 (citing People v. Burdo, 690 N.E.2d 854, 856 (N.Y. 1997)). In *Lopez*, the police interrogated the defendant relating to a murder case while he was already incarcerated in Pennsylvania on other charges, upon which counsel was attained. *See Lopez*, 947 N.E.2d at 1157. An informant had told the New York police that the defendant was involved in the robbery and was the individual who shot the victim. *See id.* at 1156. Acting on this tip, a New York police officer visited the defendant at the Pennsylvania prison to continue the investigation. *Id.* at 1157. Upon arrival at the prison, the detective read the defendant his *Miranda* rights, but did not inquire as to whether the defendant was represented by counsel. *Id.* Rather than directly asking the defendant whether he had representation, the police officer sought to obtain the defendant's consent to continue, asking only whether the defendant would like to speak with an attorney before proceeding with his interrogation. *See id.* During the course of questioning, the defendant confessed to being involved in the crime, but denied that he was the shooter. *See id.* Finding a violation of the defendant's indelible right to counsel, the court relied upon the holding in *Rogers*, finding that "the indelible right to counsel activates the moment that an attorney becomes involved." *Id.* at 1159.

[196] *See generally Rogers*, 397 N.E.2d at 713 (showing the standard). In this regard, New York's jurisprudence "has continuously evolved with the ultimate goal of 'achieving a balance between the competing interests of society in the protection of cherished individual rights, on the one hand, and in effective law enforcement and investigation of crime, on the other.'" People v. Grice, 794 N.E.2d 9, 12 (N.Y. 2003) (quoting People v. Waterman, 175 N.E.2d 445, 447 (N.Y. 1961). Consequently, the parameters of the indelible right to counsel are defined "through the adoption of 'pragmatic and . . . simple[] test[s]' grounded on 'common sense and fairness'" in order to "provid[e] an objective measure to guide law enforcement officials and the courts." *See Grice*, 794 N.E.2d at 12; People v. Robles, 533 N.E.2d 240, 245 (N.Y. 1988).

[197] *See, e.g.*, *Lopez*, 947 N.E.2d at 1160 ("Permitting a police officer to remain deliberately indifferent—avoiding any inquiry on the subject notwithstanding the nature of the custodial charges and the likelihood that a lawyer has entered the matter—in order to circumvent the protection afforded by *Rogers* is not only fundamentally unfair to the rights of the accused, it further undermines the preexisting attorney-client relationship that serves as the foundation of the *Rogers* rule.").

[198] *See id.* at 1156 (holding that an interrogator—who suspects that an attorney may have entered the custodial matter—has an obligation to inquire regarding the defendant's representational status, and the interrogator will be charged with the knowledge that such an inquiry likely would have revealed).

[199] People v. Settles, 385 N.E.2d 612, 613–14 (N.Y. 1978) ("[A] defendant in a postindictment, prearraignment custodial setting, even though not then represented by an attorney, may not in the absence of counsel waive his right to have counsel appear at a corporeal identification.").

warrant for the defendant's arrest for robbery and other charges.[200] The defendant was apprehended by police in Georgia and transferred to New York, where he was subject to indictment.[201] New York police officers read the defendant his *Miranda* rights, but failed to inform him that he was under indictment for the robbery.[202] After the defendant was given his rights, he agreed to be in a lineup and was subsequently identified by two individuals as the perpetrator in the charged offenses.[203] Chief Judge Cooke observed that an official indictment against a defendant shifts "the character of the police function . . . from investigatory to accusatory" because the defendant "cannot make any arrangement with the police which is not subject to the ultimate approval of the court."[204] Consequently, *Miranda* warnings become insufficient to "satisfy the higher standard with respect to a waiver of the right to counsel."[205]

In *People v. Skinner*, Chief Judge Cooke remained devoted to protecting the attorney-client privilege.[206] There, the circumstances at issue involved the police's pre-arrest investigation and repeated attempts to question the defendant regarding an unsolved murder.[207] During the midst of these contacts, the defendant retained an attorney to assist in the matter.[208] The attorney contacted the police to inform them that he was retained, and would handle all matters relating to the investigation as far as it dealt with defendant.[209] Shortly thereafter, the police confronted the defendant, without counsel's knowledge, to serve him with legal papers seeking to compel his appearance at a corporeal lineup.[210] During this contact, the defendant made damaging admissions to the police regarding the murder.[211] Chief Judge Cooke observed that when an individual "obtain[s] counsel specifically on [a] matter

[200] *See id.* at 614.
[201] *See id.*
[202] *See id.*
[203] *See id.*
[204] *Id.* at 616.
[205] *Id.* at 616, 617 ("[N]o knowing and intelligent waiver of counsel may be said to have occurred without the essential presence of counsel."). Moreover, the court noted that "assistance of counsel after indictment at a lineup is an indispensable correlative to a fair trial. Nice distinctions between the need for counsel at various stages of the proceedings are irrelevant once the right to counsel has indelibly attached." *Id.* at 617–18. Further, "the [indelible] right to counsel attaches" upon defendant's request for an attorney, or "after . . . arraignment . . . [or] upon the filing of an accusatory instrument." *Id.* at 615.
[206] *See* People v. Skinner, 417 N.E.2d 501, 502 (N.Y. 1980).
[207] *See id.*
[208] *See id.*
[209] *See id.*
[210] *See id.*
[211] *See id.*

under investigation," the individual cannot be questioned by law enforcement officers "in a *noncustodial setting* after [counsel] . . . instruct[s] the police not to question [the] defendant in [counsel's] absence."[212]

Although the defendant consented to questioning at police headquarters, Chief Judge Cooke found that the defendant's right to counsel was violated because law enforcement officers knew that the defendant was represented in the matter under investigation and questioned him without counsel present.[213] He explained: "Whether a person is in custody at the time of interrogation is not controlling when an attorney represents that person on the matter about which he or she is questioned."[214] Chief Judge Cooke emphasized that police actions infringing upon the central protections within the attorney-client relationship cannot be ignored.[215]

In *People v. Cunningham*, Chief Judge Cooke also held in no uncertain terms that "an uncounseled waiver of a constitutional right will not be deemed voluntary if it is made after the right to counsel has been invoked."[216] In *Cunningham*, the defendant was taken to police headquarters for questioning, where he was read his *Miranda* rights.[217] At that time, the defendant agreed to speak with police, but made no incriminating statements.[218] Later that evening, the officers formally informed the defendant that he was officially under arrest and reiterated the defendant's *Miranda* rights.[219] At this juncture, the defendant refused to waive his right to counsel.[220] In response, the police told the defendant that he would have the opportunity to speak with an attorney after arraignment; however, the police made no effort to arrange for such

[212] *Id.* (emphasis added).
[213] *See id.* at 503.
[214] *Id.* at 504. Chief Judge Cooke also observed: "This court's vigilance in protecting the right to counsel finds additional support even in the ethical responsibility of attorneys in civil matters not to communicate on the subject of the representation with an individual known to be represented by an attorney on the matter." *Id.* at 503–04.
[215] *See, e.g.*, People v. Claudio, 629 N.E.2d 384, 387 (N.Y. 1993) ("[*People v. Skinner* p]reserv[es] the integrity of an accused's choice to communicate with police only through counsel."); People v. Bell, 535 N.E.2d 1294, 1297 (N.Y. 1989) ("Our ruling [in *People v. Skinner*] was designed to prevent the police from rendering the right to counsel ineffective by questioning the defendant about matters relating to the subject of the representation in the absence of counsel retained on the matter.").
[216] People v. Cunningham, 400 N.E.2d 360, 361 (N.Y. 1980).
[217] *See id.* at 362 (citing Miranda v. Arizona, 384 U.S. 436, 444–45 (1966)).
[218] *See Cunningham*, 400 N.E.2d at 362.
[219] *See id.*
[220] *See id.*

communications.[221] Several hours later, the defendant informed police officers that he wanted to make a statement. Once again, *Miranda* warnings were given.[222] Although the defendant was asked to sign the waiver, he reiterated that he would like to speak with counsel.[223] Despite repeatedly changing his mind about whether he would consent to questioning without an attorney, he ultimately waived his right and gave incriminating statements to the police.[224]

Chief Judge Cooke instructed that "[o]nce an individual expresses the need for counsel[,] he or she stands in the same position as one who has obtained the aid of an attorney."[225] He declared that a defendant has not waived his or her right to counsel, after being assigned counsel, merely because the defendant does "not want the lawyer assigned to represent him."[226] Declaring a bright-line rule, Chief Judge Cooke stated that the right to counsel attaches in two distinct situations: (1) "upon the commencement of formal adversary proceedings," and (2) in "cases in which formal adversary proceedings have not yet been commenced, but [involves] . . . suspects in custody who ha[ve] already retained or been assigned counsel to represent them on the specific charge for which they were being held."[227] Chief Judge Cooke explained "that a waiver of a constitutional right will not be deemed 'voluntary' unless the police have 'scrupulously honored' the suspect's prior assertion of his rights."[228]

Although recognizing a need to protect the attorney-client relationship throughout his time of the bench, Chief Judge Cooke also observed that such protection could not to become a sprawling and elastic trap to impede police investigations. For example, in *People v. Mealer*,[229] Chief Judge Cooke demonstrated a fair and

[221] *See id.*

[222] *See id.*

[223] *See id.*

[224] *See id.*

[225] People v. Skinner, 417 N.E.2d 501, 503 (N.Y. 1980) (citing *Cunningham*, 400 N.E. 2d at 364).

[226] People v. Grimaldi, 422 N.E.2d 493, 495 n.* (N.Y. 1981).

[227] *Cunningham*, 400 N.E. 2d at 363, 364.

[228] *Id.* at 362–63 (citing People v. Dean, 393 N.E.2d 1030, 1031 (N.Y. 1979); People v. Clark, 380 N.E.2d 290, 295 (N.Y. 1978); People v. Munlin, 380 N.E.2d 288, 290 (N.Y. 1978); People v. Buxton, 44 N.Y.2d 33, 386–87 (N.Y. 1978)); *see also Cunningham*, 400 N.E.2d at 361 ("[A]n uncounseled waiver of a constitutional right [to counsel] will not be deemed voluntary if it is made after the right to counsel has been invoked.").

[229] People v. Mealer, 441 N.E.2d 1080 (N.Y. 1982). In *Mealer*, the defendant was indicted for murder and subsequently suspected of perjury. *See id.* at 1082. The defendant bribed a witness for the state to offer perjured testimony. *See id.* at 1081. Although the "defendant's right to counsel had attached with respect to the murder charge . . . [and] the witness was acting as a police agent when he met with [the] defendant with the knowledge and encouragement of the police . . . [the d]efendant's right to counsel nevertheless was not violated." *Id.* at 1082 (internal citations omitted).

[230] *See id.* at 1082. In *Mirenda*, Chief Judge Cooke ruled that a defendant does not have a state or federal constitutional right "to the assistance of a lawyer while conducting a *pro se* defense." People v. Mirenda, 442 N.E.2d 49, 50 (N.Y. 1982). The defendant moved to appear *pro se*, but requested that he be "appointed counsel 'to act only as an advisor.'" *Id.* Chief Judge Cooke rejected the defendant's request, noting that "[t]he assignment of standby counsel . . . is a matter of trial management. As such, it is a subject for the discretion of the trial judge, whose decision will not be disturbed by [the New York Court of Appeals] unless the judge abuses that discretion." *Id.* at 51.

[231] *Mealer*, 441 N.E.2d at 1082 (quoting People v. Ferrara, 430 N.E.2d 1275, 1279 (N.Y. 1981)) (citing People v. Middleton, 430 N.E.2d 1264, 1267 (N.Y. 1981)). The questioning of the defendant in relation to the new crime "was not used as a pretext for circumventing defendant's rights." *Mealer*, 441 N.E.2d at 1082.

[232] People v. Ferrara, 430 N.E.2d 1275, 1277 (N.Y. 1981). In *Ferrara*, the defendant testified twice before a grand jury. *Id.* at 1276. At the second grand jury hearing, the prosecutor informed the defendant and his attorney that the government believed that the defendant had committed perjury during his uncounseled testimony at the first grand jury hearing. *Id.* Despite this accusation, the defendant took the stand and denied paying kickbacks to a nursing home operator. *Id.* Subsequent to this counseled interaction, a police informant set up a meeting with the defendant and recorded the conversation in which the defendant offered to pay a kickback. *Id.* at 1276–77. Although unaware that his meeting with the informant had been recorded, the defendant denied paying kickbacks after being subpoenaed for a third grand jury hearing. *Id.* at 1277. The defendant was subsequently indicted for perjury. *Id.*

logical balance between the rights of state actors and those of the accused.[230] He explained that "[t]he right to counsel may not be used as 'a shield . . .' to immunize one represented by an attorney against investigative techniques that capture a new crime in progress,'" a crime that is independent of the charge for which a defendant is indicted.[231]

Similarly, in *People v. Ferrara*, Cooke directed that under the federal and New York State Constitutions, "retention of counsel in connection with a grand jury inquiry [does not] preclude[] investigative techniques that elicit in a noncustodial setting not a confession, but a plan to commit a new crime of the type then under scrutiny."[232]

D. New York Practice

Chief Judge Cooke also made significant contributions to the development of New York Civil Practice and Procedure. He wrote a number of important opinions concerning the interpretation and application of state rules governing civil litigation, jurisdiction, res judicata, and statute of limitation defenses.

In *George Reiner & Co. v. Schwartz*,[233] Chief Judge Cooke recognized that New York courts enjoy a liberal reign of jurisdiction over nonresidents pursuant to CPLR 302(a)(1).[234] In determining whether jurisdiction is proper under CPLR 302(a)(1), he noted that while a nonresident's activities must be viewed collectively, there are also instances where a single act by a nondomiciliary defendant may be sufficient under the "transacting business" standard, without any further requirements, to establish personal jurisdiction.[235] In *Schwarz*, the defendant, a Massachusetts resident, entered into New York to execute an agreement with a New York corporation for work to be performed outside the state as an out-of-state salesman.[236] Years later, the corporation filed suit against the defendant for violating the terms of the agreement.[237] The defendant moved to dismiss the action based upon the court's lack of subject matter and personal jurisdiction.[238] The defendant claimed that he had not transacted business within the State of New York, as he had only entered the state on a single occasion to execute an out-of-state employment agreement.[239]

Chief Judge Cooke rejected the defendant's jurisdictional defense, noting that he had purposefully entered into New York to execute an agreement with one of its residents and, by doing so, established a continuing relationship with a New York employer.[240] He observed that the court's exercise of jurisdiction was constitutional because the "defendant ha[d] purposefully availed himself of the privilege of conducting activities in our jurisdiction, thus invoking the benefits and protection of our laws."[241] He concluded that the nature and quality of the defendant's actions were significant, and the execution of the contract was an obligatory commitment that created a continuing relationship with a resident of the state that developed for years after.[242] Chief Judge Cooke explained that the

[233] George Reiner & Co. v. Schwartz, 363 N.E.2d 551 (N.Y. 1977).
[234] *See id.* at 553.
[235] *Id.*
[236] *Id.* at 551–52.
[237] *Id.* at 552. The corporation alleged that the defendant had "knowingly, willfully[,] and fraudulently violated the terms of the contract," and it sought recovery for purported overdrawing of commissions. *Id.*
[238] *Id.* The Special Term granted the defendant's motion, holding that plaintiff lacked personal jurisdiction under CPLR 302(a)(1). *Id.* at 551, 553. However, a divided appellate division reversed and reinstated the complaint. *Id.* at 551.
[239] *Id.* at 554–55 (quoting Hi Fashion Wigs, Inc. v. Peter Hammond Adv., Inc., 300 N.E.2d 421, 423 (N.Y. 1973)).
[240] *Schwartz*, 363 N.E.2d at 555.
[241] *Id.* at 554.
[242] *See id.* at 554–55.

nature and quality of the contact is determinative, and not the quantity or professed isolation of a nonresident's interaction with its residents.[243]

Chief Judge Cooke concluded that the signing of the contract, although an isolated incident in time, triggered an ongoing relationship between the defendant and a corporation of the state that allowed the court to properly exercise its jurisdiction over the defendant under CPLR 302(a)(1).[244] He explained that the defendant's activities "cannot be reasonably viewed as merely the 'last act marking the formal execution of the contract.'"[245] When analyzing the nature of the defendant's contact, Chief Judge Cooke noted that this was more than a mere and casual attempt directed towards New York, as the purposeful activity of interviewing, negotiating and contracting "[required] no longer or more extensive negotiations or more detailed agreement . . . necessary to establish an employer-employee relationship."[246]

In *O'Brien v. City of Syracuse*,[247] Chief Judge Cooke determined that the doctrine of res judicata bars "[a] property owner who unsuccessfully asserts against a governmental entity a claim for *de facto* appropriation . . . [from] later bring[ing] another action for trespass in an attempt to recover damages for the same acts as those on which the first lawsuit was grounded."[248] The plaintiffs owned property in an area that state officials had sought to restore.[249] In 1973, the plaintiffs commenced an article 78 proceeding contending that state actors had seriously interfered with their property rights during the rehabilitation process, which they contended amounted to a de facto appropriation by the city.[250] In a nonjury trial, the claim "was dismissed for failure to establish a de facto taking."[251] Following judgment, the plaintiffs filed another complaint, generally reasserting the allegations of the prior petition, and adding a claim of averment by which the city had taken the property by tax deed on June 1, 1977.[252] The "[d]efendants moved to dismiss the complaint on the ground of res

[243] *Id.* at 555.
[244] *See id.* at 554, 555.
[245] *Id.* at 554.
[246] *Id.*
[247] O'Brien v. City of Syracuse, 429 N.E.2d 1158 (N.Y. 1981).
[248] *Id.* at 1159.
[249] *Id.*
[250] *Id.*
[251] *Id.*
[252] *Id.*

judicata, which . . . was granted with leave to amend."[253] Thereafter, the plaintiffs filed an amended complaint with the same claims, "and adding . . . statements that [the] defendants [had] 'wrongfully, unlawfully and willfully' trespassed" and damaged their "property at various times during the period 1967 to 1978."[254] The defendants "moved to dismiss on the grounds of res judicata, statute of limitations, and failure to serve timely a notice of claim."[255] The state supreme court denied the motion on all grounds, and "concluded that no bar existed because there were involved materially different elements of proof for the two theories of recovery."[256] "The Appellate Division, Fourth Department, reversed on the reasoning that the entire action was barred by the doctrine of res judicata[.]"[257] It dismissed the complaint in its entirety.[258]

Chief Judge Cooke observed that the plaintiff's current cause of action consisted of: "(1) those concerning activities underlying the 1973 litigation; and (2) those asserting trespass generally."[259] He noted that "[o]nly the claims encompassed by the first category [we]re definitely barred by res judicata."[260] Conducting a transactional analysis, the Chief Judge determined that all of the claims presented during a prior suit, as the basis for that litigation, were barred since "[t]hat proceeding . . . [was] brought to a final conclusion, [and therefore,] no other claim [could] be predicated upon the same incidents."[261] He explained that:

> When alternative theories are available to recover what is essentially the same relief for harm arising out of the same or related facts such as would constitute a single "factual grouping," the circumstance that the theories involve materially different elements of proof will not justify presenting the claim by two different actions.[262]

Chief Judge Cooke agreed with the appellate division, observing

[253] *Id.*
[254] *Id.*
[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] *Id.*
[259] *Id.*
[260] *Id.* Chief Judge Cooke dismissed the complaint due to the plaintiff's failure to serve timely a notice of claim, although finding that "the second category of allegations—the general trespass allegations—are not barred by *res judicata* to the extent that they describe acts occurring after the 1973 lawsuit." *Id.* at 1160.
[261] *Id.* at 1159.
[262] *Id.* at 1160.

that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction . . . are barred, even if based upon different theories or if seeking a different remedy."[263] He observed: "In effect, de facto appropriation may be characterized as an aggravated form of trespass. The pertinent evidence in both actions is the same. The basic distinction lies in the egregiousness of the trespass and whether it is of such intensity as to amount to a taking."[264]

In *McDermott v. Torre*,[265] Chief Judge Cooke addressed a significant statute of limitation question concerning a medical malpractice action against a physician and laboratory that had misdiagnosed the plaintiff's mole as noncancerous.[266] The treating physician had contacted the laboratory to review a specimen of the plaintiff's mole.[267] After reviewing the specimen, the laboratory informed the physician, who relayed the message to the plaintiff, that the results were negative and nothing further was required.[268] Over the next several years, the physician continued to treat the plaintiff for unrelated and general physical ailments.[269] On occasion, however, the plaintiff complained about a pain in her ankle, which the physician "reassured her that there was no cause for concern."[270] Thereafter, the plaintiff discovered a lump in her groin, a malignant melanoma from the site where the mole had been removed four years earlier.[271]

Chief Judge Cooke dismissed the plaintiff's cause of action against the laboratory,[272] finding that it was barred by the statute of limitations.[273] He explained that the three-year statute of limitations applied for actions based on acts of continuous medical treatment, rather than the shorter period of CPLR 214-a.[274] He noted that the plaintiff's action against the laboratory was time-barred because there was no evidence of continuing treatment by the laboratory and more than thirty-two months had elapsed

[263] *Id.* at 1159 (citing *Reilly*, 379 N.E.2d at 176).
[264] *Id.* at 1160.
[265] McDermott v. Torre, 437 N.E.2d 1108 (N.Y. 1982).
[266] *See id.* at 1109–10.
[267] *Id.* at 1110.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.* at 1112.
[273] *Id.* at 1109, 1112.
[274] *Id.* at 1109, 1111 (noting that effective July 1, 1975, while plaintiff's treatment was continuing, the period was reduced to 2.5 years under CPLR 214-a).

between plaintiff's last visit and service of summons.[275] As for the physician, Chief Judge Cooke noted that summary judgment was not appropriate, as there were issues of fact regarding whether there had been continuous treatment, thereby triggering the three-year statute of limitations from the last date of treatment.[276]

Notably, Chief Judge Cooke provided an in-depth discussion as to why the claim could not survive against the laboratory under the doctrine of "continuing treatment by the physician."[277] He explained that "[c]ontinuous treatment serves simply as a toll—the action may be brought at any time, but the patient will not be compelled to initiate judicial proceedings so long as the physician continues to treat the injury."[278] Cooke observed that "[i]mplicit in the policy is the recognition that the doctor not only is in a position to identify and correct his or her malpractice, but is best placed to do so."[279] As for the laboratory, however, he noted that these policy considerations did not apply, because the laboratory "does not have the opportunity to discover an error in a report. Instead, it must rely on the treating physician to discover any diagnostic mistake."[280] In this context, Cooke observed: "[T]he inquiry necessarily must be directed to the nature of a laboratory's relationship to the patient."[281] He concluded that, in the absence of evidence showing an agency or other relevant relationship between the laboratory and doctor or some relevant continuing relation between the laboratory and the patient, the laboratories were nothing more than an independent contractor with no continuing relation to plaintiff to allow the continuing treatment to be imputed from the general care provider.[282]

In *Mills v. Monroe County*,[283] Chief Judge Cooke affirmed the appellate division's decision to dismiss an employment discrimination claim as untimely.[284] The plaintiff had failed to timely file a notice of claim against the county.[285] Chief Judge Cooke observed that a time-barred claim may only continue if the action was brought to vindicate a public interest, or with leave of the court.[286] He explained:

> When an employment discrimination action is brought against a county under the state or federal civil rights statutes, the failure to timely file a notice of claim shall be fatal unless the action has been brought to vindicate a public interest or leave to serve late notice has been granted by the court.[287]

Chief Judge Cooke rejected the plaintiff's contention that her cause of action was brought to vindicate a public interest, noting that her allegations were narrowly tailored to personal interest, and "her action seeks relief only for her termination, which she alleges resulted from her opposition to the county's discriminatory practices and her race and national origin."[288] He further rejected the plaintiff's argument that the notice of claim requirement contained in the state's law—section 52 of the County Law—should not apply to either her federal or state civil rights claims.[289] Cooke explained that "[i]f success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant."[290] He concluded: "[T]he state's notice requirements are [not] antithetical to the policy underlying the civil rights laws."[291]

In *McDermott v. City of New York*,[292] Chief Judge Cooke reversed a trial court's decision dismissing as untimely a third-party complaint by the city seeking indemnification from the manufacturer of a truck it had purchased.[293] After being sued by one of its employees whose arm was severed by the sanitation truck's hopper mechanism, the city brought a third-party action against the manufacturer alleging that the mechanism was defective.[294] The manufacturer sought to dismiss the indemnification action as untimely, noting that the third-party complaint was commenced in 1975, although the truck was delivered to the city on February 5, 1969.[295] Chief Judge Cooke

[275] *See id.* at 1111.
[276] *See id.*
[277] *See id.* at 1109, 1112.
[278] *Id.* at 1111–12 (citing Borgia v. New York, 187 N.E.2d 777, 778 (N.Y. 1962)).
[279] *Id.* at 1112.
[280] *Id.*
[281] *Id.*
[282] *See id.*
[283] Mills v. Cty. of Monroe, 451 N.E.2d 456 (1983).
[284] *See id.* at 457.
[285] *Id.* at 456–57.
[286] *Id.* at 456.
[287] *Id.*
[288] *Id.* at 458–59 (noting that the plaintiff sought money damages for her loss of wages and damage to her reputation).
[289] *Id.* at 457.
[290] *Id.* (quoting Bd. of Regents v. Tomanio, 446 U.S. 478, 488 (1980)).
[291] *Mills*, 451 N.E.2d at 457.
[292] McDermott v. City of New York, 406 N.E.2d 460 (N.Y. 1980).
[293] *Id.* at 461.
[294] *Id.*
[295] *Id.*

rejected this argument, explaining that the city's cause for indemnification began accruing upon payment to its worker for his injuries, rather than from date of delivery of the sanitation truck, even though the third-party complaint by the city was based on products liability.[296] He observed: "[G]iven the quasi contractual character of the indemnification action, it was obvious that the contract statute of limitations, now six years, would be held controlling."[297]

In *Fleishman v. Eli Lilly & Co.*,[298] Chief Judge Cooke provided significant input, although in dissent, relating to the issue of when a medical claim "accrues" under the applicable statute of limitations.[299] In *Fleishman*, the plaintiffs sought to recover damages as a result of medical injuries caused by their exposure to the drug Diethylstilbestrol ("DES").[300] The injuries suffered by the plaintiffs arose after the applicable statute of limitations had expired.[301] The trial court granted the defendants motion to dismiss, holding that each complaint was time-barred.[302] The New York Court of Appeals affirmed the trial court's decision, holding that medical malpractice actions began to accrue when the plaintiffs were first exposed to DES and not when the injurious effect of the exposure manifested.[303] The court observed that "[a]ny departure from the policies underlying these well-established precedents is a matter for the legislature and not the courts."[304] The court noted "that a cause of action for personal injuries caused by a toxic substance accrue[s] and the limitations period beg[ins] to run upon exposure to the substance."[305]

Disagreeing with the court's rationale, Chief Judge Cooke observed: "[T]he law is not and should not be so inflexible that it

[296] *See id.* ("The cause of action for indemnification interposed against the manufacturer of an allegedly defective product is independent of the underlying wrong and for the purpose of the statute of limitations accrues when the loss is suffered by the party seeking indemnity. Hence, the dismissal of that part of the third-party complaint seeking indemnity, as barred by the four-year statute of limitations for breach of warranty measured from the date of tender of delivery . . . was unwarranted.").

[297] *Id.* at 462.

[298] Fleishman v. Lilly & Co., 467 N.E.2d 517 (N.Y. 1984), *cert denied* 469 U.S. 1192 (1985), *superseded by statute*, N.Y. C.P.L.R. 214-c (McKinney 2017).

[299] *Fleishman,* 467 N.E.2d at 519 (Cooke, C.J., dissenting).

[300] Manno v. Levi, 465 N.Y.S.2d 219, 220 (App. Div. 1983), *aff'd*, 467 N.E.2d 517 (N.Y. 1984), *cert denied* 469 U.S. 1192 (1985), *superseded by statute*, N.Y. C.P.L.R. 214-c.

[301] *Id.*

[302] *Id.* at 221, 222.

[303] *See Fleishman,* 467 N.E.2d at 518.

[304] *Id.* at 518.

[305] Enright v. Eli Lilly & Co., 570 N.E.2d 198, 200–01 (N.Y. 1991) (citing *Fleishman*, 467 N.E.2d at 518).

cannot correct itself from injustice and unfounded concerns espoused in prior decisions."[306] He explained that the doctrine controlling the dates in which a claim accrues "should not be used as a shield behind which a court may hide as reason for perpetuating unnecessary and profound unfairness, which subjects the law to ridicule."[307] Chief Judge Cooke rejected the proposition that the application of a statute of limitations is exclusively within the control and interpretation of the legislative body of government.[308] He noted:

> That the determination of when a cause of action accrues is not solely a matter for the legislature, [and as] is plainly evident by this court's determination here and previously, that a cause of action of this type accrues upon injury which is assumed to occur at the time of exposure, ingestion or injection of the cancer-causing foreign substance.[309]

Chief Judge Cooke explained that the court had misinterpreted the policy behind the imposition of statute of limitations.[310] He noted that the limitations run based upon the balancing of interests between the parties, ensuring that both parties' interests are protected under the law.[311] He concluded that "the balance of policy considerations weighs heavily in favor of plaintiffs and indicates that a discovery rule or, at the very least, a true date of medical-injury rule should be adopted for the accrual of the causes of action."[312] As a result, he advocated that "[t]hese cases present a compelling argument for adopting a discovery rule."[313]

Notably, a few years later, the New York Court of Appeals overturned the *Fleishman* decision,[314] as the state legislature

[306] *Fleishman*, 467 N.E.2d at 518 (citing Woods v. Lancet, 102 N.E.2d 691, 694 (N.Y. 1951)).

[307] *Fleishman*, 467 N.E.2d at 518.

[308] *See id.* at 519.

[309] *Id.*

[310] *See id.* at 519–20 ("A statute of limitations serves in part to prevent plaintiffs from sleeping on their rights or waiting to assert stale claims and to ensure that defendants will receive notice of claims as soon as practicable. In these cases, the plaintiffs cannot be said to have purposefully or unreasonably waited to bring suit because no injuries were known by them to occur at the time of their ingestion of or exposure to DES." (first citing Urie v. Thompson, 337 U.S. 163, 170 (1949); then citing Raymond v. Eli Lilly & Co. 371 A.2d 170, 174 (N.H. 1977))).

[311] *See Fleishman*, 467 N.E.2d at 519 (quoting Victorson v. Bock Laundry Mach. Co., 335 N.E.2d 275, 279 (N.Y. 1975)).

[312] *Fleishman*, 467 N.E.2d at 519.

[313] *Id.* at 520.

[314] *See* Enright v. Eli Lilly & Co., 570 N.E.2d 198, 200 (N.Y. 1991) (first citing *Fleishman*, 467 N.Y.2d 198; then citing N.Y. C.P.L.R. 214-c (McKinney 2017)). The court recognized that special rules have been fashioned by the legislature and "are a response to unique procedural

implicitly adopted Chief Judge Cooke's proposition for an equitable discovery rule in unique medical cases, such as those presented by individuals exposed to DES.[315] The state's legislature enacted "a 'discovery' statute of limitations [that] was directed at opening up traditional avenues of recovery by removing a procedural barrier that was unreasonable given the nature of DES injuries."[316] In 1986, the New York State legislature recognized that "claims for injuries caused by exposure to DES and other toxic substances were often time-barred before the harmful effects of the exposure could be discovered, [and] changed the law to provide that the limitations period in exposure cases begins to run upon discovery of the injury."[317] The legislature also "revived for one year previously time-barred causes of action based on exposure to DES and four other toxic substances."[318]

E. Privileges

Chief Judge Cooke's wrote several instructive opinions regarding a party's right not to disclose information that is privileged. In *Matter of Beach v. Shanley*,[319] Chief Judge Cooke established that New York's Shield Law (Civil Rights Law § 79-h) offered a broad and unqualified privilege to journalists who refused to disclose information or sources to state officials.[320] Specifically, Chief Judge Cooke observed that the law created a journalistic privilege against compulsory disclosure of news sources to a grand jury, even if the source's disclosure of information may itself have constituted criminal activity.[321] In *Beach*, a grand jury investigation was conducted on the Rensselaer County sheriff's office: a captain and lieutenant were alleged to be involved in illegal weapon sales.[322] The grand jury failed to indict either suspect, but issued damaging reports recommending their removal from official duty.[323] An unidentified source contacted the defendant, a local television reporter, and offered information about the sealed reports contingent upon the defendant's promise not to release the source's

barriers and problems of proof peculiar to DES litigation." *Enright*, 570 N.Y.2d at 201–02.

[315] *See* N.Y. C.P.L.R. 214-c.

[316] *Enright*, 570 N.E.2d at 202.

[317] *Id.* at 201 (citing N.Y. C.P.L.R. 214-c).

[318] *Enright*, 570 N.E.2d at 201 (citation omitted).

[319] Beach v. Shanley, 465 N.E.2d 304 (N.Y. 1984).

[320] *See id.* at 310.

[321] *See id.* at 309, 310.

[322] *See id.* at 306.

[323] *See id.*

identity.[324] The defendant agreed, and later reported that the grand jury had recommended the removal of the sheriff.[325] Thereafter, another grand jury convened to investigate the "disclosure of a certain sealed grand jury report."[326] The defendant was served with a subpoena to appear before the grand jury in an effort to determine "whether the contents of the sealed report were disclosed by a grand juror or a public official or public employee in violation of section 215.70 of the Penal Law."[327] The defendant moved to quash the subpoena, which was eventually granted by the trial court.[328]

Chief Judge Cooke rejected the district attorney's contention that Article I of the New York State Constitution invalidated the evidentiary privileges set forth by the Shield Law when relating to grand jury subpoenas.[329] He explained: "The constitutional provision against impairing a grand jury's power was not intended to prevent the legislature from creating evidentiary privileges or their equivalent that have an incidental impact on investigations into willful misconduct by public officers."[330] Instead, Chief Judge Cooke thought that "the proposal was advanced solely for the purpose of making certain that the legislature of this state would never be able to . . . take from the grand jury its authority to investigate and indict for alleged criminal acts by public officials."[331] He concluded that the relevant provisions of Article I targeted only "legislation that directly restricts a grand jury's right to inquire or that, although facially neutral, would have its primary impact by limiting investigations of public officers."[332] He stated unequivocally that the Shield Law was not such a statute, since "[i]ts impact on investigations . . . [was] incidental."[333]

Chief Judge Cooke recognized that "a grand jury's power to issue subpoenas is unfettered,"[334] but the Shield Law was constructed to protect reporters from contempt, fine, or imprisonment for their

[324] *See id.*

[325] *See id.*

[326] *Id.*

[327] *Id.*

[328] *See id.* at 307 (noting that after the trial court quashed the subpoena, the appellate division reversed). That court reasoned that the Shield Law was invalid because it "impaired a grand jury's power to investigate public officials." *Id.*

[329] *See id.* at 311. Article I, section 6, of the state Constitution proscribes the legislature from enacting any laws that impair or suspend a grand jury's power to investigate willful misconduct. N.Y. CONST. art. 1, § 6.

[330] *Beach*, 465 N.E.2d at 310.

[331] *Id.* (quoting *In re* Wood v. Hughes, 173 N.E.2d 21, 24 (N.Y. 1961)).

[332] *Beach*, 465 N.E.2d at 311.

[333] *Id.*

[334] *Id.* at 307.

refusal to disclose information "regardless of whether the information is highly relevant to a governmental inquiry and whether the information was solicited or volunteered."[335] Chief Judge Cooke emphasized the plain language of the statute, which read that "[a]ny information obtained in violation of the . . . [statute] shall be inadmissible in any action or proceeding or hearing before any agency."[336] He noted that "the Shield Law provides a broad protection to journalists without any qualifying language."[337] Thus, the protection extended regardless of whether the reporter observed criminal activity or "even when the act of divulging the information was itself criminal conduct."[338]

In *Matter of Bronx Cty. Grand Jury Investigation*,[339] Chief Judge Cooke rendered an important decision concerning both spousal and attorney-client privileges.[340] The case stemmed from evidence gathered by the district attorney's office in its investigation of the murder of Clara Vanderbilt.[341] The defendant presumed that he was a target of the investigation.[342] While at work, the defendant made a tape-recorded message addressed to his wife.[343] That evening, the defendant unsuccessfully attempted suicide.[344] The

[335] *Id.* at 309.

[336] *Beach*, 465 N.E.2d at 309 (quoting N.Y. CIV. RIGHTS LAW § 79-h(d) (McKinney 2017)).

[337] *Beach*, 465 N.E.2d at 310. Three years after *Beach*, in *Knight-Ridder Broadcasting, Inc.*, the Court of Appeals readdressed the issue of the existence or nonexistence of a confidentiality requirement in the amended Shield Law. *See* Knight-Ridder Broadcasting, Inc. v. Greenberg, 505 N.Y.S.2d 368, 370 (App. Div. 1986), *aff'd*, 511 N.E.2d 1116 (N.Y. 1987). The appellate division in *Knight-Ridder* declined to interpret Chief Judge Cooke's language in *Beach* that the Shield Law afforded a "broad protection to journalists without any qualifying language" to nullify the requirement of a confidentiality agreement that the Shield Law originally required for privilege protections. *Id.* at 371 (quoting *Beach*, 465 N.E.2d at 310). Years later, in *Sullivan*, the state supreme court in Queens County suggested that *Beach* overruled judicial interpretations of the Shield Law that maintained a confidentiality requirement throughout its various amendments, while *Knight-Ridder* reinstated the "cloak of confidentiality" to journalistic privilege. *See* Sullivan v. Hurley, 635 N.Y.S.2d 437, 439 (Sup. Ct. 1995) (quoting *Knight-Ridder Broadcasting, Inc.*, 511 N.E.2d at 1118).

[338] *Beach*, 465 N.E.2d at 310. Judge Wachtler wrote a concurring opinion in *Beach*, stating that he would have deemed the quashing proper not just because of the Shield Law privilege but because such protection should be a matter of right under the state constitutional freedom of the press. *Id.* at 311 (Wachtler, J., concurring). Chief Judge Cooke declined to conduct a constitutional analysis, noting that "[c]ourts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground." *Id.* (majority opinion). Judge Meyer issued a dissent in *Beach*. *Id.* at 312 (Meyer, J., dissenting). He argued that the majority misinterpreted the scope of Article I, section 6, by erroneously searching for intent beyond the "clarity of the constitutional provision." *See id.* at 312–13.

[339] *In re* Bronx Cty. Grand Jury Investigation, 439 N.E.2d 378 (N.Y. 1982).

[340] *See id.* at 380.

[341] *See id.*

[342] *See id.*

[343] *See id.*

[344] *See id.*

defendant's wife later discovered the tape.[345] She did not listen to the tape, but instead gave it to her friend, who was an attorney.[346] Thereafter, the defendant's office was searched for additional documents and recordings.[347] A second tape was found in his desk.[348] Both tapes were eventually received and held by the defendant's attorney.[349] Although the defendant was ordered to turn over the tapes, he failed to comply.[350] The defendant argued that the first tape contained information protected by the marital privilege and the second tape was protected by both the attorney-client privilege and his right against self-incrimination.[351]

The trial court quashed the subpoenas, but was reversed on appeal.[352] The appellate division rejected both arguments of privilege.[353] The court observed that the privilege applies only to confidential statements "induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship."[354] The court also ordered a scientific inspection of the first tape to determine whether its content had been altered.[355] As to the first tape, Chief Judge Cooke rejected the appellate division's holding. He found that a communication is made during marriage even if the intention is that the message will be received after death, because such a communication cannot be considered to be made in contemplation of destroying the marriage.[356] He observed that the exception for statements aimed at destroying a marriage concerns the "nature of the statement itself."[357] Chief Judge Cooke explained that a declaration made during a suicide attempt might possibly be the "last attempt to preserve the affection that gave rise to the marriage."[358] In the absence of any other evidence on the record suggesting otherwise, he determined that the messages were indeed induced by the marriage.[359]

[345] *See id.*

[346] *See id.* at 380–81.

[347] *See id.* at 381.

[348] *See id.*

[349] *See id.*

[350] *See id.*

[351] *See id.*

[352] *Id.*

[353] *Id.*

[354] *Id.* at 382.

[355] *Id.* at 381.

[356] *See id.* at 382.

[357] *Id.*

[358] *Id.*

[359] *Id.*

To satisfy the element of confidentiality, Chief Judge Cooke noted that the defendant delivered it to his wife, outside the presence of the third parties, who then effectively delivered it to the lawyer.[360] He explained that when the lawyer first found the tape, only the two spouses knew of its existence and message.[361] Thus, the delivery of the tape to third parties for safekeeping did not destroy the privilege, because the third parties had "no justifiable interest in becoming privy to the marital privilege."[362] Chief Judge Cooke further explained that the privilege only fails "when the substance of a communication, and not the mere fact of its occurrence, is revealed to third parties."[363] Moreover, Chief Judge Cooke did not find a basis for ordering a scientific examination of the tape, since "[o]nce it is determined that the contents of the tape were privileged, it is irrelevant whether there have been erasures or other deletions."[364]

In regard to the second tape, Chief Judge Cooke declined to accept the defense's argument that the attorney's disclosure of the tape would violate the defendant's Fifth Amendment protection against self-incrimination.[365] He observed that an attorney may not directly assert a protection claim based on a Fifth Amendment right held by his client.[366] The coercive power of the subpoena is directed at the attorney, but production would in no way self-incriminate him to implicate the commands of the Fifth Amendment.[367] Nevertheless, Chief Judge Cooke did accept the defendant's argument that "[a]n attorney may rely on the attorney-client privilege to prevent discovery of materials that would not have been discoverable if in the client's hands."[368] Chief Judge Cooke undertook a two-pronged analysis to determine if an attorney can assert attorney-client privilege to prevent discovery of materials that would not have been discoverable in the client's possession.[369] The first factor was whether the attorney received the material under circumstances giving rise to the privilege.[370] If so, then the court must consider whether the material would have been protected in the client's

[360] *See id.*
[361] *Id.*
[362] *Id.*
[363] *Id.* at 382–83.
[364] *Id.* at 383.
[365] *See id.*
[366] *Id.*
[367] *Id.*
[368] *Id.*
[369] *Id.*
[370] *Id.*

possession.[371]

Chief Judge Cooke explained:

> While it is true that the attorney-client privilege does not attach unless there is a "confidential communication" between counsel and his or her client, this does not require that all aspects of the communication, including its topic, must be confidential for the privilege to attach. Rather, the pertinent "confidence" arises from the attorney-client relationship and the privacy of the conversation or communication to the attorney.[372]

Chief Judge Cooke explained that only actual disclosure, and not mere intent, will breach the privilege.[373] Therefore, if no actual disclosure has occurred, the privilege remains intact even if the client had intended to disclose the substance of the material.[374] Ultimately, the Chief held that the attorney-client privilege attached because the tape's recording was uttered only to the lawyer "by his client who was seeking legal advice and outside the presence of any third party with no intention that it be passed to another."[375]

Furthermore, Chief Judge Cooke observed that had the tape remained in the defendant's possession, it would have been protected.[376] He explained that testimonial evidence is "that which communicates the witness's ideas or thoughts, that exposes the witness's mental state or thought process."[377] Both the evidence and the act of production must include "some testimonial quality."[378] Chief Judge Cooke reasoned that the lawyer's production of the tape was "testimonial by virtue of his authentication, express or implied, of the tape," including "the circumstances of its preparation, its accuracy, and the conclusions drawn from it."[379]

[371] *Id.*
[372] *Id.* at 384.
[373] *Id.*
[374] *Id.*
[375] *Id.*
[376] *Id.* at 384–85, 386. Judge Jasen authored a partial concurring and dissenting opinion in this case. *Id.* at 386 (Jasen, J., dissenting). He disagreed that the second tape was protected by the attorney-client privilege. *Id.* at 387. Even though the defendant's wife delivered the tape to the lawyer for the purpose of obtaining legal advice, the lawyer conceded that he never listened to it. *Id.* at 388. Therefore, Judge Jasen reasoned, there was only a disclosure of the existence of the tape, which could hardly be confidential considering the multiple persons who had knowledge of the tape's existence. *Id.* at 387.
[377] *Id.* at 385 (majority opinion).
[378] *Id.*
[379] *Id.*

F. Family Law

Chief Judge Cooke wrote many instructive opinions dealing with family law. His sense of fairness and his desire for justice in judicial proceedings was most evident in his resolve of matters concerning paternity, child custody, and parental rights.

For example, in *Matter of Vicki B. & David H.*,[380] Chief Judge Cooke decided that a paternity proceeding to determine paternity of a child born out of wedlock was not barred by the statute of limitations when the putative father had acknowledged being the father by providing financial support during the child's infancy.[381] He observed that "[w]hen a putative father has acknowledged paternity either in writing or through the furnishing of support payments, the time within which a paternity proceeding must be brought is not restricted by any statutory limitation."[382] He reversed the appellate division and reinstated the family court order finding no time bar.[383]

In *Dickson v. Lascaris*,[384] Chief Judge Cooke reversed the denial of a father's petition to regain custody of his children from a third party.[385] Specifically, the father petitioned the court to reclaim custody of his three children, who he had entrusted to a friend.[386] After his wife's refusal to help with the upbringing of the children, he tried to raise the children himself.[387] However, after realizing he could not manage such task alone, he entrusted the care of his children to a friend of his father.[388] Several years later, after remarrying and establishing regular contact with his children, he sought to regain custody.[389] Granting his request, Chief Judge Cooke explained: "[B]etween a parent and a third person, parental custody of a child may not be displaced absent grievous cause or necessity."[390] He stated: "[A] child is not a piece of property over whom title may be acquired by adverse possession,"[391] and that when deciding who should have custody of the child, the best

[380] *In re* Vicki B. v. David H., 442 N.E.2d 1248 (N.Y. 1982).
[381] *Id.* at 1248.
[382] *Id.*
[383] *See id.* at 1249.
[384] *In re* Dickson v. Lascaris, 423 N.E.2d 361 (N.Y. 1981).
[385] *See id.* at 362.
[386] *See id.*
[387] *See id.*
[388] *See id.*
[389] *See id.* at 363.
[390] *Id.*
[391] *Id.* at 364.

interests of that child must always come first.[392]

Similarly, in *Matter of Leon R.R.*,[393] Chief Judge Cooke reversed the family court's granting of a petition to terminate parental rights of a child's natural parents.[394] The child was removed from the custody of his parents when he was a year and a half old because of accusations of neglect.[395] He remained with his foster parents for over eight years, after which time, measures were taken to reintegrate him back with his natural parents.[396] However, efforts by the foster agency seemingly left the natural parent's requests unanswered.[397] The agency alleged that the child was a permanently neglected child, and therefore wanted to terminate the parental rights and award permanent custody to the foster parents.[398]

Chief Judge Cooke rejected the agency's request, noting that they failed to show that the natural parents permanently neglected the child as required by law. He noted that the agency was required to prove that the parents:

> [F]ailed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.[399]

Chief Judge Cooke also found that the record demonstrated that the respondents availed themselves of every opportunity to strengthen the parent-child relationship between them and the child, but that the petitioner had sought to impede these attempts.[400]

In *People ex rel. Sibley v. Sheppard*,[401] Chief Judge Cooke issued an opinion protecting the right of grandparents to remain in contact with a grandchild who was taken from the natural mother after

[392] *See id.* at 363–64 (citing Bennett v. Jeffreys, 356 N.E.2d 277, 283 (N.Y. 1976)).
[393] *In re* Leon R.R., 397 N.E.2d 374 (N.Y. 1979).
[394] *See id.* at 376.
[395] *See id.*
[396] *See id.*
[397] *See id.* at 377.
[398] *See id.* at 379.
[399] *Id.*
[400] *See id.*
[401] People *ex rel.* Sibley v. Sheppard, 429 N.E.2d 1049 (N.Y. 1981).

neglect proceedings.[402] The petitioner, the child's grandmother, visited the child regularly until his temporary custodians (respondents) adopted him.[403] After adoption, the respondents made it difficult for her to visit, which led to a petition under section 72 of the New York Domestic Relations Law to preserve the vitiation rights of the child's natural grandparent.[404] Chief Judge Cooke declared that an adopted child may not be completely isolated from her natural born family, especially when statutory law grants the natural grandparents a visitation right if in the child's best interest.[405] He rejected the respondent's contention that section 117 of the Domestic Relations Law allowed the rights of the natural family of an adopted child to be severed at the time of adoption.[406] Similarly, Chief Judge Cooke rejected the respondent's constitutional challenges (invasion of familial privacy), noting that parents are not free to act in whatever way they wish.[407] He explained that a family is within the scope of regulation if it is for the benefit of public policy, and permitting a natural grandparent to visit with their grandchild does not impede on any constitutional rights to privacy.[408]

In *In re Sheila G.*,[409] Chief Judge Cooke issued an opinion establishing the duty of child-care agencies to facilitate and assist parents in maintaining contact with children held in the agency's temporary care. There, a child was born out of wedlock and voluntarily placed up for adoption by her mother with the New York City Department of Social Services.[410] The child was then placed in foster care with Brookwood Child Care Agency.[411] A month and a half later, her natural born father contacted Brookwood requesting a meeting with agency officials, in which he stated that he wanted to be able to visit with and financially support the child.[412] The agents at Brookwood informed the father that the mother had adamantly refused permission for him to contact his daughter, and

[402] *See id.* at 1050.
[403] *See id.*
[404] *Id.* New York law recognizes the rights of a natural grandparent and states that "when one or both parents are deceased, a proceeding in habeas corpus may be brought against a person who has 'the care, custody, and control of' the grandchild." *Id.* (quoting N.Y. DOM. REL. LAW § 72(1) (McKinney 2017)).
[405] *See Sheppard*, 429 N.E.2d at 1051–52.
[406] *See id.* at 1050–51.
[407] *Id.* at 1052.
[408] *See id.*
[409] *In re* Sheila G., 462 N.E.2d 1139 (N.Y. 1984).
[410] *Id.* at 1141.
[411] *Id.*
[412] *Id.*

he was told that until he could formally establish paternity, the agents would be bound by the mother's wishes.[413] Months later, the mother decided to allow visitation rights to the father,[414] who planned to adopt the child in the near future after being able to determine paternity.[415] Later, the agency rejected his request, noting that it took eighteen months total.[416] The agency noted that the lapse of time was indicative of his inability to plan for the child's future.[417] The family court denied the agency's petition for permanent neglect and noted that it had undermined the potential relationship between the father and child.[418] However, the court was reversed by the appellate division, which found that the father's procrastination gave rise to a determination of permanent neglect.[419]

Rejecting the appellate division's finding, Chief Judge Cooke explained:

> When a child-care agency has custody of a child and brings a proceeding to terminate parental rights on the ground of permanent neglect, it must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family. Only when this duty has been deemed satisfied may a court consider and determine whether the parent has fulfilled his or her duties to maintain contact with and plan for the future of the child.[420]

Chief Judge Cooke explained that only when an agency has tried to assist a parent in meaningful ways, such as: providing counseling with respect to a problem that interferes with the return of the

[413] *Id.*
[414] *Id.*
[415] *Id.*
[416] *See id.* at 1142.
[417] *See id.* The definition for "permanent neglect" is codified in section 384-b(7) of the New York Social Services law, which provides that a permanently neglected child:

> [M]ean[s] a child who is in the care of an authorized agency and whose parent or custodian has failed for a period of more than one year following the date such child came into the care of an authorized agency substantially and continuously or repeatedly to maintain contact with or plan for the future of the child, although physically and financially able to do so, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship when such efforts will not be detrimental to the best interests of the child.

Id. at 1145.
[418] *See id.* at 1143.
[419] *See id.* at 1144.
[420] *Id.* at 1140–41.

child; assisting in planning for a child's future; aiding in attaining a house; or scheduling regular and meaningful visits between the child and the parent, then the agency will be found to have satisfied its statutory duty.[421]

Chief Judge Cooke noted that the agency made no attempts to assist the father, who presented them with two separate plans to gain custody of his child.[422] In fact, the agency frustrated his attempts and made it difficult for him to regain custody by failing to make suitable arrangements for visits.[423] Chief Judge Cooke held that the agency acted with complete indifference to the father's goals, failing to satisfy its statutory obligations.[424] Chief Judge Cooke noted: "[I]t is doubtful whether it could be found to be in the child's best interest to deny her [parent's] persistent demands for custody simply because it took so long for [him] to obtain it legally."[425]

CONCLUSION

Chief Judge Cooke was not only an accomplished judge, but also a human being of the finest caliber. He was a leader in all aspects of life, a man of integrity, and a being of moral excellence. Chief Judge Cooke's legacy as a man, judge, and public leader is truly exemplary, because:

> However high he rose in public life, however powerful he became, however long the list of his accomplishment, [he] treated everyone, everyone, with kindness and respect. The fact is he changed a lot of things, but some things never changed. His hat size never changed. His concern for people never changed, and he never deviated from his own fundamental values. Always he took the high road.[426]

For his contributions as a judge, Professor Bonventre best explained that Chief Judge Cooke will be most remembered:

> [F]or his tenure on the Court of Appeals, as its foremost guardian of individual rights, its most unrelenting opponent of inequity, oppression, and inhumane treatment. For his human dimension to judging. For his sensitivity to individual and community needs, for his commitment to reducing injustice, and elevating the conduct of public officials.[427]

Upon his unfortunate passing on August 17, 2000,[428] it was clear that the New York State judiciary and the legal community had been blessed to be amidst greatness.[429] "He served the state brilliantly to the very last minute, [and] to speak only from the record books would ignore the amazing warmth he always displayed . . . . His mission was to treat everyone equally. Always, he took the high road."[430]

Chief Judge Lawrence H. Cooke, we cherish your memory and continue to follow your wisdom and unwavering dedication of service to the law, your community, and the State of New York.[431]

[421] *See id.* at 1147, 1148.
[422] *Id.* at 1149.
[423] *Id.* at 1149–50.
[424] *Id.* at 1150.
[425] *Id.* (quoting *In re* Sanjivini K., 391 N.E.2d 1316, 1320 (N.Y 1979)).
[426] Judith S. Kaye, *Eulogy for Chief Judge Lawrence H. Cooke*, 64 ALB. L. REV. 5, 7 (2000).

[427] Bonventre, *supra* note 72, at 1.
[428] Adolfsen & Adolfsen, *supra* note 34.
[429] *See, e.g.*, William H. Honan, *Lawrence H. Cooke, 85, New York Chief Judge, Dies*, N.Y. TIMES (Aug. 19, 2000), http://www.nytimes.com/2000/08/19/nyregion/lawrence-h-cooke-85-new-york-chief-judge-dies.html.
[430] John Emerson, *County Mourns at Judge Cooke's Funeral*, SULLIVAN COUNTY DEMOCRAT (Aug. 25, 2000), http://www.sc-democrat.com/archives/2000/news/08August/25/cooke.html.
[431] As former Chief Judge Kaye expressed, Judge Cooke "wasn't just born with the love of his community, he earned it every single day." Kaye, *supra* note 426, at 7.

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SUNDAY, OCTOBER 28, 2018

NY's Court of Appeals in the Era of Trump

New York's highest court must step up.

The reactionary direction in so many areas of national policy and, perhaps most especially, the effect that the two newest appointees to the Supreme Court will have on ***federal*** constitutional and statutory protections, require heightened vigilance by ***state*** high courts.

As the final arbiters of their individual ***state's*** own constitution and laws, ***state*** courts have the ***authority, opportunity, and obligation*** to ***independently*** insure that fundamental civil rights and liberties are enforced, regardless of what the federal high court does under federal law. As has often been true throughout its history, the New York Court of Appeals should take a--if not ***the***--leadership role.

Seventy-five years ago, Chief Judge Irving Lehman made clear the role and responsibility of New York's high court:

> *Parenthetically we may point out that 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.*

In that case, *People v. Barber* (1943), the Court of Appeals refused to adopt the Supreme Court's narrow view of free speech and religious liberty and, instead, did not hesitate to protect both as a matter of New York's own constitution law. Significantly, the federal Supreme Court--a mere four months later--followed the Court of Appeals' lead and overruled its prior rights-denying decision. (*Murdock v. Pennsylvania* [1943], overruling *Jones v. Opelika* [1942].)

> *That sort of leadership and*

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Today's NY Court of Appeals

influence by state courts and, in particular, by the New York Court of Appeals is needed today.

Twenty years later, in *People v. Donovan* (1963), involving the self-incrimination privilege and the right to counsel, then-Judge Stanley Fuld reminded the government of the Court of Appeals' independent tradition and function in our federal system of dual sovereignty:

> *[W]e find it **unnecessary to consider** whether or not **the Supreme Court of the United States** would [rule the police conduct to be] a violation of the defendant's rights **under the Federal Constitution**....**[T]o quote from our opinion** in Waterman (9 N Y 2d, at p. 565), [the violation in this case] "contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."*

Indeed, ***New York's*** high court relied solely on ***New York's*** own constitutional protections and precedents in that case and in so many others where, in the words of Chief Judge Charles Breitel, it reaffirmed its commitment to "extend[ing] constitutional protections...under the State Constitution beyond those afforded by the Federal Constitution." *People v. Hobson* (1976).

That sort of willingness to be bold and independent by state courts and, in particular, by the New York Court of Appeals is needed today.

Then, throughout the tenure of Lawrence Cooke, both as Judge and eventually Chief Judge, the Court of Appeals refused to "pay[] mere lip service to the principle of due process" (*People v. Isaacson* [1978]). It led the country in the rigorous enforcement of constitutional protections in both civil and criminal cases as a matter of New York ***state*** law, ***independent*** of the Supreme Court's rulings under corresponding ***federal*** law. (E.g., *People v. Isaacson* [1978], "traditional notions of justice and fair play;" *Sharrock v. Dell Buick* [1978], civil due process requirements of notice and opportunity to be heard; *People v. Skinner* [1980], right to counsel.)

That sort of steadfast guardianship and rigorous enforcement of constitutional principles by state courts and, in particular, by the New York Court of Appeals is needed today.

Not long thereafter, when the Court seemed at risk of losing its moorings, then-Judge Judith Kaye felt compelled to remind some of her colleagues of the propriety and obligation of a state high court to render independent judgment:

> *[A]t some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient, even as to whether constitutional protections we have enjoyed in this State have in fact been diluted by subsequent decisions of a more recent Supreme Court....**A state court decision that rejects Supreme Court precedent, and opts for greater safeguards as a matter of state law,***

> *does indeed establish higher constitutional standards locally. [But even] the Supreme Court as well as its individual Justices have reminded state courts not merely of* ***their right but also of their responsibility to interpret their own constitutions****.[R]ejecting Supreme Court precedents [reflects] both* ***the role of the Supreme Court in setting minimal standards*** *that bind courts throughout the nation, and t****he role of the state courts in upholding their own constitutions****. (*People v. Scott*, concurring opinion [1992].)*

Fortunately, and in large measure owing to Judith Kaye's influence and veritable tutoring on judicial federalism, the Court of Appeals exercised its independent judgment and avoided merely following lockstep with whatever the Supreme Court decided under federal law, however questionable.

Understanding and embracing the axiomatic principles of federalism, including the independent role of state courts--as emphatically restated by Judith Kaye--is needed today by state courts and, in particular, by the New York Court of Appeals.

Nevertheless, in the later years of Kaye's tenure as Chief Judge, the Court of Appeals failed to heed those principles and did lose its moorings for a spell. Consequently, during that period the Court produced some very unworthy decisions. Among them was one of the Court of Appeals most regrettable rulings in the modern era, *Hernandez v. Robles* (2006), rejecting the right to marry for same-sex couples.

As Chief Judge Kaye wrote in her passionate dissent, the majority's refusal to recognize marriage equality was an embarrassing break with the Court's tradition of leadership in safeguarding fundamental rights:

> *This State has a proud tradition of affording equal rights to all New Yorkers. Sadly, the Court today retreats from that proud tradition....*
> *It is* ***uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution****, and to order redress for their violation.* ***The Court's duty to protect constitutional rights is an imperative*** *of the separation of powers, not its enemy.*
> *I am confident that* ***future generations will look back on today's decision as an unfortunate misstep.***

And, of course, Chief Judge Kaye was right. The Court's reluctance to safeguard constitutional rights to the fullest ***under New York law*** was, at the very very least, "an unfortunate misstep." Indeed, it has proven to be a quite shameful ruling. It placed the Court among the nation's most backward, callous, and timid tribunals. And it required New York's governor and legislature to protect equal rights because the Court had failed to do so.

That sort of timidity and underenforcement of the most fundamental constitutional mandates of equal treatment and due process, by a state court and by the New York Court of Appeals in particular, must be avoided today.

A few years hence, with Chief Judge Jonathan Lippman at the helm, the Court's national stature as a leader among state high courts rebounded. *(Indeed, several chief justices of state courts around the country actually volunteered that to me during the time.)*

The Court of Appeals once again began boldly to protect basic rights as a matter of ***state*** law, ***independent*** of how the ***federal*** Supreme Court might decide the same issues. So, for example, in *People v Weaver* (2009), the Court declared that the technological surveillance in question was a search requiring probable cause and a warrant. Whether ***federal*** Supreme Court doctrine--as embraced by the dissenters--would have dictated a different result was beside the point.

Writing for the majority, the Chief Judge made clear that a potentially contrary ***federal*** Supreme Court ruling was irrelevant:

> *What we articulate today may or may not ultimately be a separate standard. If it is, we believe* ***the disparity would be justified****.* ***The alternative would be*** *to countenance an enormous unsupervised intrusion by the police agencies of government upon personal privacy and, in this modern age where criminal investigation will increasingly be conducted by sophisticated technological means, the consequent* ***marginalization of the State Constitution and judiciary in matters crucial to safeguarding the privacy of our citizens.***

Notably, three years later in *U.S. v. Jones* (2012), the Supreme Court--despite its narrow, rigidly, and regressively textualistic opinion by Justice Scalia--reached the same result as did the Court of Appeals. Significantly, a majority of the Justices, in separate concurring opinions, actually adopted the very same privacy analysis articulated by Chief Judge Lippman.

The sort of confident fidelity to a state court's independent role in protecting fundamental rights, as reflected in the Court of Appeals' decision in Weaver, is needed today.

The current Court of Appeals--with all its members having been appointed in recent years--is still a young court, with little institutional memory, and is seemingly still finding its way. At the least, it has not yet made its mark. It has yet to establish itself as an heir of the earlier courts, of carrying forth the historic tradition of the Court of Appeals as a force for vigorously protecting constitutional rights and liberties and fundamental fairness, and of doing so entirely independent of what the federal Supreme Court has done or might do.

Other state high courts around the country--the supreme courts of Iowa, Massachusetts, Oregon, Vermont, and Washington being among them--have been in the forefront of producing landmark rulings as a matter of independent state law. The Court of Appeals was conspicuously and uncharacteristically absent from any such list during a recent period. As previously mentioned, however, the Court subsequently regained considerable national stature while Lippman was Chief Judge.

New York Court of Appeals

It still remains to be seen where the Court of Appeals, with Chief Judge Janet DiFiore presiding, will eventually land. It remains to be seen how faithful this current Court will be to the historic tradition of bold, independent vigilance in the protection of constitutional rights and fundamental fairness. Indeed, that tradition has of late been manifesting itself primarily in the dissenting opinions--in the dissents penned by Judges decrying the majority's indifference to some injustice left unredressed.

- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination
- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito
- Toal_Jean
- Torture
- Traffic Stops

*(See the previous discussion in **Dissents, Disappointments, and Open Questions**, **Part 1** and **Part 2**.)*

In this era of Trump and of the ***federal*** Supreme Court he is remaking, the fundamental role and obligation of ***state*** courts and, in particular, of the New York Court of Appeals could not be more compelling. That role and obligation is to be ever mindful of the ***dual sovereignty of our federal system*** of government, and to stand as a bulwark in the protection of civil rights and liberties and basic justice, ***independent*** of regressive federal law and jurisprudence.

This is no time for timidity or indifference or passive acquiescence to injustice on the altar of some interpretive method. The Court of Appeals must step up.

Labels: Breitel_Charles, Cooke_Lawrence, DiFiore_Janet, Fuld_Stanley, Judicial Federalism, Kaye_Judith, Lehman_Irving, Lippman_Jonathan, NY Court of Appeals, State Constitutional Law, Trump_Donald

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CONCLUDING REFLECTIONS

CHANGING ROLES: THE SUPREME COURT AND THE STATE HIGH COURTS IN SAFEGUARDING RIGHTS

Vincent Martin Bonventre[*]

You know what they say in show business: never follow an act with little kids, puppies, or chief justices. But here I go anyway. Before I proceed, however, for the benefit of our students I would like to acknowledge what appears to be an Albany Law School contingent sitting up in front in the audience. There is Court of Appeals Judge Victoria Graffeo; Presiding Justice of the Appellate Division, Third Department, Anthony Cardona; Appellate Division, First Department Justice Bernard Malone; and Appellate Division, Third Department Justice Anthony Carpinello. Judge and Justices, can I ask you to stand up and take a bow for our students? Thank you. And the four of them are seated next to Court of Appeals Judge Susan Read, who is an honorary Albany Law grad today.

I. STATE SUPREME COURTS IN THE FEDERAL SYSTEM

We have heard from some of the most eminent figures of the American judiciary today: Chief Judge Judith S. Kaye of New York, Chief Justice Shirley S. Abrahamson of Wisconsin, Chief Justice Christine Durham of Utah, and Chief Justice Jim Hannah of Arkansas. To be perfectly frank, let me tell you that I for one—and I am certainly not alone in this view—would much prefer that my rights and liberties were placed in their hands than in the majority of the current United States Supreme Court.

Indeed, Justices of the Supreme Court itself share that view. They believe that is actually how our federal system of government should work. Some of the Supreme Court Justices take that view

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because they believe that their own Court has in recent decades abdicated its ultimate responsibility of zealously safeguarding constitutional rights and liberties—i.e., that the Court has been failing to enforce rights and liberties as vigorously as it should. Consequently, in our federal system that duty must fall upon the state supreme courts.[1] It has always been there anyway as an essential role of the American judiciary as a whole, state as well as federal. But with the much less rights-protective posture of the current Supreme Court, the state supreme courts' role is especially critical.

Other Justices of the United States Supreme Court think it is entirely appropriate that the decision be left largely to the state supreme courts whether to protect the rights and liberties of their own citizens and that, if they choose to do so, they do so under their own state law. These Justices do not believe that the role of the United States Supreme Court is to be the zealous enforcer of rights and liberties. In fact, they view the Federal Constitution as a very limited, static document. They view the Bill of Rights and the Fourteenth Amendment in a minimalist, narrow fashion—as affording only the most undeniable, explicit guarantees.[2]

This characterization of these Justices—and the similar characterizations of these justices by others[3]—is not opinion. Years ago, I had the opportunity to spend some time with Chief Justice

[1] *See, e.g.*, William J. Brennan, *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489 (1987) (urging state supreme courts to protect fundamental rights and liberties under their own state constitutions in order to insure such protection at a time the U.S. Supreme Court was backpedaling under the Federal Constitution); Mass. v. Upton, 466 U.S. 727, 735 (1984) (Stevens, J. concurring) (reminding the state's supreme court of its duty to enforce individual rights under it's own state constitution). *Cf.* Michigan v. Long, 463 U.S. 1032, 1040–41 (1983) (declaring that the Supreme Court would exercise jurisdiction to review and reverse decisions of state courts that afforded greater protection of constitutional rights than the Supreme Court would have, but that the state courts remain free to provide that greater protection under their own state law where they make the state-law bases of their decisions clear).

[2] *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 Tex. L. Rev. 693 (1976) (arguing against an active role of the federal courts in construing constitutional protections and in favor of strict deference to the political branches and to the states, except where the Federal Constitution's protection is clear); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (supporting an interpretation of federal constitutional rights and liberties that limits them to the originally intended meaning of the specific language in the text).

[3] The literature is voluminous. Two recent works on the Court—one by a political conservative and the other by a political liberal—that examine its role today are illustrative. One views the exercise of restraint in construing constitutional rights favorably: KENNETH W. STARR, FIRST AMONG EQUALS: THE SUPREME COURT IN AMERICAN LIFE (2002). The other decries the activist narrowing of civil rights and liberties: STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND THE STATE OF LIBERTY IN AMERICA (2000).

William H. Rehnquist. This was shortly following his ceremonial swearing-in at the Supreme Court as Chief Justice, which—interestingly, in the context of these remarks—happened to take place together with the swearing-in of Antonin Scalia as Associate Justice.[4] At that time, I asked the Chief Justice about several very recent cases in which the United States Supreme Court had reversed decisions of the New York Court of Appeals. The New York court—somewhat audaciously in light of the Supreme Court's increasing retrenchment on rights and liberties—had actually construed and enforced constitutional protections quite broadly. The United States Supreme Court reversed the New York decisions in each of those cases on the ground that the state high court had provided too expansive an interpretation of federal constitutional rights.[5] I said to the Chief Justice that there seem to be a growing number in our country who believe that the United States Supreme Court is no longer the moral conscience of the nation, that it is no longer being viewed as the primary guardian of our rights and liberties. He responded that no, the Court is not that, and it is not supposed to be.[6] He said that the New York Court of Appeals can do whatever it wants for the people of New York under its own law—like the other state supreme courts can for the people of their states—and that is the way it is supposed to be.[7]

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[4] The ceremonial swearing-in of the two took place on September 26, 1986.

[5] *See, e.g.*, New York v. Class, 475 U.S. 106 (1986), *rev'g* 63 N.Y.2d 491 (1984) (disagreeing with the New York court that a police officer's reaching into the passenger compartment of an automobile to read the vehicle identification number constituted a search for the purpose of federal constitutional search and seizure protections); New York v. P.J. Video, 475 U.S. 868 (1986), *rev'g* 65 N.Y.2d 566 (1985) (rejecting the New York court's holding that warrants to seize expressive materials required the support of particularly demanding probable cause); Arcara v. Cloud Books, Inc., 475 U.S. 697 (1986), *rev'g* 65 N.Y.2d 324 (1985) (overruling the New York court's decision that government actions that had the result of impinging on presumptively protected First Amendment activities—even in the absence of such an intent—were subject to the strict-scrutiny/compelling-interest test).

[6] He subsequently wrote that the notion of the Court as the conscience of the country is a "deception [that] has considerable potential for mischief." WILLIAM H. REHNQUIST, THE SUPREME COURT, REVISED AND UPDATED (2004). That sentiment is shared by Justice Scalia. *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the nation?").

[7] Conversation with William H. Rehnquist, Chief Justice, U.S. Supreme Court, in Washington, D.C. (Mar. 20, 1987). With respect specifically to the New York Court of Appeals' decisions on remand from the Supreme Court reversals, with the state court adhering to its prior rulings but doing so as a matter of independent state constitutional law, Rehnquist noted with unmistakable displeasure and more than a hint of contempt that the New York high court was "free to do as it chooses" in expanding individual rights for New Yorkers, "but it ought to have some basis for what it's doing." *Id.*; *see* Arcara v. Cloud Books, Inc., 68 N.Y.2d 553 (1986); People v. P.J. Video, 68 N.Y. 2d 296 (1986); People v. Class, 67 N.Y.2d 431 (1986).

II. SUPREME COURT AS GUARDIAN

For most of us, that much less lofty and much less protective view of the United States Supreme Court—Chief Justice Rehnquist's view and that of a majority of the Justices for the last couple of decades—is much different than the view we traditionally have had. For most of us, growing up through grammar school and high school, through college and even law school, we thought of the United States Supreme Court as the foremost guardian of our fundamental rights and liberties as Americans.[8] When we thought of the Supreme Court that way, we were thinking of decisions of the Court that are landmarks, even if we did not always know their names. But they are cherished landmarks, and we knew about them as such. We knew of them and still cherish them because, in those decisions, the United States Supreme Court did function as a guardian, because the Court did safeguard our fundamental rights and liberties, and because the Court did so whether or not the decisions were popular, and whether or not the states or the states' own supreme courts chose to protect those rights and liberties themselves.

So many of these decisions are readily and generally familiar. Certainly, anyone who has studied constitutional law or the Supreme Court, in college or in law school, knows them. To those who work or teach in the field, they are part of our stock-in-trade. Indeed, for all Americans, they are an integral part of the heritage of freedom and liberty and justice in this country. A brief mention of just a few—in no particular order, but just as they come to mind while preparing these observations—will no doubt make the point. In each of these cases, the Supreme Court refused to leave protection of fundamental rights to the states, or to excuse the failure of states to vigorously enforce federal constitutional guarantees.

In *Griswold v. Connecticut*, [9] Ms.Griswold and Dr. Buxton complained to the Supreme Court that the state of Connecticut's criminal prohibition against the use of and advice about birth control was an infringement on constitutionally-protected privacy

[8] Indeed, the most eminent Supreme Court scholars viewed the Court that way and made that view abundantly clear in their classic texts from which many of us learned about the Court; even the titles of those texts bespeak the role ascribed to the Court. *See, e.g.*, Alpheus T. Mason, THE SUPREME COURT: PALLADIUM OF FREEDOM (1962); HENRY J. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES (1st ed. 1967).

[9] 381 U.S. 479 (1965).

rights. The Court sided with Griswold and Buxton, invalidated the state statute, and gave meaning and effect to the fundamental right to personal privacy in intimate matters. In *Loving v. Virginia*,[10] the Lovings complained to the Justices that Virginia convicted and sentenced them for violating the state's criminal prohibition against interracial marriage. The Court invalidated the state's antimiscegenation statute and, thus, struck a blow against racial discrimination and invidious interference with the right to marry. In *Brown v. Board of Education*,[11] children living in the states of Kansas, South Carolina, Virginia, and Delaware complained about their racially segregated public schools. The Court outlawed segregation as a violation of constitutional equal protection and effectively put an end to the pernicious "separate but equal" doctrine and its practices, not only in education but in other areas of state governance, entitlements, and treatment of citizens as well. In *Sherbert v. Verner*,[12] Ms. Sherbert complained that South Carolina denied her unemployment compensation benefits when she was fired from her employment for refusing to violate her religion and work on Saturday, the Sabbath of her faith. The Court overruled South Carolina and declared to that state, as well as to all the others, that it could not interfere with the constitutionally-guaranteed free exercise of religion unless there was a genuinely compelling need to do so. In *Near v. Minnesota,*[13] the Supreme Court told Minnesota that it and all the states were prohibited by the Federal Constitution from violating freedom of the press, whether by outright or indirect censorship.

In *Rochin v. California,*[14] the Court declared that California's conduct in pumping a suspect's stomach without a warrant violated basic due process, and that the Constitution forbade that state and every other from treating criminal suspects with any such brutish conduct that "shocked the conscience." In *Miranda v. Arizona,*[15] the Court condemned police practices in Arizona and other states that routinely violated the constitutional privilege against compulsory self incrimination. In order to safeguard that right, the Court imposed the protective requirement of the now universally known pre-interrogation warnings, providing notice to suspects of their

[10] 388 U.S. 1 (1967).
[11] 347 U.S. 483 (1954).
[12] 374 U.S. 398 (1963).
[13] 283 U.S. 697 (1931).
[14] 342 U.S. 165 (1952).
[15] 384 U.S. 436 (1966).

rights to silence and to an attorney. In *Robinson v. California,*[16] the Court extended the federal constitutional prohibition against cruel and unusual punishment to the states. In *Duncan v. Louisiana,*[17] it was the right of the accused in criminal cases to a jury trial, notwithstanding the laws of Louisiana and other states that did not allow for one. In *Gideon v. Wainwright,*[18] it was the entitlement to counsel in criminal cases, despite the objections of Florida, Alabama, and North Carolina that such a right would impede efficient prosecutions and be overly burdensome on the public purse.

The catalogue of such landmarks goes on and on. But the point is that these, and many many others,[19] are the kinds of decisions that come to mind when we think of the United States Supreme Court as the guardian of our rights and liberties and, as the facade on its marble building proclaims, of "Equal Justice Under Law."

III. ROLE REVERSAL

Right or wrong, wise or foolish—and that is not the point here—the appellation of foremost guardian is no longer apropos for the Supreme Court. The dynamics have changed. Certainly, there continue to be cases where the Court does strike a blow for rights and liberties. But in the main, when the cases that the Court reviews from the states are surveyed, it becomes clear that there has been a striking change in the relationship between the Supreme Court and the high courts of the states.

No longer are the cases from the state courts predominantly, or even typically, those where the Supreme Court determines that the states have failed to protect rights and liberties sufficiently. By

[16] 370 U.S. 660 (1962).

[17] 391 U.S. 145 (1968).

[18] 372 U.S. 335 (1963).

[19] Understandably, readers may well question the failure to identify many obvious others, such as West Virginia State School Board of Education v. Barnette, 319 U.S. 624 (1943) (invalidating the state's mandatory flag salute in public schools as applied to Jehovah Witness students who objected on religious grounds); Mapp v. Ohio, 367 U.S. 643 (1961) (requiring state courts to exclude evidence obtained in violation of federal constitutional search and seizure protections); Malloy v. Hogan, 378 U.S. 1 (1964) (applying the federal constitutional prohibition against compulsory self-incrimination to the states); Benton v. Maryland, 395 U.S. 789 (1969) (applying the federal constitutional prohibition against double jeopardy to the states); Brandenburg v. Ohio, 395 U.S. 444 (1969) (effectively adopting the Brandeis-Holmes view of constitutional free speech and, thus, invalidating the state statute which criminalized advocacy speech beyond that which was likely to directly incite imminent lawless action); Wisconsin v. Yoder, 406 U.S. 205 (1972) (requiring an exemption from the state's compulsory school attendance requirements for the religiously-objecting Amish). But still, the catalogue of landmarks goes on and on.

contrast, the cases today are regularly those where the Court finds fault with the state courts for protecting rights and liberties too much. Again, just a few of those that come readily to mind are representative.

In *Oregon Employment Division v. Smith*,[20] for example, the United States Supreme Court ruled that the Oregon Supreme Court had protected freedom of religion too much. Constitutionally guaranteed free exercise is entitled only to some rational-basis, legitimate-purpose test, declared the nation's guardian of our rights. Oregon's high court was reversed for applying the more demanding strict-scrutiny, compelling interest test to the state's interference with religious liberty.[21] Similarly, in *Milkovich v. Loraine Journal Co.,*[22] the Supreme Court overruled the courts of Ohio for following an Ohio Supreme Court precedent that, according to the nation's court of last resort, protected freedom of the press too much.[23] Contrary to the position of Ohio's high court, the Supreme Court declared that constitutional protection of the press and journalists from defamation liability was restricted to statements of pure opinion; statements that mixed fact with opinion had no similar immunity under the Federal Constitution.

The turnabout in criminal cases has been even more pronounced. Indeed, it is broad and deep. In *Massachusetts v. Sheppard,*[24] for example, Massachusetts complained to the United States Supreme Court about its own supreme court. The Supreme Judicial Court of Massachusetts had refused to overlook a violation of search and seizure rights in a case in which the police were unaware that their search was unconstitutional. The United States Supreme Court overruled the Massachusetts high court for enforcing the protections against unreasonable searches and seizures too much: the state court should have excused the officers' "good-faith" mistake.[25] Likewise, in *Illinois v. Gates*,[26] Illinois complained about its

[20] 494 U.S. 872 (1990).

[21] Of course, the Oregon court had good reason to believe that free exercise of religion, like other fundamental constitutional rights, was entitled to such protective review. The Supreme Court itself, twenty-seven years earlier in *Sherbert v. Verner*, seemed to make that clear. *See supra* note 12 and accompanying text.

[22] 497 U.S. 1 (1990).

[23] Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986) (dismissing a defamation action against a reporter on the grounds that the plaintiff was a public figure and that the newspaper article in question was protected opinion under both the federal and Ohio state constitutions).

[24] 468 U.S. 981 (1984).

[25] *Id.* at 987–88.

[26] 462 U.S. 213 (1983).

supreme court. Here too the United States Supreme Court sided with the state against the state's high court on the ground that the state court was protecting search and seizure rights too much—i.e., the state court adhered to a more stringent test for probable cause than a distinctly flexible "commonsense," "totality of the circumstances" approach that the Supreme Court now preferred.[27] In both *New York v. Belton*[28] and *New York v. Class,*[29] the state of New York complained that the New York Court of Appeals had protected the privacy rights of drivers too much, and the United States Supreme Court agreed. In the first case, the state court would not permit a warrantless search of the entire passenger compartment of an automobile, including anything therein, anytime a driver was lawfully arrested for any offense. In the second, it required some justification for an officer to reach into the passenger compartment and clear the dashboard to inspect the vehicle identification number, deeming such conduct to be a search. The Supreme Court, by contrast, viewed the full automobile search in the first case to be automatically permissible upon the driver's arrest, regardless of any connection to the offense involved. In the second case, the Supreme Court simply did not view the police conduct as a search at all.

In *Arizona v. Fulminante,* [30] Arizona complained about its supreme court for reversing a conviction where the prosecution had introduced a coerced confession into evidence. The United States Supreme Court agreed that the Arizona court was enforcing the right against compulsory self-incrimination too rigorously and that, instead, it should have applied a harmless error analysis. In *Oregon v. Hass,*[31] Oregon complained about its supreme court for strictly enforcing *Miranda* rights by disallowing any prosecutorial use of a confession where the police had interrogated a suspect in disregard of his invocation of the right to an attorney. The United States Supreme Court agreed that the Oregon Supreme Court had protected the suspect's rights too much, and it held that prosecutors were free to use such unlawfully obtained confessions to impeach suspects who testify at their trials.

Again, the catalogue of such cases goes on and on.[32] A look at a

[27] *Id*. at 230.
[28] 453 U.S. 454 (1981).
[29] 475 U.S. 106 (1986).
[30] 499 U.S. 279 (1991).
[31] 420 U.S. 714 (1975).
[32] Among those best known and most illustrative of the changed dynamic are those

few very recent ones, from the Supreme Court's past term,[33] shows that this changed dynamic has continued under Chief Justice John Roberts. In *Kansas v. Marsh*,[34] the Kansas Supreme Court overturned a death sentence because the aggravating and mitigating factors in the case were equally balanced. The state of Kansas complained to the United States Supreme Court. The Court overruled the state's high court and held that the Federal Constitution did not require aggravating factors to outweigh the mitigating ones in order to justify a death penalty. In *Washington v. Recuenco,*[35] the Supreme Court agreed with the state of Washington that its high court was unnecessarily protective of the right to a jury trial. The state court had reversed a sentence that was unconstitutionally enhanced at trial on the basis of judge-determined aggravating factors, rather than by jury findings beyond a reasonable doubt. The state court was wrong, according to the Supreme Court, because the prosecution should have been permitted to prove that the conceded jury right violation was otherwise harmless.

In *Oregon v. Guzek*,[36] the state complained that its supreme court had given capital defendants the right to present innocence-related evidence at the sentencing that was not first introduced at the trial. The Supreme Court reinstated the capital sentence, holding that

involving search and seizure, or more accurately, what is not a "search" or not a "seizure." *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988) (agreeing with the state which challenged a precedent of the state's supreme court, applied by the state's intermediate court in this case to exclude evidence obtained from a warrantless police search of the defendant's trash which had been sealed in opaque garbage bags left at the curb; the Supreme Court ruling that such a search was not a "search" within the meaning of the Fourth Amendment and, thus, not subject to the constitutional prohibition against unreasonable searches); Florida v. Riley, 488 U.S. 445 (1989) (reversing a decision of the state supreme court, on appeal by the state, and holding, contrary to the state's high court, that the warrantless police inspection by means of a helicopter hovering above a residential backyard within the curtilage of the defendant's home was not a "search" within the meaning of the Fourth Amendment and, thus, not subject to the constitutional prohibition against unreasonable searches); California v. Hodari, 499 U.S. 621 (1991) (siding with the state, which appealed a decision of the state's intermediate court [the state supreme court had denied review] that had excluded evidence obtained as a result of a warrantless, probable cause-less chase and attempted stopping of the defendant; the Supreme Court holding that the police conduct was not subject to the constitutional prohibition against unreasonable seizures because it did not amount to a "seizure" within the meaning of the Fourth Amendment). Again, the catalogue of cases goes on and on.

[33] At the time these remarks were prepared, the Supreme Court's most immediate past term was October 2005, and some of the following cases were decided at the very end of that term in June, 2006.

[34] 126 S. Ct. 2516 (2006).

[35] 126 S. Ct. 2546 (2006).

[36] 546 U.S. 517 (2006).

the Federal Constitution provided no such entitlement to demonstrate "residual doubt" with new evidence. Finally, one last case comes from Chief Justice Durham's court. *Brigham City v. Stuart*,[37] involved a decision of Utah's high court requiring the exclusion of evidence obtained upon a warrantless entry into a private home. With Durham in the majority, the Utah court held that to be valid unless such an entry must have resulted from a genuine emergency, and not some other non-justifying motivations. The United States Supreme Court, however, agreed with the Attorney General of Utah, reversed the Supreme Court of Utah, and ruled that the actual motives of the police for entering a home without a warrant are irrelevant, as long as there is some scenario that fits within the concept of emergency and renders the entry otherwise "reasonable."

IV. FINAL POINTS: STATE COURTS, STATE DECISIONS, AND STATE CONSTITUTIONAL LAW IN THE CHANGED FEDERAL DYNAMIC

Whether any particular decision of the Supreme Court or the general change in dynamic is a good or bad thing is, once more, not the principal point here.[38] There are, however, a few lessons that need to be drawn. They are not mere opinion; they are fact.

First, despite the Supreme Court's frequently avowed deference to the states[39] and respect for state supreme courts,[40] the truth of the

[37] 126 S. Ct. 1943 (2006).

[38] It should, nevertheless, not be difficult to discern my own view, which I am pleased to make explicit in the interest of full disclosure. *See* William O. Douglas, *Law Reviews and Full Disclosure,* 40 WASH. L. REV. 227 (1965). That view is that the Supreme Court's relinquishment of its role as the foremost guardian and vigorous enforcer of constitutional rights and liberties, as well as its concomitant practice of expending its sharply reduced caseload on reviewing and reversing state supreme courts which have assumed that role, is at best unfortunate and indeed—to be brutally plain—deplorable.

[39] *See, e.g.*, California v. Ramos, 463 U.S. 992, 1014 (1983) ("We sit as judges, not as legislators, and the wisdom of the decision . . . is best left to the States."); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (declaring the Religious Freedom Restoration Act of 1993, which prohibited infringements by the states on the free exercise of religion unless necessitated by a compelling government interest, to be an interference by the national government with the powers of the states that the Fourteenth Amendment does not authorize); United States v. Morrison, 529 U.S. 598 (2000) (invalidating the Violence Against Women Act of 1994 as an intrusion, unauthorized either by the Commerce Clause or the Fourteenth Amendment, on the police power to suppress crime that the Constitution denied to the national government and reposed in the states); United States v. Lopez, 514 U.S. 549 (1995) (same for the Gun Free Zones Act of 1990).

[40] *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1040 (1983) (finding that "respect for the independence of state courts" is "precisely" the reason for avoiding review of state court decisions clearly based on state law).

matter is that the United States Supreme Court today has very little hesitation in reviewing a decision of a state supreme court, even where the state court has actually protected constitutional rights. More to the point, the Supreme Court today has no hesitation to overrule such rights-protective decisions of state courts.

Historically, the Supreme Court virtually never reviewed these decisions.[41] No constitutional right is at risk in such a state court decision. No constitutional right has been violated by such a state court decision. In fact, the only question on appeal before the United States Supreme Court is whether, in its view, the state court protected a right too much, or protected an asserted right that the Supreme Court does not believe is entitled to protection at all. These cases are hardly the type that a Supreme Court that has served as the national guardian of our rights and liberties—the ultimate protector of constitutional guarantees—would care to spend its sharply reduced caseload reviewing.[42]

Indeed, despite its avowed deference to states and states rights, what the United States Supreme Court really is doing in virtually all of these cases is injecting itself into an *intra*state squabble—i.e., a squabble between two branches of a state's government. These cases virtually all entail a disagreement by a state's executive or legislative branch with that state's judiciary. The criminal cases, for example, always involve a state's executive branch, the prosecution, protesting a decision of its own state court—typically the state's supreme court. These are disputes solely between state actors. They present no possibility of any violation of a Federal Constitutional right; the state court has taken care of that. The

[41] Justice Stevens noted the same in *Long*. *Id.* at 1069 (Stevens, J., dissenting) ("Until recently we had virtually no interest in cases of this type.").

[42] Justice Stevens has been a persistent critic of the Court's use of its docket to review such cases, including several times at the end of the Court's last term. *See* Washington v. Recuenco, 126 S. Ct. 2546, 2553 (2006) (Stevens, J., dissenting) ("[T]his is a case in which the Court has granted review in order to make sure that a State's highest court has not granted its citizens any greater protection than the bare minimum required by the Federal Constitution. Ironically, the issue in this case is not whether respondent's federal constitutional rights were violated-that is admitted-it is whether the Washington Supreme Court's chosen remedy for the violation is mandated by federal law."); Kansas v. Marsh, 126 S. Ct. 2516, 2540 (2006) (Stevens, J., dissenting) ("[T]he State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required."); Brigham City v. Stuart, 126 S. Ct. 1943, 1950 (2006) (Stevens, J., dissenting) ("Federal interests are not offended when a single State elects to provide greater protection for its citizens than the Federal Constitution requires.").

state court has protected or redressed the right in issue. In fact, it is precisely this protection or redress by the state court that the state's other branch is complaining about and asking the United States Supreme Court to undo.

Number two, as previously discussed and as a corollary to the first point, the United States Supreme Court today does not view its role as primarily dedicated to vigorously enforcing fundamental constitutional rights. In fact, the Court today seems instead to be dedicated to insuring a minimal safety net. But more—or less—than that, the Court not only seems to view its role as insuring this minimal safety net, but also to be exercising that role by insuring that state supreme courts do not exceed the safety net. The Court is declaring emphatically and unambiguously to state courts: You have no authority to provide more protection for American Constitutional rights than the bare minimum. Protect local rights under local law all you want, the Court is saying, but not those rights and liberties and freedoms to which the nation as a whole is dedicated.

Number three, there is only one reason that rights-protective decisions of state courts are even subject to the United States Supreme Court's review: state courts are rendering these decisions in such a way that the Supreme Court can find at least a scintilla of federal law involved. This is critical, of course, because beginning in 1983 with *Michigan v. Long*,[43] whenever a state court allows even the possibility that it has answered a federal question or based its decision in any measure on federal law, the Supreme Court presumes jurisdiction over the case. The reason, in turn, that state courts often do leave some doubt—i.e., often do leave open the possibility of a federal question in their decisions—is that many state court judges and justices, as well as their law clerks and the lawyers who argue the cases in state courts, know virtually nothing about state constitutional law and adjudication. Most are unfamiliar, except in the most superficial way, with the relationship between state and federal constitutional law, and between the authority of state high courts and that of the United States Supreme Court.

Indeed, it is more typical than not for the lawyer's argument and

[43] 463 U.S. 1032, 1040–42 (1983) (reversing the traditional presumption against federal question and Supreme Court jurisdiction such that, henceforth, these would be presumed unless the state court made unambiguous through a plain statement that its decision was based on an adequate and independent state ground).

the state court's decision to do little more than add an innocuous citation or footnote to a state constitutional provision, or to refer to the state constitution once or twice, but not to develop an argument actually based upon it. The most common state constitutional "argument" that is presented, when one is presented at all, seems to be that the state court is free to provide greater rights under the state constitution than is provided under the federal. But this truism of an assertion is typically not followed by any well-developed rationale explaining why the state court should do so in the particular case. The federal constitutional arguments are apparently deemed sufficient to cover any questions of state law, as well as federal.

Finally, number four. On this point, those of us in legal education must take the blame. Most law schools and legal educators seem so paranoid about being labeled state-law schools and state-law scholars that, on the kinds of legal issues discussed here—those of constitutional law, criminal procedure, civil rights and liberties, and other areas of public law—they try to adopt a national posture, and they do this by emphasizing federal law and decisions of the United States—i.e., the Federal—Supreme Court. But, in truth, this is not a focus on national law. This is not a focus on American law. Most American law, most law in this nation, is decided in state courts. Most decisions on fundamental issues of public law—as well as on the fundamental issues of torts, contracts, and other areas of private law—are rendered by the supreme courts of this nation's states.

If legal education were to teach constitutional law, criminal procedure, civil rights and liberties, and other such areas of the law from a truly national perspective, the emphasis would not be placed so narrowly and lazily on federal law and the Federal Supreme Court. Rather, American Constitutional Law, American Criminal Procedure, American Civil Rights and Liberties, and other subjects of American public law would have a much broader focus that encompassed the variety of perspectives taken across America by the state high courts. Such focus, for example, would not limit due process to the decisions of the Federal Supreme Court. Rather, it would also explore the positions and insights of the Wisconsin Supreme Court, the Utah Supreme Court, the Arkansas Supreme Court, and the New York Court of Appeals, or those of other state high courts that had addressed the particular due process issues in question. The same would be true regarding the privilege against

self incrimination, the right to counsel, search and seizure protections, and indeed for all the rights of the accused. Likewise, for press, speech, and religious liberties, and for equality and other areas of civil rights and liberties, the focus would be more truly national. It would not be so limited and—to be sure—so misleading by considering federal case law so exclusively, or so overwhelmingly.

Unfortunately, however, this type of narrow, federal emphasis is precisely what has been adopted by most of legal education.[44] The focus may no longer be on the law of the home state. But law schools have nevertheless failed in the quest to be truly "national."

That being said, after today's symposium the students in the audience will not forget just how important it is, when practicing law and arguing cases in state courts, to develop state-law arguments. You will know not to limit your research and resulting arguments to federal case law. You will know that you must explore the decisions of the supreme court of the state in which you are practicing, and even the supreme courts of other states whose analysis and arguments support your position and might be persuasive. You should never forget this after today, having been urged not by one, but by four chief justices.

* * *

In any event, I want to thank all of you for coming. I certainly want to thank our honored guests, Chief Judge Kaye to whom this symposium has been dedicated, Chief Justice Abrahamson, Chief Justice Durham, and Chief Justice Hannah, as well as all our honored guests in the audience. Thank you to our moderators, Dr. Luke Bierman and Professor Sandy Stevenson. Thanks finally to the *Albany Law Review*, and especially to Jerald Sharum, the Editor-in-Chief, and Paul Trumble, the Executive Editor for the *State Constitutional Commentary*, for putting together this marvelous event.

[44] For a related criticism of the scholarly focus on the opinions, voting, and jurisprudence of the Justices of the United States Supreme Court and almost universal disregard of the jurists on the state high courts, see Ken Gormley, *The Forgotten Supreme Court Justices,* 68 ALB. L. REV. 295 (2005).

The Trump-Remade Court Today

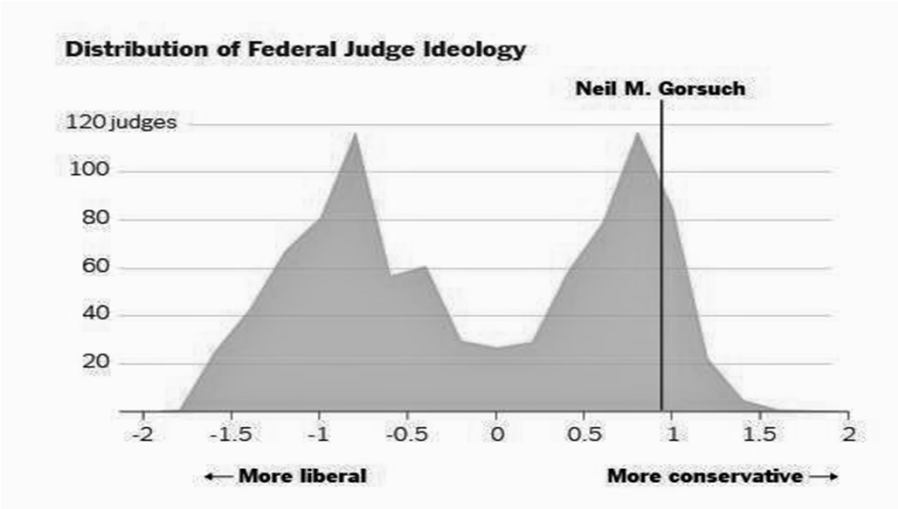
Vincent Martin Bonventre
Albany Law School
April 2019

The Gorsuch Factor

Trump's 1st Appointee

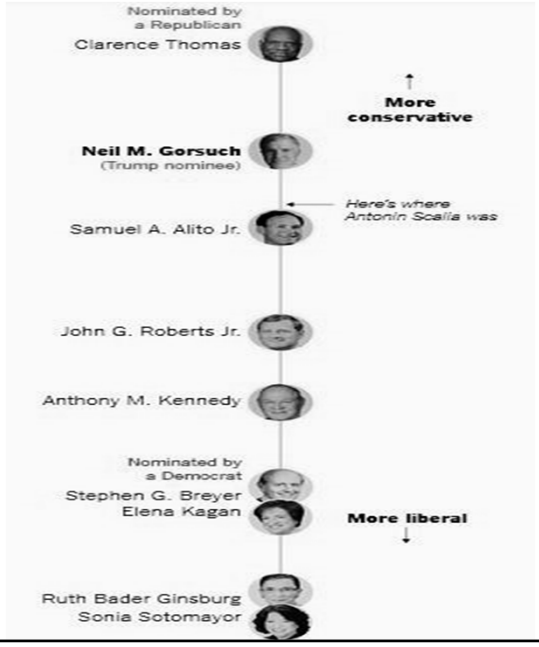
With His Hero Antonin Scalia

Trump's [1st?] Appointee
Neil Gorsuch



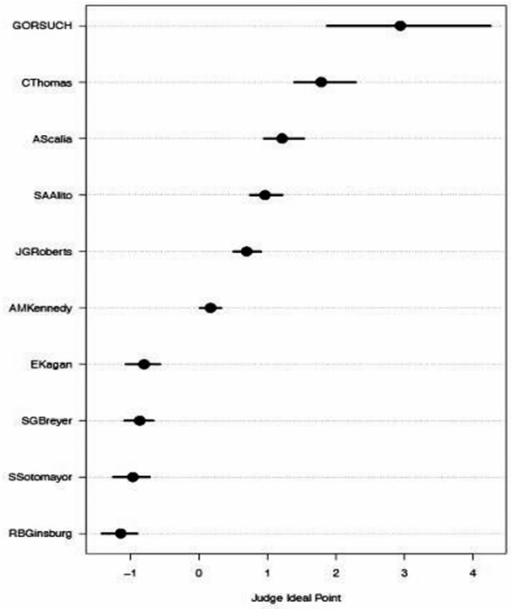
(Source: Adam Bonica [Stanford], et al, U of Chi Coase-Sandor Institute [2016], in NY Times, Feb. 1, 2017.)

Neil Gorsuch



(Source:
Lee Epstein [Washington Univ.], et al,
President-Elect Trump and his Possible Justices [2016])

Neil Gorsuch



(Source:
Ryan C. Black [Michigan State]
&
Ryan J. Owens [Univ. of Wisc.],
Estimating the Policy Preferences of Judge Neil M. Gorsuch [2017])

2016-2017 Decisional Highlights
Post Gorsuch Appointment

1. **Death Penalty** *McGehee v. Hutchinson*, 5-4
   Gorsuch joined majority—pro death penalty..

2. **Campaign Finance** *Republican Party of Louisiana v. FEC*, 7-2
   Gorsuch joined dissent by Thomas—against campaign spending restrictions.

3. **Indigent Criminal Defense** *McWilliams v. Dunn*, 5-4
   Gorsuch with dissenters—against affording poor defendants a mental health expert.

4. **Worker Rights** *Perry v. Merit Systems Protection Board*, 7-2
   Gorsuch dissented, joined by Thomas—against civil service/discrimination worker lawsuits.

2016-2017 Decisional Highlights
Post Gorsuch Appointment

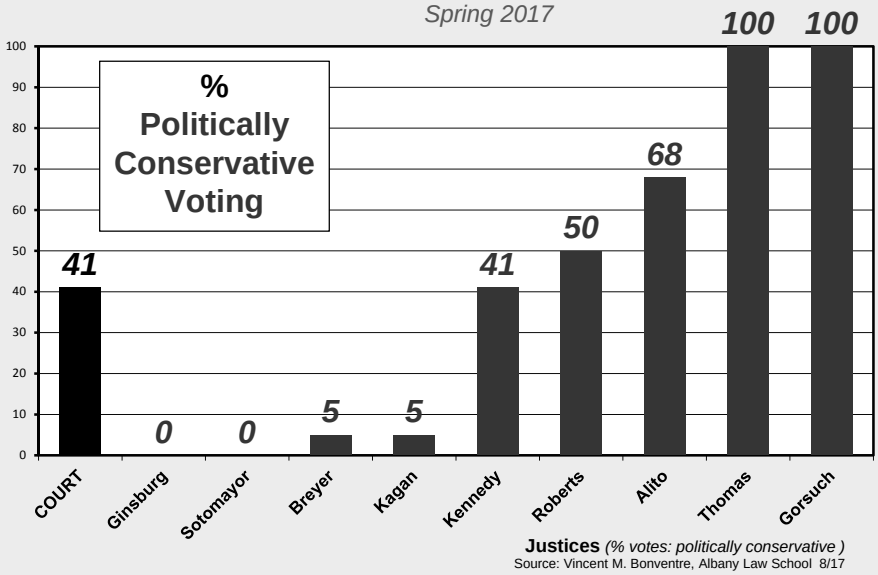
5. <u>Trump's Travel Ban</u> *Trump v. Int'l Refugee Asst Project*, 6-3
Gorsuch joined dissent by Thomas—against immigrants with "bona fide ties" to this country .

6. <u>Church-State</u> *Trinity Lutheran Church v. Comer*, 5-2-2
Gorsuch separately concurred, joined by Thomas—against restrictions on even religious funding.

7. <u>Gay Rights</u> *Pavan v. Smith*, 6-3
Gorsuch dissented, joined by Thomas and Alito—against marital rights for same-sex married couples.

8. <u>Gun Rights</u> *Peruta v. California*, 7-2
Gorsuch joined dissent by Thomas—against state restrictions on concealed guns in public places.

Supreme Court *w/ Gorsuch*
Ideological Voting Patterns
Spring 2017

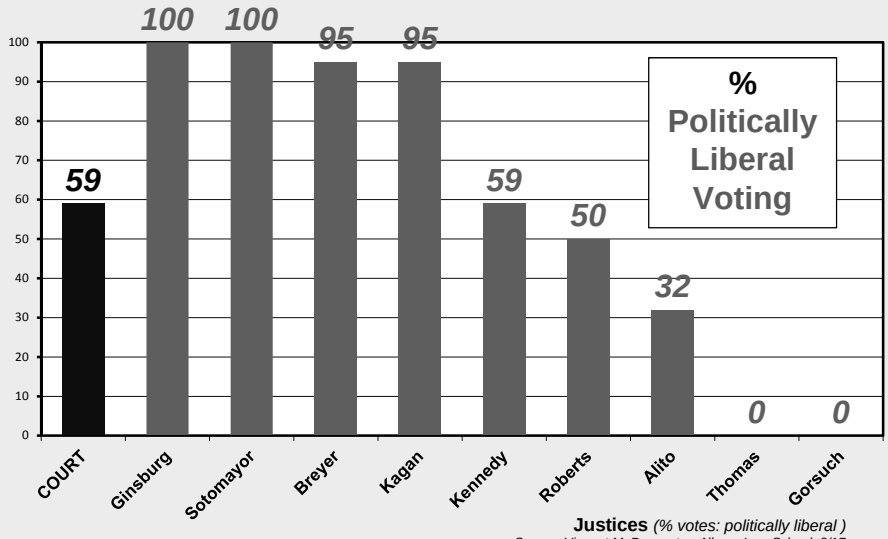


Source: Vincent M. Bonventre, Albany Law School 8/17

Supreme Court *w/ Gorsuch*

Ideological Voting Patterns

Spring 2017

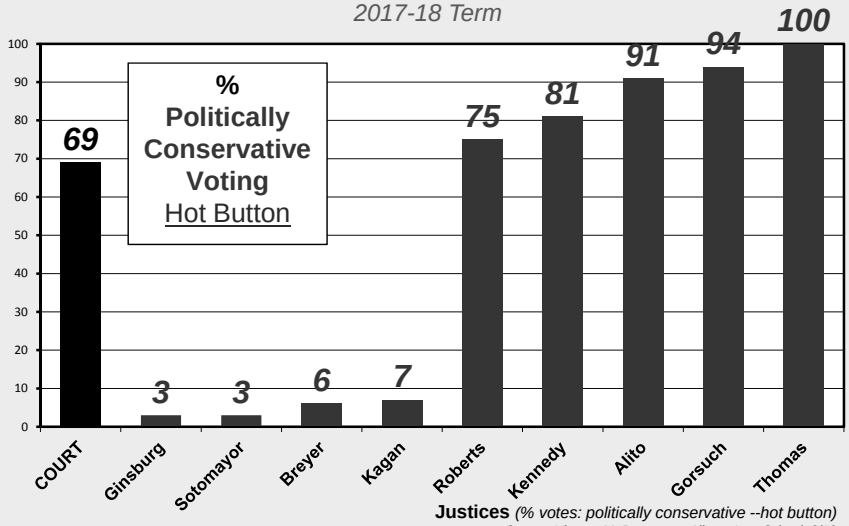


Source: Vincent M. Bonventre, Albany Law School 8/17

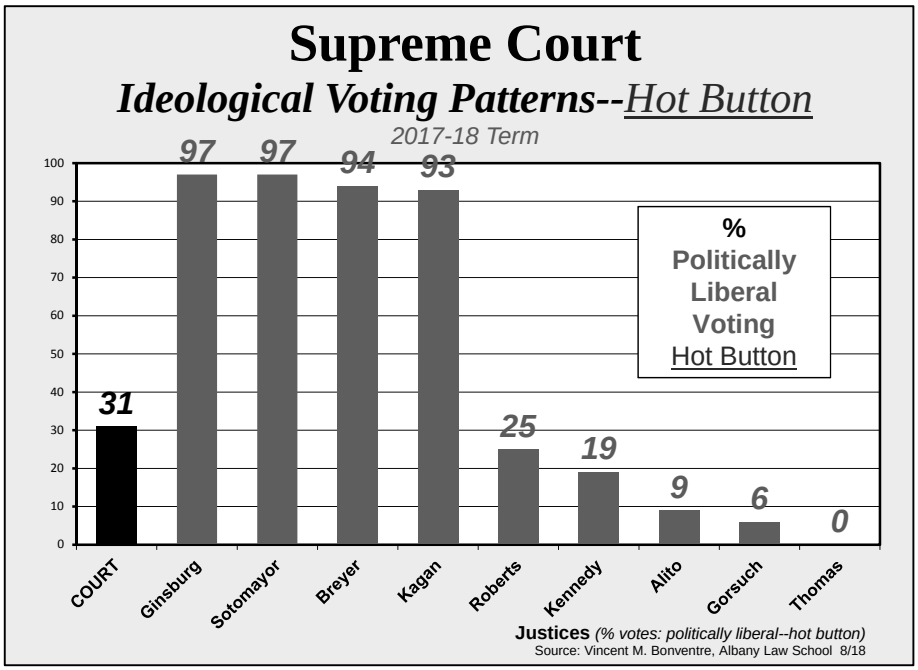
Supreme Court

Ideological Voting Patterns--Hot Button

2017-18 Term



Source: Vincent M. Bonventre, Albany Law School 8/18

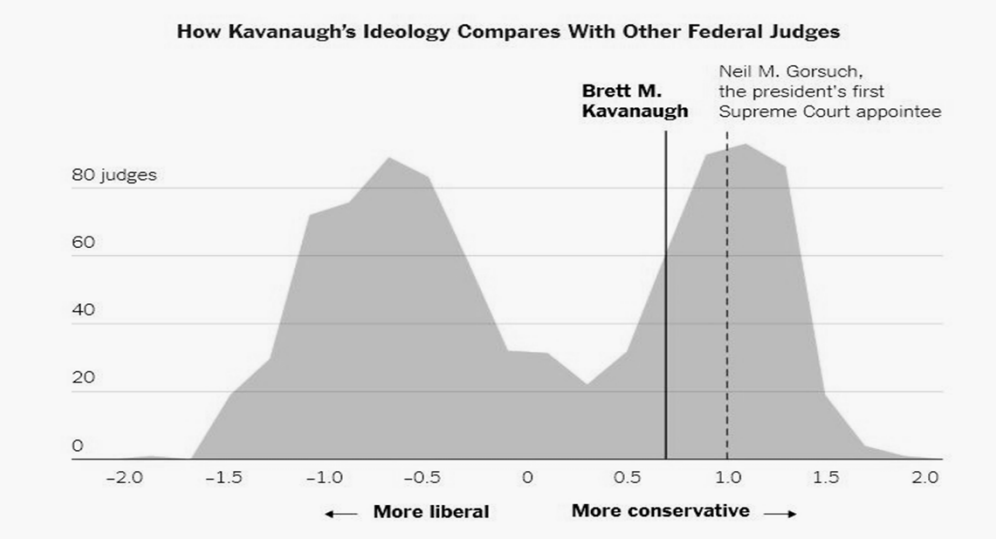


Trump's 2nd Nominee

Brett Kavanaugh

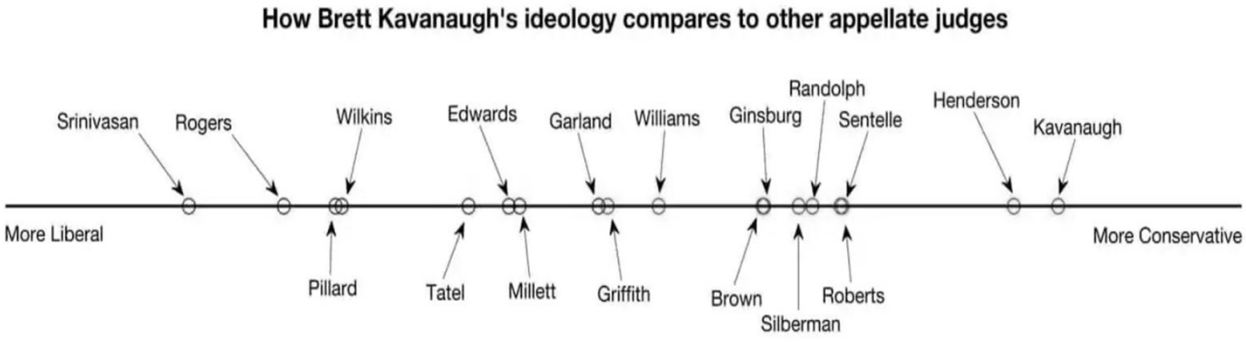
- Clerked for Justice Kennedy
- George W. Bush Administration; Appointee to D.C. Circuit
- Conservative/Republican
- 53 years old;
- **~30 years on the Court likely**

Brett Kavanaugh



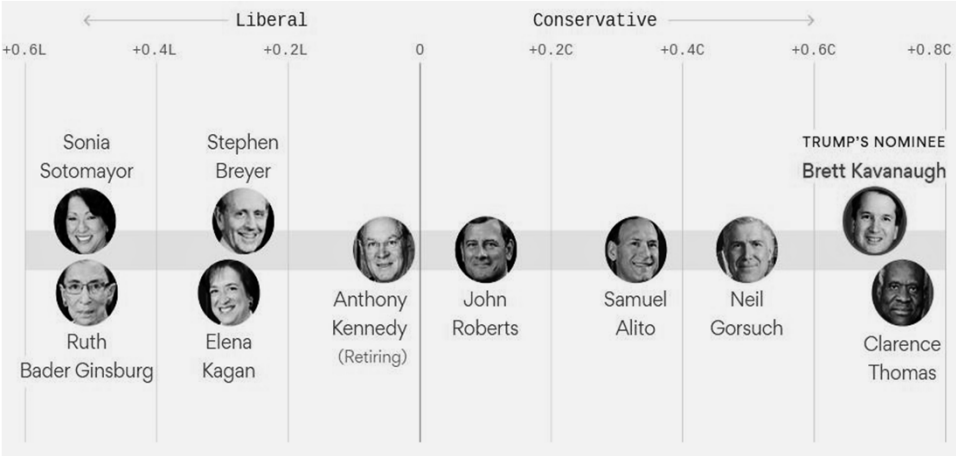
(Source: Adam Bonica [Stanford], et al, Database on Ideology, Money in Politics, and Elections [2016], reported in Where Kavanaugh, Trump's Nominee, Might Fit on the Supreme Court, NY Times, July 9, 2018.)

Brett Kavanaugh



(Source: Chart in Kevin Cope and Joshua Fischman [Univ. of Virginia], "It's hard to find a federal judge more conservative than Brett Kavanaugh," Washington Post, Sept. 5, 2018)

Brett Kavanaugh

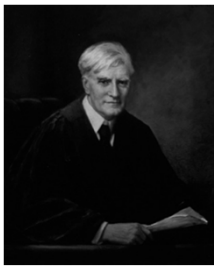


(Source: Chart in Andrew Witherspoon, Harry Stevens, "Where Brett Kavanaugh sits on the ideological spectrum," Axios, July 10, 2018, based on Epstein [Washington Univ.], et al, "President-Elect Trump and his Possible Justices" [2017] and Epstein [Washington Univ.], et al, "Possible Presidents and their Possible Justices" [2016].)

Judge Kavanaugh's Judicial Philosophy

The judge's job is to ***interpret the law, not to make the law or make policy.*** *Read the text of the Constitution as written, mindful of history and tradition.* ***Don't make up new constitutional rights that are not in the text*** *of the Constitution.*
It's not complicated.

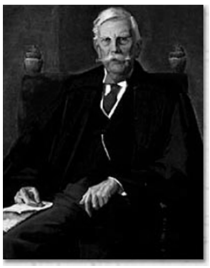
(Source: Address at George Mason University, Antonin Scalia Law School [2016])



Justice Benjamin Nathan Cardozo

*I take **judge-made law as one of the existing realities** of life. **Not a judge on the bench but has had a hand in the making**…He **must balance all his ingredients**, his philosophy, his logic, his analogies, his history, his customs his sense of right, and all the rest, and **must determine, as wisely as he can, which weight shall tip the scales.***

(Source: Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, Yale U. Press [1921].)



Justice Oliver Wendell Holmes

*The language of judicial decision is mainly the language of logic. But **[b]ehind the logical form lies a judgment**, often **an inarticulate and unconscious judgment, and yet the very root** and nerve of the whole proceeding. It is because of some belief, or because of **some opinion as to policy**.*

(Source: Oliver Wendell Holmes, Jr., *The Path of the Law*, Harvard L. Rev. [1897].)

Judge Kavanaugh's

"Uncomplicated" "Not-in-the-Text"

Philosophy Applied

- *the right to get married*--yes, even for heterosexuals?
- *the right to have sexual relations with another consenting adult*--yes, even if with a spouse?
- *the right to have and raise children*--yes, even if for married couples?
- *the right even to have a friend or to associate in a group of friends or like-minded individuals?*
- *the right to go for a stroll in your neighborhood?*
- *the right to sing in the shower or listen to music or read poetry?*
- *"the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men" (Justice Louis Brandeis)?*

More of

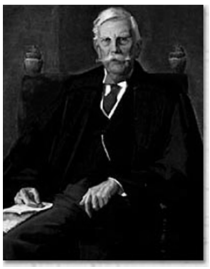
Judge Kavanaugh's Judicial Philosophy

Federal judges should ***not be making policy-laden judgments****....By that, I mean a judiciary that decides cases* ***based on settled principles*** *without regard to policy preferences....*

[As to] *originalism versus living constitutionalism*[:]

Originalism *is akin to textualism, but the meaning of a word might have changed. When that has occurred,* ***the meaning at the time of enactment controls****.*

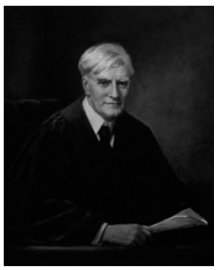
(Source: Notre Dame Law Review [2017])



Justice Oliver Wendell Holmes

*The judges themselves have failed adequately to recognize their **duty of weighing considerations of social advantage**. The duty is **inevitable**, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said..*

(Source: Oliver Wendell Holmes, Jr., *The Path of the Law*, Harvard L. Rev. [1897].)



Justice Benjamin Nathan Cardozo

*[W]hen a rule has been found to be inconsistent with the **sense of justice or with the social welfare**, there should be full abandonment. We have had to do this in the field of constitutional law. **[T]he content of constitutional immunities is not constant**, but varies from age to age. A constitution states or ought to state not rules for the passing hour, but **principles for an expanding future**.*

(Source: Benjamin Nathan Cardozo, *The Nature of the Judicial Process*, Yale U. Press [1921].)

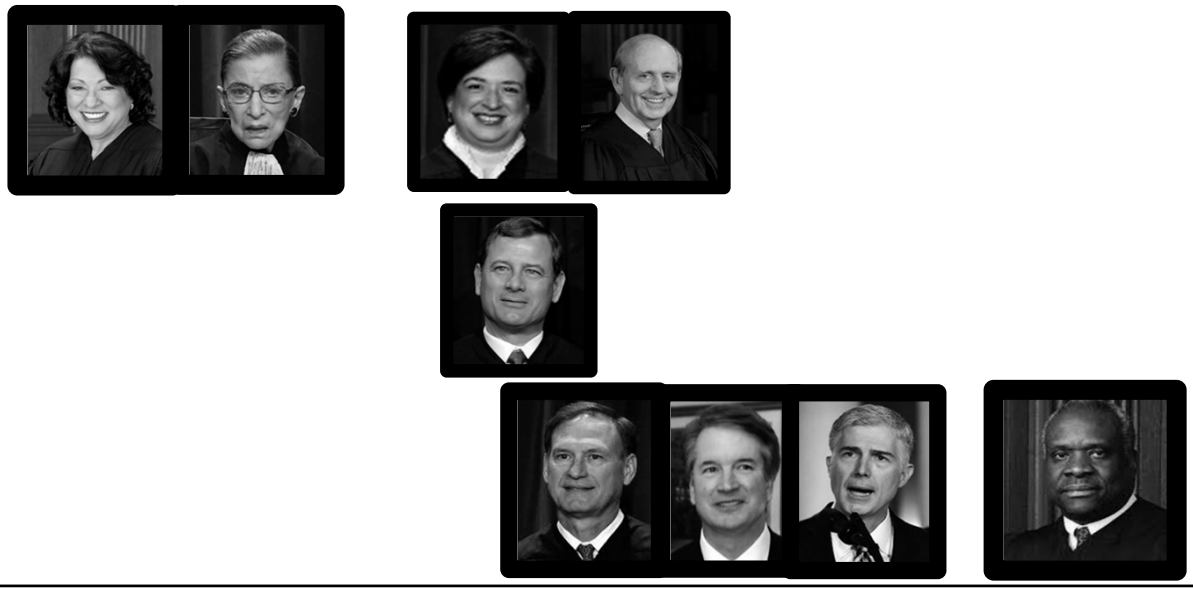
Judge Kavanaugh's

"Originalism" & "Settled Principles"

Philosophy Applied

- *Outlawing Racial Segregation-Brown v. Bd of Educ (1954)?*
- *Legalizing Interracial Marriage-Loving v. Virginia (1967)?*
- *Applying Equal Protection to Women-Reed v. Reed (1971)?*
- *Legalizing Birth Control for Married Couples-Griswold v. Connecticut (1965)?*
- *Outlawing Racial Discrimination in Public Accommodations-Heart of Atlanta Motel v. U.S. (1964)?*
- *Requiring a warrant for searches of private activities—Katz v. U.S. (1967)*?
- *Right to Counsel for the Poor-Gideon v. Wainwright (1962)?*

The Now & Future Trump Court ?



CHIEF JUDGE JUDITH S. KAYE SYMPOSIUM

STATE-FEDERAL JUDICIAL COUNCIL CLE PROGRAM: SYMPOSIUM IN HONOR OF CHIEF JUDGE JUDITH S. KAYE – STATE CONSTITUTIONAL ISSUES

THURGOOD MARSHALL U.S. COURTHOUSE
Wednesday, May 24, 2017, 4:00pm

Moderator: Carrie Cohen, *Morrison & Foerster LLP*

Speakers:
Hon. Jonathan Lippman, *Latham & Watkins LLP; Chief Judge, New York Court of Appeals (Ret.)*
Hon. Victoria A. Graffeo, *Harris Beach PLLC; Assoc. Judge, New York Court of Appeals (Ret.)*
Vincent M. Bonventre, *Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School*

Judge Graffeo: Chief Judge Kaye was a woman who made us proud to be female attorneys and jurists. Judge Kaye was appointed to the Court of Appeals in 1983, about six years after Justice William Brennan's famous lecture on State Courts and Social Justice. In a 1995 article, Judge Kaye recalled how impressed she was with his call to "resuscitate our state constitutions" since she, like most attorneys, had been "federalized" and was not very familiar with the contents of our State Constitution.[1] So, even before she began her tenure as an Associate Judge on the Court, Judge Kaye had begun to contemplate the greater role that the New York Constitution could have in state jurisprudence, particularly in common law cases.

In the criminal realm, she publicly expressed her views about how the State Constitution could be an instrument for greater protections for New Yorkers in her concurrence in the 1992 case of *People v. Scott*[2]

[1] Judith S. Kaye, *Brennan Lecture: State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U.L. REV. 1, 11–12 (1995).
[2] People v. Scott, 593 N.E.2d 1328, 1346 (N.Y. 1992) (Kaye, J. concurring).

and *People v. Keta*.[3] The plurality writings in this case illustrated the philosophical differences of opinion at the Court regarding the relationship between the federal and state constitutions and when the Court of Appeals should deviate from the parameters established by U.S. Supreme Court precedent.[4] The *Scott* case involved a classic real property "law school" fact pattern—it was a "curtilage" case.[5] Although Mr. Scott had posted "no trespassing" signs on his 165-acre property, a deer hunter walked on his land and discovered Scott's marijuana crop.[6] The hunter alerted the State Police and a State trooper accompanied the hunter to the property to check out the cultivation.[7] This was, of course, done without Scott's knowledge or permission.[8] The State Police later obtained a search warrant and confiscated the plants, resulting in Scott's arrest for criminal possession of marijuana.[9]

As part of his defense, Scott filed a suppression motion claiming that the police had illegally entered his property.[10] The trial court denied his suppression request, and the Appellate Division affirmed that ruling.[11] Both courts relied on the U.S. Supreme Court's Fourth Amendment analysis in *Oliver v. U.S.*,[12] in which the Supreme Court articulated the "open fields" doctrine. Applying the rationale in *Oliver*, the lower courts had concluded that Scott was not entitled to an expectation of privacy outside the curtilage of his residence.[13] Since the marijuana plantings were a distance from his home, the courts concluded that no search and seizure violation had occurred under the Fourth Amendment or Article I of the New York State Constitution.[14]

The New York Court of Appeals reversed in an opinion authored by Judge Stewart Hancock.[15] He explained that the Court's previous precedent in *People v. Reynolds*,[16] (another curtilage case that perhaps could have been distinguished on the basis that the property

[3] *Id.* at 1339, 1346.
[4] *See id.* at 1334–35, 1338.
[5] *Id.* at 1330.
[6] *See id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Oliver v. United States, 466 U.S. 170 (1984).
[13] *See Scott*, 593 N.E.2d at 1330.
[14] *Id.*
[15] *Id.* at 1328.
[16] People v. Reynolds, 523 N.E.2d 291 (N.Y. 1988).

owner in that case had not posted "No Trespassing" signs) could be disregarded if the Court determined that the *Oliver* decision did not sufficiently safeguard the constitutional rights of New Yorkers.[17]

This was not the first time the Court of Appeals considered using language in the State Constitution to extend greater protections than those recognized by the U.S. Supreme Court. For instance, *People v. P.J. Video, Inc.*[18] established the standards for the issuance of search warrants in obscenity situations based upon New York common law and state constitutional principles.[19]

Returning to the *Scott* opinion, Judge Kaye decided to write separately despite the fact that she agreed with Judge Hancock's analysis.[20] I believe that she felt compelled to author a concurrence in *Scott* in order to express what she felt were the troublesome implications of the dissent's view regarding when the Court should examine the implications of the State Constitution. She began by observing that "[o]n a Court where more often than not there is consensus, in State constitutional law cases—civil as well as criminal—we have been uncommonly divided."[21] In her usual eloquent and clear writing style, she explained her view that, "[] where we conclude that the Supreme Court has changed course and diluted constitutional principles, I cannot agree that we act improperly in discharging our responsibility to support the State Constitution when we examine whether we should follow along as a matter of State law. . . ."[22]

Judge Kaye saw distinct advantages to employing the State Constitution because it gave the Court of Appeals the "final say" on an issue since resolving a case on such a basis would, "make plain the State decisional ground so as to avoid unnecessary Supreme Court review."[23] In other words, a New York Court of Appeals decision anchored on state constitutional protections or rights would insulate such a determination from further appellate review by the U.S. Supreme Court.

Judge Kaye also disagreed with the dissent's view that the U.S. Supreme Court had discouraged States from examining their constitutional provisions. She felt that it "shortchanges both the role

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[17] *See Scott*, 593 N.E.2d at 1330.
[18] People v. P.J. Video, Inc., 501 N.E.2d 556 (N.Y. 1986).
[19] *See id.* at 564–65.
[20] *Scott*, 593 N.E.2d at 1346 (Kaye, J. concurring).
[21] *Id.*
[22] *Id.* at 1347.
[23] *Id.*

of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions."[24] Her respect for the importance of dual sovereignty is now well embedded in New York jurisprudence.

During her years as Chief Judge of the New York Court of Appeals, Judith S. Kaye was a staunch proponent of state constitutionalism, and frequently in her presentations before bar associations or law school audiences she would remind attorneys and law students to familiarize themselves with the New York State Constitution in order to use its provisions when crafting legal issues for litigation purposes.

In November 2017, the electorate in New York will be deciding whether to approve a constitutional convention through a ballot proposal. Such a question is presented to voters only every twenty years. Regardless of how you feel about the proposal, the upcoming vote presents an opportunity for the Bar in New York to raise awareness and inform New Yorkers about the many subjects addressed in our lengthy State Constitution. Judge Kaye would encourage all New York lawyers to read our State Constitution and to use it in suitable cases to further your clients' interests. She was, indeed, a visionary in so many ways.

Thank you.

Judge Lippman: Judith Kaye's dissent in *Hernandez v. Robles*[25] in July of 2006 was to say the least prophetic. Just a short seven years later, the U.S. Supreme Court declared the Defense of Marriage Act unconstitutional under the Equal Protection clause of the federal constitution in *United States v. Windsor*.[26] In 2015, the Supreme Court in *Obergefell v. Hodges*[27] declared state laws prohibiting same-sex marriage unconstitutional, thus allowing marriages between gay and lesbian couples across the nation.[28]

At the time of *Hernandez*, Massachusetts was the only state high court to uphold the right of same-sex couples to marry, and more than a dozen states had passed constitutional amendments banning same-sex marriage.[29]

The prevailing opinion in *Hernandez* was authored by Judge Robert S. Smith who argued that the state legislature had behaved

[24] *Id.* at 1348.
[25] Hernandez v. Robles, 855 N.E.2d 1 (2006).
[26] United States v. Windsor, 570 U.S. 744 (2013).
[27] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).
[28] *Id.* at 2607–08.
[29] *Hernandez*, 855 N.E.2d at 33–34 (Kaye, J. dissenting).

rationally in concluding that children are better off growing up with a mother and a father, and that this was sufficient justification for requiring that a marriage only be between a man and a woman.[30] The court found that the legislature could logically find that same-sex relationships promote stability in marriage, thus serving the welfare of children.[31] A concurrence by Judge Victoria A. Graffeo emphasized that the ultimate decision on the legality of same-sex marriage rests with the state legislature and not with the court.[32]

In analyzing Chief Judge Kaye's dissent, her own words are far more powerful than anything that paraphrasing can achieve. Therefore, I will for the most part let her elegant, yet passionate language speaks for itself. In that vein, she opens her dissent with a powerful recitation of the human beings that are involved in the case:

> Plaintiffs (including petitioners) are 44 same-sex couples who wish to marry. They include a doctor, a police officer, a public school teacher, a nurse, an artist and a state legislator. Ranging in age from under 30 to 68, plaintiffs reflect a diversity of races, religions and ethnicities. They come from upstate and down, from rural, urban and suburban settings. Many have been together in committed relationships for decades, and many are raising children—from toddlers to teenagers. Many are active in their communities, serving on their local school board, for example, or their cooperative apartment building board. In short, plaintiffs represent a cross-section of New Yorkers who want only to live full lives, raise their children, better their communities and be good neighbors.[33]

Judge Kaye made clear that marriage is a fundamental right and that it is not defined by who is entitled to exercise that right.[34] Hence, she found that denying same-sex marriage violated the state's due process clause.[35]

As was true with the ban preventing individuals in interracial relationships from marrying, Chief Judge Kaye explained that the history of excluding individuals from expressing their fundamental rights cannot be the basis for denying them access to those rights

[30] *Id.* at 7.
[31] *Id.*
[32] *Id.* at 22 (Graffeo, J. concurring).
[33] *Id.*
[34] *Id.* at 22–23.
[35] *Id.*

once they challenge their exclusion.[36] Noting that ninety-six percent of Americans were opposed to interracial couples' marriages ten years before *Loving v. Virginia*,[37] struck down the remaining anti-miscegenation statutes in the country,[38] Chief Judge Kaye found many of the same arguments used then were being used to exclude same-sex couples from marriage.[39] Illustrating the significant shift that occurred in access to marriage just a short time ago, she noted that "during the lifetime of every Judge on this Court, interracial marriage was forbidden in at least a third of American jurisdictions."[40] Rejecting as circular the notion that "same-sex couples can be excluded from marriage because 'marriage,' by definition, does not include them,"[41] Judge Kaye concluded that "the long duration of a constitutional wrong cannot justify its perpetuation, no matter how strongly tradition or public sentiment might support it."[42]

Judge Kaye also found that the same-sex marriage ban was discriminatory and violated the Equal Protection Clause, even under a rational basis analysis.[43] She argued that there can be no rational basis for excluding same-sex couples from marrying.[44] As to the impact on children, she opined:

> Defendants primarily assert an interest in encouraging procreation within marriage. But while encouraging opposite-sex couples to marry before they have children is certainly a legitimate interest of the State, the *exclusion* of gay men and lesbians from marriage in no way furthers this interest. There are enough marriage licenses to go around for everyone.[45]
>
> Nor does this exclusion rationally further the State's legitimate interest in encouraging heterosexual married couples to procreate. Plainly, the ability or desire to procreate is not a prerequisite for marriage. The elderly are permitted to marry, and many same-sex couples do indeed have children.[46]

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[36] *Id.* at 23.
[37] Loving v. Virginia, 388 U.S. 1 (1967).
[38] *Hernandez*, 855 N.E.2d at 24–25 (Kaye, J. dissenting).
[39] *Id.*
[40] *Id.* at 25.
[41] *Id.* at 26.
[42] *Id.*
[43] *Id.* at 30.
[44] *Id.*
[45] *Id.*
[46] *Id.*

> Marriage is about much more than producing children, yet same-sex couples are excluded from the entire spectrum of protections that come with civil marriage—purportedly to encourage other people to procreate. Indeed, the protections that the State gives to couples who do marry—such as the right to own property as a unit or to make medical decisions for each other—are focused largely on the adult relationship, rather than on the couple's possible role as parents. Nor does the plurality even attempt to explain how offering only heterosexuals the right to visit a sick loved one in the hospital, for example, conceivably furthers the State's interest in encouraging opposite-sex couples to have children, or indeed how excluding same-sex couples from each of the specific legal benefits of civil marriage—even apart from the totality of marriage itself—does not independently violate plaintiffs' rights to equal protection of the laws. The breadth of protections that the marriage laws make unavailable to gays and lesbians is "so far removed" from the State's asserted goal of promoting procreation that the justification is, again, "impossible to credit."[47]

Judge Kaye also debunked the idea that it is pervasive that civil marriage has traditionally been between a man and a woman. She stated that:

> To say that discrimination is "traditional" is to say only that the discrimination has existed for a long time. A classification, however, cannot be maintained merely "for its own sake" Instead, the classification (here, the exclusion of gay men and lesbians from civil marriage) must advance a state interest that is separate from the classification itself. Because the "tradition" of excluding gay men and lesbians from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of "history." Indeed, the justification of "tradition" does not explain the classification; it merely repeats it. Simply put, a history or tradition of discrimination—no matter how entrenched—does not make the discrimination constitutional (["it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been."]).[48]

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[47] *Id.* at 31–32 (citations omitted).

[48] *Id.* at 33 (citations omitted).

Finally Judge Kaye takes issue with the idea same-sex marriage must ultimately be addressed by the legislature. She made clear that:

> [T]his Court cannot avoid its obligation to remedy constitutional violations in the hope that the Legislature might some day render the question presented academic. After all, by the time the Court decided *Loving* in 1967, many states had already repealed their antimiscegenation laws. Despite this trend, however, the Supreme Court did not refrain from fulfilling its constitutional obligation. . . . It is uniquely the function of the Judicial Branch to safeguard individual liberties guaranteed by the New York State Constitution, and to order redress for their violation. The Court's duty to protect constitutional rights is an imperative of the separation of powers, not its enemy.[49]

In bold unmistakable terms, Judge Kaye's dissent in *Hernandez* provided the template and the vision for *Windsor* and *Obergefell*. Judge Kaye saw this critically important legal issue through the lens of the very real human beings who were impacted by the same-sex marriage ban—people who were just like everybody else. As she indicated, they represented New Yorkers of all kinds, seeking to live life fully with their families and as members of their communities. They deserved, as all other human beings, to be treated with respect and dignity, and the law would very rapidly evolve to recognize that universal right.

Judge Kaye ended her dissent with a prediction: "I am confident that future generations will look back on today's decision as an unfortunate misstep."[50] Those words were prescient, and it did not take future generations to prove her right!

[49] *Id.* at 34.
[50] *Id.*

STATE-FEDERAL JUDICIAL COUNCIL CLE PROGRAM: SYMPOSIUM IN HONOR OF CHIEF JUDGE JUDITH S. KAYE – STATE CONSTITUTIONAL ISSUES

State Bar Building, Albany, New York
Wednesday, June 14, 2017

Co-sponsors:
New York State Bar Association
Northern District of New York Federal Court Bar Association
Speakers:
Hon. Mae D'Agostino, *United States District Judge, Northern District of New York*
Vincent M. Bonventre, *Justice Robert H. Jackson Distinguished Professor of Law, Albany Law School*

Judge D'Agostino: Professor Bonventre from Albany Law School. I recently told him that I wish I could go to his classes because I heard him speak now at a few seminars, and he is enthralling.

Prof. Bonventre: I guess I'll have to be enthralling, thank you Judge. But I'm very, very pleased to be here especially with these panelists who I admire so much. You know, this is like deja vu all over again because some of us did these presentations three weeks ago down in Manhattan. But, nevertheless, even though I will be repeating myself, I am certainly glad to once again pay tribute to Chief Judge Kaye. Chief Judge Kaye and I actually began in the New York Court of Appeals together in 1983, she as a Judge and I as a Junior Clerk. Several years later, she became Chief Judge of the court and I became a junior professor. Ultimately, she became revered as a national judicial icon, and I became a sometimes resented local commentator on her court.

But we stayed close through all those years, and I recently wrote something that . . . Let me just read it to you. Of course, it's not as magnificent as some of the articles that Hank Greenberg has written about Judith Kaye, but this is my own effort. "Those of us who worked with her and knew her and loved her will remember her warmth and kindness, her wisdom and inspiration, her dignity and

class, her elegance and eloquence, and her unsurpassed decency, and tireless devotion to the public good. We miss her dearly." My purpose is to place Chief Judge Kaye's advocacy of state constitutional adjudication in context, and to give it some contour. Simply speaking, her philosophy with regard to state constitutional adjudication is that state courts, including the New York Court of Appeals, ought to be applying state law whenever possible to decide constitutional questions.

I mean there's nothing particularly peculiar about that. In fact, there really isn't anything either idiosyncratic or radical about her views. Indeed, there were other judges of other state courts around the country who also were advocating prominently for state constitutional law. Whether that was Hans Linde in Oregon, Randall Shepard in Indiana, Stanley Mosk in California, Shirley Abrahamson in Wisconsin, Christine Durham in Utah, and I could go on and on. But the thing about Chief Judge Kaye is that there was just nobody as brilliant as her, nobody as eloquent as her, and of course none of those others sat on the New York Court of Appeals. So nobody had the kind of gravitas that she had.

Now, not only were there others around the country that were advocating for independent state constitutional adjudication, but the fact of the matter is that what she was advocating and what she became a prominent scholar in was very consistent with our federal republic. Indeed, it's just a truism that the United States Supreme Court has no authority to interpret the meaning of state law. It's also a truism that state courts ought to be applying state law in deciding cases. There's certainly no issue when it comes to property law, contract law, tort law. But all of a sudden, at least in recent history, there seems to be an issue with regard to constitutional law.

Also, it's a truism that state courts are entirely unconstrained by what the United States Supreme Court rules as a matter of Federal Constitutional Law, except for those few instances where the United States Supreme Court says that Federal Constitutional Law mandates what the states do or prohibits what the states do. Other than that, state courts are entirely unconstrained. Indeed, the history of Federal Constitutional Law makes plain all those truisms. For most of our history, the United States Supreme Court ruled virtually nothing with regard to civil rights and civil liberties that had any impact on state courts. In fact, it wasn't until 1868, with the ratification of the Fourteenth Amendment, that there was even an argument. Only then might those rights in the Bill of Rights apply to the States, because we know the Bill of Rights itself did not apply

to the states.

Shortly after the ratification of the Fourteenth Amendment, of course, the United States Supreme Court pulled a hat-trick, and decided in the *Slaughter-House Cases*[1] and the Civil Rights Cases that the Fourteenth Amendment didn't change anything with regard to fundamental rights in the Bill of Rights applying to the states. It really was not until 150 years into the Republic when another New Yorker – like Judith Kaye, a former Chief Judge of the Court of Appeals – Benjamin Cardozo, sat on the United States Supreme Court. When he spoke and wrote in *Palko v. Connecticut*[2] in 1937 that actually those fundamental rights that are implicit in a scheme of ordered liberty, those fundamental rights that were essential to a free society, those could be imposed on the states. Other than that, no.

And then, of course, it was in 1952 another New Yorker, Felix Frankfurter . . . Well, he was born in Austria but he spent his impressionable years in New York City. He wrote in *Rochin v. California*[3] that the only thing the United States Supreme Court could prohibit the states from doing were those actions which "shock the conscience." But until those cases, there was virtually nothing that the United States Supreme Court did with regard to civil rights and civil liberties that had any impact on the states.

With regard to the New York Court of Appeal's own history and tradition, what Chief Judge Kaye was advocating was entirely consistent with that. Because from the time the New York Court of Appeals was instituted in 1846, the New York Court of Appeals led the country in independent state-based adjudication. Almost right off the bat in the *Wynehamer*[4] case, the famous case in 1856, the New York Court of Appeals ruled it was radical at the time that due process must mean something more than that the legislature can simply duly enact any law that infringes upon fundamental rights, or that a court can simply apply that legislation to abridge fundamental rights. No, due process meant more than that.

We call that substantive due process. If we like the substance, we love substantive due process. If we don't like the substance, we hate it, right?

In 1885, *In re Jacobs*,[5] another great on the court, Robert Earl,

[1] Slaughter-House Cases, 83 U.S. 36 (1872).
[2] Palko v. Connecticut, 302 U.S. 319 (1937).
[3] Rochin v. California, 342 U.S. 165 (1952).
[4] Wynehamer v. People, 13 N.Y. 378 (1856).
[5] *In re* Jacobs, 98 N.Y. 98 (1885).

announced another radical proposition at the time: that constitutional liberty means a lot more than simply the absence of physical restraint, a lot more than simply the absence of imprisonment. And then Earl went further. In order for legislation to be valid, it had to have some actual relationship to the avowed legitimate purpose of that legislation.

Then, of course, several years hence in the great 1943 case, *People v. Barber*.[6] The United States Supreme Court by this time at least said Free Exercise of Religion was one of those rights that are implicit in the scheme of ordered liberty applicable to the states. And yet the United States Supreme Court really didn't protect Free Exercise of Religion too much. So when an anti-peddling statute came before the Supreme Court, it refused to grant a religious exemption to the Jehovah Witnesses. The next year, the New York Court of Appeals didn't hesitate at all. Speaking through Chief Judge Irving Lehman, it granted a religious exemption. In one of Lehman's paragraphs, he really set forth exactly what Chief Judge Kaye promoted during her tenure on the Court. Lehman wrote: "Parenthetically, we may point out that in determining the scope and effect of the guarantees of fundamental rights of the individual of the Constitution of the State of New York, this court is bound to exercise its independent judgment. And it is not banned by a decision of the Supreme Court of the United States."

That was in 1943. Oh and by the way, four months later, the United States Supreme Court, citing Chief Judge Lehman in *People v. Barber*, reversed itself and granted the Jehovah Witnesses an exemption.

That's the way it used to be. Later, even in the era of Chief Justice Earl Warren, when the United States Supreme Court was in the vanguard of protecting civil rights and civil liberties, that didn't stop the New York Court of Appeals from deciding cases on an independent basis. No, exactly like Chief Judge Kaye would ultimately advocate.

The Court of Appeals, speaking through Chief Judge Desmond, Chief Judge Fuld and others, would decide cases that became landmarks, not only in New York, but that ultimately were adopted by the United States Supreme Court in the Warren era. Actually, relying on and citing specifically by name, Desmond and Fuld.

And, by the way, in those cases, you know what Fuld and Desmond would say? It's unnecessary to consider what the United States

[6] People v. Barber, 289 N.Y. 378 (1943).

Supreme Court would do with regard to these issues.

Even after Earl Warren, even after that era, when the United States Supreme Court began to retrench a bit on civil rights and civil liberties, did the New York Court of Appeals simply just follow what the Supreme Court was doing? No! Speaking through others, such as and most prominently perhaps Chief Judge Lawrence Cooke, the New York Court of Appeals continued. And it continued to be the leading court in the country in independent state constitutional adjudication.

Not surprisingly, at an event at Albany Law School several years ago, when the Judges of the Court of Appeals would choose their favorite judge in Court of Appeals history to speak about, who did Chief Judge Kaye pick? She picked Chief Judge Cooke. And why? As she said, it in large measure because of Chief Judge Cooke's independent state constitutional adjudication. Also, he came from Monticello like she did.

Anyway, by that time the rest of the country seemed to be discovering state constitutional law. It was really interesting: the "reemergence" of state constitutional law, the "rediscovery" of state constitutional law. The "new judicial federalism." But it was not new in New York, and Chief Judge Kaye understood that.

Why was it new to the rest of the country? Chief Judge Kaye knew this as well, and tried to change what was happening in legal education. It became new, it became a "renaissance," it became a "reemergence" because law schools by and large after the '60s started teaching constitutional law and constitutional criminal procedure by almost exclusively focusing on United States Supreme Court decisions.

Prior to that time, if you looked at a constitutional law treatise, when it came to civil rights and civil liberties and due process cases, many if not most of the cases cited were out of the state courts. Because the Supreme Court had been doing very little about civil rights and civil liberties prior to that time. But after the '60s, law schools, and we continue to do that today law schools would just focus on the United States Supreme Court.

But Chief Judge Kaye, speaking through the Conference of Chief Judges and also in other speeches, articles, and her decisions on the Court of Appeals, and yes, in her dissents at the Court of Appeals (she would dissent quite a bit at that time). She would say and argue, "We ought to be deciding these cases on independent state constitutional law."

I just want to end by talking about Chief Judge Kaye's advocacy for

independent state constitutional law at a time when, very curiously, the New York Court of Appeals seemed to be very unsure, very uncertain even about the very legitimacy of independent state constitutional law. No, it was not because Republican Governor Pataki began appointing conservative Republicans to the court. No, it happened before then.

There became a time, to certain members of the Court of Appeals, it seemed as though independent state constitutional adjudication was somehow illegitimate. That the court was supposed to be following the Supreme Court of the United States on constitutional issues. That the Court of Appeals ought not to be exercising independent judgment.

Well, in one of those cases, in which the forces in favor of state constitutional law won, Chief Judge Kaye wrote a concurring opinion. I think it's one of her finest. It's in the case of *People v. Scott*.[7]

She wrote this in that concurring opinion, "However much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgments as to whether a particular protection is adequate or sufficient."[8] It's hard to find judges nowadays especially if they're before the Senate Judiciary Committee acknowledging that judges actually ought to be rendering judgment, as opposed to simply mechanically applying law to facts. "In those instances where we have gone beyond Supreme Court interpretations of federal constitutional requirements, our objection has been the protection of fundamental rights, consistent with our constitutions, our precedents, and our own best human judgments in applying them."[9]

Judith Kaye was not only an absolutely wonderful, caring, generous human being. Beyond that, she really was a great jurist, and it was really an honor to know her. Thank you very much.

[7] People v. Scott, 593 N.E.2d 1328 (N.Y. 1992) (Kaye, J. concurring).
[8] *Id.* at 1347.
[9] *Id.*

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MONDAY, JUNE 18, 2018

Today's Partisan Gerrymandering Case: 7-2 for "It's Still Unsettled"

In *Gill v. Whitford*, the case involving hyper-partisan gerrymandering, the Supreme Court chose not to render a final decision. Instead, the Court returned the case to the lower court for further proceedings.

At issue was the carving of voting districts by a state legislature--here, in Wisconsin--in such a way that favors the political party in power (the Republicans) over a different party (the Democrats), in gross disproportion to the votes the respective parties received statewide, even when the disfavored party receives a majority of those votes. Several Democratic voters challenged the gerrymandering as an unconstitutional dilution of their right to vote. The Supreme Court neither rejected nor upheld their challenge.

What the Court did do was to send the case back to the court below for a fuller exploration of the question of "standing." That is, the Supreme Court returned the case to the lower federal court to allow the two sides an opportunity to more fully litigate whether the challengers had suffered a personal and particularized injury to their voting rights. If the challengers can demonstrate that, then they have the right to bring this lawsuit complaining about the gerrymandering and the Supreme Court has the constitutional authority to hear the case on appeal. If the challengers cannot so demonstrate, then the opposite.

Chief Justice Roberts wrote the majority opinion which was joined by all the Justices except Thomas and Gorsuch. Those two would simply have dismissed the challengers lawsuit and put an end to the case.

In any event, despite the Court's decision not to reach the merits of the case and to rule on the constitutionality of hyper-partisan gerrymandering, today's ruling is not without some especially notable aspects. Let's consider a few of them:

- Four of the Justices--the Court's liberals: Ginsburg, Breyer, Sotomayor, and Kagan--fully joined Chief Justice Roberts majority opinion. But they also joined together in a separate concurring opinion, authored by Kagan, making clear their shared view that hyper-partisan gerrymandering is unconstitutional. As Kagan put it: "*Courts have a critical role to play in curbing partisan gerrymandering...Courts—and in particular this Court—will again be called on to*

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- Cruel and Unusual
- Crummey_Peter
- Cuomo_Andrew
- Cuomo_Mario
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
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- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
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- Fahey_Eugene
- Father's Day
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- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering
- Ginsburg_Ruth Bader
- Goats

redress extreme partisan gerrymanders. I am hopeful we will then step up to our responsibility to vindicate the Constitution against a contrary law."

- Chief Justice Roberts' opinion for the Court--which those 4 liberal Justices joined--did not reject the substance of Kagan's concurring opinion. Instead, Roberts' opinion made plain the Court's view, which the liberals shared, that the question of standing had to be resolved as a threshold matter before the Court would reach the substantive merits--i.e., the constitutionality of hyper-partisan gerrymandering.
- Related to that, Chief Justice Roberts' opinion for the Court left the door open to reconsidering the Court's past decisions which severely limited challenges to partisan gerrymandering--challenges that Kagan's concurring opinion would allow. Roberts' opinion twice referred to "*our cases **to date***." [My emphasis.] His opinion also noted that "*We leave for another day consideration of other possible theories of harm*" expressed in Kagan's opinion. So again, the Court did not reject the possibility of challenges to hyper-partisan gerrymandering. Rather, the Court actually suggested the possibility of revisiting past decisions in order to allow them.
- Justices Thomas and Gorsuch were alone in rejecting the Court's decision to allow the challengers an opportunity to demonstrate that their complaint is about "individual legal rights," not simply "generalized partisan preferences."
- Among the critical questions to be addressed in the further proceedings at the lower court and, ultimately, at the Supreme Court when the case almost assuredly returns are:
  - Can the challengers demonstrate injury to their voting rights that go beyond their own voting districts?
  - Can they demonstrate that their injury necessarily involves the neighboring districts--i.e., redrawing those districts necessarily affected their own districts and, therefore, their own voting rights?
  - Can they demonstrate that their injury involves the entire statewide redrawing of districts, because that affected the statewide influence of their own district representatives?
  - How narrowly personal or more broadly systemic will the Supreme Court construe the challengers' standing--and thus their right to challenge and the Court's jurisdiction to hear--complaints about partisan gerrymandering?
- Finally, the Court's narrow disposition of this case somewhat mirrors the Court's disposition of the *Masterpiece Cakeshop* case (where the baker refused to create a cake for the celebration of a same-sex marriage; *see* ***The Cakeshop case: What the Court Did NOT Decide***). In that case, the Court refrained from deciding whether or not religious objectors are entitled to an exemption from an anti-discrimination law. Although the Court's opinion in that case outlined the pros and cons on that issue, it ruled on the narrow ground that the baker had not been given a fair hearing below. In that case, as in this

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- New York's Former Chief Judges: Kaye & Lippman [mini-presentations]

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> gerrymandering case, the Roberts Court garnered a broader consensus, by avoiding the broader underlying question and, instead, issuing a narrower and less final resolution. This may well be the approach Chief Justice Roberts resorts to, when possible, to avoid yet another decision where the Justices are deeply divided--and embarrassingly so--along strict partisan lines.

We may get another decision in a major case this coming Thursday. There are some tough, controversial ones to come. (*See **Supreme Cases Awaiting Decision***.) We shall see.

Labels: Gerrymandering, Gorsuch_Neil, Judicial Decisionmaking, Kagan_Elena, Roberts Court, Roberts_John, SupCt, Thomas_Clarence

Newer Post Home Older Post

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TUESDAY, JUNE 26, 2018

The Supreme's Cell Location Data Decision: Right, Revealing, and a Real Milestone

(Today's "travel ban" decision was another pathetic partisan divide. The 5 Republicans vs the 4 Democrats. We'll discuss that next. But first, this privacy/search & seizure milestone.)

The Supreme Court ruled this past Friday that when government tracks a person's movements and whereabouts--in this case for 4 months, using cellphone location data--that is a search. Speaking through Chief Justice Roberts' majority opinion in *Carpenter v. U.S.*, the Court held that government must (except, for example, in an emergency situation) obtain a warrant, supported by probable cause, before it may engage in such a comprehensive technological scrutiny of someone's private life.

Now, that decision may not seem so earthshaking. Well of course that's a search! Well of course the Constitution generally requires a warrant and probable cause for a search! Well of course the government shouldn't be allowed to examine the data that my cellphone company has about my cellphone's location in order to monitor my every movement--unless it has some good reason (i.e., probable cause) and gets a warrant!

Well, you might think so, and the Supreme Court now agrees. Yes, ***now***, and by a mere ***5-4 vote***!

Chief Justice Roberts was the deciding vote in *Carpenter*. He joined the Court's 4 liberals (Justices Ginsburg, Breyer, Sotomayor, and Kagan) and he assigned himself the opinion for the resulting majority. His opinion was a milestone. Not only for the particular result in the case--to repeat, government must get a warrant supported by probable cause in order to track a person's movements through cellphone location data. But also because Roberts re-invigorated one of the Court's foremost privacy-protecting landmarks. And because he declined to apply the Court's privacy-limiting precedents.

As for the 4 dissenting Justices, they all authored their own opinions presenting different arguments why Roberts and his majority were wrong.

[We've discussed at length in New York Court Watcher the nonsense--

- Compelling Interest
- Confirmation hearings
- Constitutional Law
- Contraceptive Coverage
- Cooke Symposium
- Cooke_Lawrence
- Criminal Law
- CrimLvApps (NYCOA)
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- Crummey_Peter
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- Cuomo_Mario
- Death Penalty
- DeBour
- Dianne Renwick
- Dicker_Fred
- DiFiore_Janet
- Discrimination
- Dissents
- Diversity
- DNA
- DOMA
- Dominguez_Ramon
- Double Jeopardy
- Durham_Christine
- Employment Law
- Environmental Law
- Equal Protection
- Executive Order
- Exonerations
- Fahey_Eugene
- Father's Day
- FBI
- Federalism
- Feinman_Paul
- FISA Court
- Free Exercise of Religion
- Free Speech
- Freedom of the Press
- Fuld_Stanley
- Fundamental Rights
- Funeral Protests
- Garcia_Michael
- Garland_Merrick
- Gay Rights
- Gender Equality
- Gerrymandering
- Ginsburg_Ruth Bader
- Goats

and dangerous nonsense at that--of the Supreme Court's search and seizure jurisprudence that has developed over the past few decades. It has developed largely in order to avoid excluding evidence obtained from unconstitutional searches. So the Court has disingenuously ruled that many searches are not really "searches" and, therefore, that they are not subject to constitutional protections.
A police helicopter hovering over your backyard to search your property--that's not a "search." A search of your private property away from your house--that's not a "search." A search of all the contents of your garbage put out for pick-up--that's not a "search." A search by police canines sniffing your body--that's not a "search." And lots more. No, none of these are "searches" according to Supreme Court decisions Consequently, in such "not-a-search" situations, the 4th Amendment's prohibitions against unreasonable searches and seizures just don't apply. The government need not get a warrant or have probable cause or even have some reasonable suspicion. No, nothing! No justification whatsoever is required for these searches under the Constitution because, the Court has told us, they are not really "searches."
Yes, it's hard to believe until you actually read these decisions.
*(See **Supreme Court: Right on GPS Surveillance--But BEWARE! (part 1)**; **The GPS Decision--part 2: Scalia's Dangerous Nonsense & Alito's Rebuttal**; **The GPS Decision--The Video**)]*

Let's consider the search & seizure case law particularly relevant to the issue in *Carpenter*.

The 4th Amendment of the Constitution protects against "unreasonable searches and seizures." In furtherance of that protection, it declares that "no Warrants [to conduct searches or seizures] shall issue, but upon probable cause." In it's 1967 landmark decision in ***Katz v. U.S.***, the Supreme Court ruled that **the 4th Amendment "protects people, not places."** That amendment, the Court elaborated, was intended to protect the legitimate privacy interests that people have in a free society--not the limited items that happen to be specifically mentioned in that amendment.

The Court in *Katz was* adopting the view expressed in one of the most famous dissents in Supreme Court history, authored by one of the truly great Justices in that history--the dissent of Louis Brandeis in *Olmstead v. U.S.* (1928). The majority in *Olmstead* held that the Constitution provided no protection against government eavesdropping on the defendant's private phone conversations. No warrant needed. No probable cause needed. The reasons? Conversations are not one of the "tangible' or "material" "things" specifically mentioned in the 4th Amendment. Also, the outside telephone wires that the government tapped belonged to the telephone company, not to the defendant.

Brandeis rejected that reasoning. He argued, in these oft-repeated lines, that the Constitution "*conferred, as against the Government, **the right to be let alone** -- the most comprehensive of rights, and the right most valued by civilized men. To protect that right, **every unjustifiable intrusion** by the Government upon **the privacy of the individual**, whatever the means employed, must be deemed a violation of the Fourth Amendment.*" Nearly 40 years later, in the *Katz* landmark, the Court overruled *Olmstead* and similar decisions, and it embraced Brandeis's view of protected privacy. Henceforth, all government intrusions upon legitimate expectations of privacy would have to be justified--by probable cause supporting a warrant.

But then...

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In the decades that followed *Katz*, as "law and order" Justices were being appointed and the Court was retrenching from decisions that were protective of the rights of the accused, the Court variously and persistently diluted that landmark. So, for example, the Court adopted the so-called **"third party doctrine."** In short, if you allow someone else to have information about you--e.g., your bank has records of your transactions and your phone company has records of the numbers you've called or which have called you--then you have no *Katz* privacy rights in that information, even from a government investigation. And so the 4th Amendment provides no protection.
(I'm not saying that follows logically, but only saying that's what the Court has ruled.)

Then there's the curious reemergence of (what I will call) the **"not specifically mentioned doctrine"** and, relatedly, the **"trespass doctrine."** In these latter dilutions of *Katz*--actually breaks from it--the Court has insisted, for example, that while the 4th Amendment specifies "houses" for protection, it does not mention the private property beyond a house. So there is no 4th Amendment protection for the deceptively labelled "open fields"--i.e., actually any private property a homeowner has beyond the immediate area of the home itself. The Court has also insisted that the 4th Amendment is really about property rights and about preventing the government from "trespassing"--i.e., physically invading without permission--upon one of your "tangible" "things" that are mentioned in that amendment. So, only nonconsensual invasions of your person (body), house, papers (documents), or effects (personal property). No "trespass" on one of those? Then no 4th Amendment protection.

Sooooo, under the "third party doctrine," since you've "allowed" your bank and your phone company to have records about you, the government doesn't need a warrant or probable cause--or any other justification--to search your records. Also, because your private property beyond your house is not mentioned in the 4th Amendment, the same thing. And as long as the government does not "trespass" upon you or your car (which is an "effect" or personal property), apparently no warrant or probable cause is required to conduct unlimited surveillance on your comings and goings.

That's was state of 4th Amendment search and seizure jurisprudence when the Court was deciding the cellphone location data issue in *Carpenter*.

So how exactly did Chief Justice Roberts reach the result he did for the Court's majority? Here's an outline of the critical highlights:

- Roberts stated the issue in the case succinctly and without any ideological slant at the outset: "***whether*** *the Government conducts* ***a search*** *under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements*." [My emphasis whenever in bold.]
- He then described the purpose of the 4th Amendment in terms of privacy and the Court's privacy-protective landmarks:
    - "*The 'basic purpose of this Amendment,' our cases have recognized, 'is* ***to safeguard the privacy and security of individuals*** *against*

- Miranda
- Mullarkey_Mary
- Napravnik_Rosie
- Nomination
- Non-Establishment of Religion
- NY Commission on Judicial Nomination
- NY Court of Appeals
- NY Court of Appeals (2012-13)
- NY Ct Workload
- O'Connor_Sandra Day
- Obama and SupCt
- Obamacare
- Open Fields
- Pataki_George
- Pellucidly Clear
- Pigott_Eugene
- Plain Touch
- Powell_Lewis
- Presidential Power
- Presidential Powers
- Privacy Rights
- Proposition 8
- Prosecutorial Ethics
- Racial Discrimination
- Read_Susan
- Reasonable Doubt
- Recess Appointments
- Rehnquist_William
- Religion and the Law
- Right to Counsel
- Right to Silence
- Rivera_Jenny
- Roberts Court
- Roberts_John
- Rogers_Chase
- Russia Investigation
- Same-Sex Marriage
- Saratoga Highlights
- Scalia and Thomas
- Scalia_Antonin
- Search and Seizure
- Sears_Leah Ward
- Second Amendment
- Section 1983
- Self-incrimination
- Sex Discrimination

> *arbitrary invasions by governmental officials.' Camara v. Municipal Court of City and County of San Francisco, 387 U. S. 523, 528 (1967)."*
> and
> "*In Katz v. United States, 389 U. S. 347, 351 (1967), we established that 'the Fourth Amendment* ***protects people, not places****,' and expanded our conception of the Amendment to protect certain expectations of privacy as well.*"

- Roberts then **declined** to apply the Court's 2012 decision in the GPS tracking case, *U.S. v. Jones*, in terms of Justice Scalia's majority opinion which had characterized the 4th Amendment in terms of **trespass upon property rights**. (I.e., Scalia wrote that the GPS monitoring of the driver's movements implicated the 4th Amendment because government officials had **physically trespassed on his car by attaching a GPS device** without his consent--**not because** electronically monitoring his movements without a warrant was an intrusion upon his privacy rights. In fact, Scalia disparaged *Katz* as a "deviat[ion]." See ***The GPS Decision--part 2: Scalia's Dangerous Nonsense & Alito's Rebuttal.***)
- Instead, Roberts emphasized that **5 Justices in *Jones*** had underscored the "***privacy concerns***" underlying the 4th Amendment--i.e., Justice Alito's concurring opinion, joined by Ginsburg, Breyer, and Kagan, arguing that ***Katz*** **governed the case and denouncing Scalia's disinterment of the trespass doctrine** as outmoded and long overruled; and Sotomayor's lone concurring opinion, joining Scalia but also applying *Katz*.
    - Reaffirming the view of those 5 Justices--a majority of the Court--instead of Scalia's "trespass doctrine," Roberts noted that, "*Since GPS monitoring of a vehicle tracks 'every movement' a person makes in that vehicle, the concurring Justices concluded that 'longer term GPS monitoring in investigations of most offenses* ***impinges on expectations of privacy****'.*"
- Then, addressing the "third party doctrine," Roberts explained that at the time those earlier precedents about bank records and phone records had been decided in the '70's, "*few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements.* ***We decline to extend Smith*** [bank records] ***and Miller*** [phone records] ***to cover these novel circumstances.***"
- Roberts elaborated further on the extent and implications of cellphone data on 4th Amendment privacy rights: "*[A] cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up. Virtually any activity on the phone generates [location information], including incoming calls, texts, or e-mails and countless other data connections that a phone automatically makes when checking for news, weather, or social media updates. Apart from disconnecting the phone from the network, there is no way to avoid leaving behind a*

- Simons_Richard
- Smith_Malcolm
- Smith_Robert
- Sotomayor_Sonia
- Souter_David
- Souter's possible replacements
- Standing
- State Constitutional Commentary
- State Constitutional Law
- State Courts
- Statutory Interpretation
- Stein_Leslie
- Stevens_John Paul
- Stevens' possible replacements
- Stop and Frisk
- Strict Scrutiny
- Strip Searches
- SupCt
- SupCt (2011-12)
- SupCt (2012-13)
- SupCt Highlights (2007-08)
- SupCt Highlights (2008-09)
- SupCt Highlights (2009-10)
- SupCt Highlights (2010-11)
- SupCt Highlights (2013-14)
- SupCt Highlights (2014-15)
- SupCt Highlights (2017-18)
- SupCt Nominations
- SupCt Workload
- SupCt: Crim Law
- SupCt: Discrimination
- Technology
- Ternus_Marsha
- Textualism
- Thomas_Clarence
- Titone_Vito
- Toal_Jean
- Torture
- Traffic Stops
- Trump Investigation
- Trump_Donald
- Unenumerated Rights
- Unions

trail of location data. As a result, in no meaningful sense does the user voluntarily 'assume[] the risk' of turning over a comprehensive dossier of his physical movements...The Government's acquisition of the cell-site records was a search within the meaning of the Fourth Amendment."

- Finally, lest there be any doubt that the Chief Justice intended to re-enforce the privacy rights character of the 4th Amendment and, simultaneously, to re-inter the outmoded views that had already been overruled in *Katz* (but were nevertheless re-embraced in Scalia's majority opinion in *Jones*--the GPS case), Roberts returned to Brandeis and his dissent in *Olmstead*: "*As Justice Brandeis explained in his famous dissent, the Court is obligated—as '[s]ubtler and more far-reaching means of invading privacy have become available to the Government'—to ensure that the 'progress of science' does not erode Fourth Amendment protections. Olmstead v. United States, 277 U. S. 438, 473–474 (1928).*"

As for the 4 dissenters:

- Justice Kennedy argued that the "third party doctrine" precedents should be applied, and that they "*dictate that the answer is no*" 4th Amendment "search" was conducted in this case.
- Justice Thomas, echoing the majority opinion in *Olmstead*--rather than the Brandeis dissent--argued that the question in this case was "*whose property was searched,*" and the cellphone location data belonged to the cellphone company, not to the defendant.
- Justice Alito argued that a subpoena for the cellphone company to present records--which was involved in this case--did not implicate the same privacy concerns as would an actual search of the defendant's premises, papers, or personal property.
- Justice Gorsuch argued against *Katz* as being at odds with the original meaning of the 4th Amendment and unworkable. Instead, "if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection"--but not with regard to the cellphone company's records or your location and movements.

So there it is. I know this was a bit long and detailed. But this decision is so vitally important for fundamental privacy protection amidst such extraordinary and extraordinarily rapidly advancing technology.

As far as the Supreme Court itself is concerned, the significance of this case includes being decided by a bare majority, Chief Justice Roberts being the deciding vote, his siding with the 4 liberal Justices, his rejecting the application of older precedents to answer a modern technological question, his even rejecting a recent majority opinion--by Justice Scalia--that sought to resurrect an old view of the 4th Amendment, and his leaving no doubt that the privacy concerns expressed in Brandeis's dissent in *Olmstead* (not the Court's decision in that case) and later adopted in *Katz* are the governing principles of the 4th Amendment.

As for the dissenters, Justices Kennedy and Alito argued in favor of applying previous decisions of the Court that would have precluded the reach of *Katz to* this case and, presumably, to other analogous intrusions made possible by advancing technology. Justices Thomas and Gorsuch

- Velazquez_Johnny
- Video Games
- Vin's Votes
- Voting Rights
- Wachtler_Sol
- White_Byron
- Wilson_Rowan
- Women's Rights
- Wrongful Convictions
- Zimmerman_George

BLOG ARCHIVE

Jun 2018 (6) ▼

would abandon *Katz*--largely or entirely--and would restrict 4th Amendment protections to its original or literal limits, regardless of the changed realities of the modern world.

So one vote made the difference. A departure of one of the liberal Justices--and the retirement of the elder Ginsburg or Breyer in the not too distant future is certainly a possibility--or even of the Chief Justice, would likely result in the Court's narrowing of the *Carpenter* decision. *A fortiori* if the departing Justice is replaced by the current President or by a conservative successor. In fact, if such were to occur, it is likely that those antiquated "third party" and "trespass" and "not specifically mentioned" doctrines would be rehabilitated and applied to constrict constitutional privacy protections.

That thought--at least to me--is dismaying. But for today, the *Carpenter* decision is cause for celebration and some hope.

Labels: Brandeis_Louis, Criminal Law, Judicial Decisionmaking, Privacy Rights, Roberts_John, Scalia_Antonin, Search and Seizure, SupCt, Technology

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