HORIZONTAL PRESSURES AND VERTICAL TENSIONS: STATE CONSTITUTIONAL DISCORDANCY AT THE NEW YORK COURT OF APPEALS

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INTRODUCTION

In 1992, shortly before her elevation from Associate Judge to Chief Judge of the New York Court of Appeals, Judith S. Kaye observed:

Perhaps more than any other issue, the State constitutional law cases over the past decade have seemed to fracture the Court. On 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 . . . . Whether this is a consequence of the "new" judicial federalism and a process of hammering out approaches and methodologies to accommodate it, or the consequence of other factors, is a subject for fuller discourse elsewhere.¹

This article is meant to accept Chief Judge Kaye's invitation to discuss the New York Court of Appeals' approach to its different cases. It will examine the extent to which the Court of Appeals acts consensually in its plenary caseload and in its effort to resolve particular issues arising under the New York Constitution. Judge Kaye's perception that the Court of Appeals

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exercises its decision making prerogatives differently in several categories of cases will be explored so that some preliminary assessments about the phenomenon can be made.

This undertaking is not without significance. As the “New Judicial Federalism” matures, critiques of its intellectual foundation and development are becoming more prevalent. Analytical assessment of the motivations underlying state constitutional decision making can help inform our appreciation of how state judges approach constitutional cases. The New York Court of Appeals, as one of the most influential state high courts and a traditional leader in independent state court decision


3. See, e.g., James A. Gardner, The Failed Discourse of State Constitutionalism, 90 MICH. L. REV. 761, 762 (1992) (pointing to a movement ushered in by Justice William Brennan “advocating state independence in constitutional decisionmaking”); Peter J. Galie, Modes of Constitutional Interpretation: The New York Court of Appeals’ Search for a Role, 4 EMERGING ISSUES ST. CONST. L. 225, 250 (1991) (discussing the “dual role that state courts play as final arbiters of their own law and as appellate courts reviewing and deciding federal law claims . . . ”); G. Alan Tarr, Constitutional Theory and State Constitutional Interpretation, 22 RUTGERS L.J. 841, 841 (1991) (discussing the “new judicial federalism” as being a “renewed reliance by state courts on state constitutions as independent sources of rights” and “no longer confined to a few adventuresome courts”).

4. See, e.g., Luke Bierman, The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals, 68 TEMP. L. REV. 1403 (1995) (considering “how the judges of the New York Court of Appeals exercise their individual prerogatives in resolving cases”); Vincent M. Bonventre, New York’s Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals, 67 TEMP. L. REV. 1163, 1165-66 (1994) (examining the Court of Appeals under Judge Wachtler as “becoming lopsidedly pro-government and pro-prosecution” and predicting that Judge Kaye’s court will become more supportive of individual rights and liberties because in the past she “urged her colleagues to exercise independence in decision-making by interpreting state law rather than applying federal rulings -- even if the state-based results would be different”).

making, is a natural venue in which to focus analytical attention, especially considering Chief Judge Kaye’s prominence in the judicial federalism movement. Moreover, examining the different ways in which an important state high court resolves particular kinds of cases contributes more generally to our knowledge of the dynamics underlying judicial behavior.

This article will begin by confirming the accuracy of Chief Judge Kaye’s assessment of her court’s decision making. The New York Court of Appeals seems to decide its plenary caseload with much agreement; indeed, the Court of Appeals resolves upwards of ninety percent of its cases unanimously. In deciding the extent to which the New York Constitution should be interpreted in accordance with federal constitutional doctrine, however, New York State Court of Appeals judges are much more discordant.


Appeals’ plenary caseload may result from the effects of leadership, influence and socialization - pressures that can be described as horizontal in nature as they are exerted from within the court, on the collegial body’s members. The prevalence of dissent when the Court of Appeals decides judicial federalism cases, on the other hand, may be attributed to the influence of the United States Supreme Court looming over the state high court as the latter struggles to fashion state constitutional doctrine against the backdrop of the federal constitution -- tensions that can be characterized as vertical in nature as they derive from the Supreme Court’s generally perceived paramount position in the hierarchical judicial system.

I. CONSENSUS AND DISSENSUS

A. Data Set

To assess Chief Judge Kaye’s observation about the Court of Appeals’ decision making propensities, it is appropriate to examine how the plenary caseload and judicial federalism cases were resolved during the five court terms preceding her assessment. This period from 1987 to 1992 provides a legitimate data source for a variety of reasons. First, during the 1987-88 through 1991-92, terms the court’s membership remained constant, thereby minimizing any effects that changes in court personnel might have contributed to decision making dynamics.8 Second, these judicial terms encompass a period after the court’s civil jurisdiction was amended (effective January 1, 1986)9 to afford it substantially more discretion over the plenary caseload


so that any lingering effects of the jurisdictional change are minimized.\textsuperscript{10} Third, it was during these terms that the court’s state constitutional decision making attracted substantial popular and scholarly interest.\textsuperscript{11}

To provide a comparative basis to determine the durability of Chief Judge Kaye’s assessment, the 1994-95 judicial term will also be examined. This term offers an appropriate comparison because it is the first full term following Chief Judge Kaye’s cited observation during which the court operated with a full complement of seven judges.\textsuperscript{12} The presence of a different chief judge and three new associate judges during this term will allow consideration of whether changes in the court’s membership might have had any impact on the court’s actions.

The plenary caseload includes all cases decided by the Court of Appeals with either a memorandum or an opinion during the subject term.\textsuperscript{13} These cases are categorized into overall cases,

\footnotesize{\textsuperscript{10} See, e.g., Luke Bierman, \textit{When Less is More: Changes to the New York Court of Appeals’ Civil Jurisdiction}, 12 \textit{PACE L. REV.} 61 (1992).}


\footnotesize{\textsuperscript{12} Beginning near the end of the 1991-92 term and continuing until early 1994, the Court of Appeals saw a rash of turnover due to resignations, retirements and promotions. In September 1992, George Bundy Smith replaced Judge Alexander who had resigned earlier that year. In November 1992, Chief Judge Wachtler resigned following his arrest on federal felony charges. Judge Kaye’s promotion to Chief Judge became effective in March 1993. Howard A. Levine replaced Kaye as an associate in September 1993 and Carmen Beauchamp Ciparick replaced Judge Hancock following his mandatory retirement, due to age, at the end of 1993.}

\footnotesize{\textsuperscript{13} The focus is on the number of cases, not on the number of opinions, to ensure that the full import of judicial attention in resolving cases is considered.}
civil cases and criminal cases. Judicial federalism cases are those in which the Court of Appeals specifically addressed whether to adopt a federal constitutional doctrine or to define a distinct rule as a matter of state constitutional law.

The extent to which the Court of Appeals has acted consensually is examined from different perspectives. One analysis focuses on the court acting as an institution resolving cases. In this analysis, the extent to which all the Court of Appeals judges agreed to a particular outcome, regardless of the presence of concurrences or dissents to express different rationales, is considered. Another analysis focuses more on the individual judge’s voting. This perspective considers the extent to which judges expressed different rationales through the use of concurrences and dissents. Whereas the former approach affords an institutional perspective, tending to overstate the presence of consensus since agreement about outcome may well mask underlying disputes and motivations that otherwise have been compromised for the purpose of resolving the specific case.14 The latter approach, in contrast, provides a useful check on the extent of consensus by concentrating on individual judge’s personal motivations in decision making that have led to a separate public expression through a concurrence or dissent.15

B. Plenary Caseload

The data indicate that Chief Judge Kaye’s assessment of her colleagues’ usual propensity for agreement is accurate; the Court of Appeals tends to resolve its plenary caseload with frequent unanimity.16 In the five terms between 1987 and 1992, the court

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Thus, multiple cases decided by one opinion are counted as multiple cases. It should be noted that some cases were omitted from the data set for various reasons. A more thorough explanation of the data set’s creation can be found elsewhere. See Bierman, supra note 4; Luke Bierman, Institutional Identity and the Limits of Institutional Reform: The New York Court of Appeals in the Judicial Process, Ph.D. dissertation, SUNY at Albany, 1994.

15. Id.
16. See Table A.
was unanimous in 81% to 90% of its cases. The court, in these terms, decided its civil cases unanimously with rates that were within an even more narrow range (82% to 88%). Although unanimous decisions in criminal cases varied during these terms, from a low of 78% to a high of 93%, the extent of consensus nonetheless is substantial. The 1994-95 term saw rates of agreement as to outcome that were comparable to those in the earlier terms.

The high rate of agreement in the plenary caseload is evident even when examining the extent to which all judges agreed to resolve cases with a single opinion.17 In the overall plenary caseload in each of the five terms between 1987 and 1992, the Court of Appeals judges agreed to a single opinion more than three-quarters of the time. A low rate of agreement at 78% occurred in 1988-89, with a high of 87% in 1987-88. During this time, the judges refrained from using concurrences and dissents to a large degree. These were not judges who often resorted to using concurrences and dissents.

Moreover, this conclusion is supported by the court's resolution of civil and criminal cases in these terms. The judges were even more agreeable in civil cases, which were decided with all judges agreeing to a single opinion in more than 80% of the cases in each term. Criminal cases provoked proportionally less agreement to a single opinion than civil cases during these terms, but there was substantial agreement nonetheless. Between 72% and 78% of the criminal cases were decided with a single opinion in four of the terms, with 90% of criminal cases being resolved with a single opinion in the other term. The Court of Appeals acted with much consensus between 1987 and 1992.

This agreeability by the Court of Appeals judges continued even after the personnel changes leading to the 1994-95 term. During this term, the judges agreed to resolve cases with a single opinion 83% of the time. Civil cases were resolved in a single

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17. See Table B.
opinion at the same rate, with criminal cases decided in this manner somewhat less frequently.

These data indicate that the Court of Appeals is characterized by consensus in its decision making comparable to the highest rates of unanimity that have been identified within the United States Supreme Court. The New York Court of Appeals judges usually agree about the outcome of a case and they also ordinarily reach consensus on a single rationale as expressed in a single opinion. The presence of high rates of unanimity in the 1987-92 terms and in the 1994-95 term suggests that this general agreeability is not time bound but is durable. It also appears from the high rates of agreement about outcome as well as about rationale that the judges do not distinguish themselves from the institution -- agreement is the order of the day. These judges exhibit little motivation to write separate opinions, whether concurrences or dissents. As Chief Judge Kaye recognized, more often than not, there is agreement in the Court of Appeals.

C. Judicial Federalism Cases

In the five terms between 1987 and 1992, the Court of Appeals decided 30 judicial federalism cases. The court was unanimous about outcome in only eight, or 27%, of these cases. This contrasts sharply with the approximately 80% to 85% of the overall, civil and criminal plenary caseloads that were decided unanimously as to outcome during these terms. The difference between the plenary caseload and the judicial federalism cases is likewise apparent in the extent to which the judges joined in a single opinion to decide the cases. Again, only eight judicial federalism cases, or a little more than one-quarter of the thirty decided during these terms, were resolved with a single opinion, which is a substantial difference from the more than three-quarters of the plenary, civil and criminal caseloads that were decided without multiple opinions.

19. See Table C.
20. See Table D.
From the small sample of the two cases available, similar decision making dynamics can be seen in the 1994-95 term. In one of only two judicial federalism cases in this term, the judges agreed unanimously with the outcome. However, there was one separate concurrence.\(^{21}\) In the other case, there was substantial disagreement over the outcome evidenced by four separate opinions, including a concurrence and two dissents.\(^{22}\)

The data also confirms Chief Judge Kaye's observations. Although the Court of Appeals strongly tends to be unanimous with its plenary caseload, the amenability for consensus seems to break down when the court is faced with more specific issues dealing with the scope of the state constitution.\(^{23}\) The continued presence of high rates of consensus in the plenary caseload and of dissensus in the judicial federalism cases into the 1994-95 term, even with several new judges, suggests that the tendency toward agreement at the Court of Appeals is not time bound or personnel driven. The obvious deduction to be made is that factors associated with the judicial federalism cases invite dissent. With these observations, it is appropriate to turn our attention to the pressures and tensions that may contribute to the court's different decision making propensities in the plenary caseload and the judicial federalism cases.


\(^{23}\) Actually, the Court of Appeals' failure to reach consensus in other narrowly defined categories of cases has been identified. See Bierman, supra note 5. Even among these more divisive case categories, it appears to be the judicial federalism cases that prompt the most dispute as evidenced by the extent to which concurring and dissenting opinions are written. See Bierman, supra note 5.
II. HORIZONTAL PRESSURES IN THE PLENARY CASELOAD

A. Jurisdictional Effects

A possible explanation for the high rates of agreement in the Court of Appeals’ plenary caseload may be related to institutional arrangements surrounding the court’s largely discretionary jurisdiction. Judicial process scholars have attributed particular decision making preferences of appellate courts to the jurisdictional mechanisms by which these courts receive their cases. For example, the United States Supreme Court’s divisiveness has been traced to the Judges’ Bill of 1925,24 which provided substantial discretion to the Court to select its plenary caseload. The Justices have used this jurisdictional authority to select cases that can be characterized as policy oriented and, thus, raise more difficult and contentious issues than were confronted under the Court’s earlier more mandatory jurisdiction.25 The proliferation of concurrences and dissents as the Justices attempted to resolve these contentious policy issues resulted. In contrast, the United States Courts of Appeals, which exercise essentially mandatory jurisdiction over much “routine” litigation, have been identified as exhibiting “not much” conflict in their decisions.26

In 1985, the New York Court of Appeals’ jurisdiction in civil cases was amended to provide it with substantially greater control over its plenary caseload.27 The objective of this amendment was to remove routine matters that reached the court as mandatory cases and to allow the court to focus more of its attention on

27. 1985 N.Y. Laws 300; see Bierman, supra note 11.
those cases it believed significant for raising novel or important issues or conflicts in the law\textsuperscript{28} or, as Chief Judge Kaye it, "bellringers."\textsuperscript{29} Despite the opportunity to select cases that would be divisive in nature, the fact is that the Court of Appeals seems to be resolving its plenary caseload without much dispute. Therefore, there must be other factors contributing to the court's decision making.

\textbf{B. Leadership}

The Court of Appeals' high rates of consensus in its plenary caseload may be better explained by a variety of internal pressures that contribute to the decision making process. These pressures affect the way judges interact and relate to one another and, ultimately, how they resolve the cases before them. As these pressures generally are exerted from within the court and on the members of the collegial judicial body, they can be conceived as horizontal in origin and effect.

One horizontal pressure that may contribute to the Court of Appeals' tendency toward agreement in its plenary caseload is the leadership exerted by the chief judge. It is well recognized that the Chief Justice of the United States has a variety of task, social and intellectual leadership opportunities.\textsuperscript{30} For example, the assignment of opinion writing responsibilities has been identified as an important arsenal in the Chief Justice's ability to ensure that the Court's tasks are completed, not only in an efficient manner,

\textsuperscript{28} See Governor's Memorandum, 1985 N.Y. Laws 300.
\textsuperscript{29} Interview with Judith S. Kaye, Chief Judge of the New York Court of Appeals, New York (March 21, 1994).
but in a way that comports with objectives of the Chief.\textsuperscript{31} Chief Justice Earl Warren’s extraordinary ability to work with the different Justices on his Court contributed to his successes in moving the Court in particular directions; the unanimous decision in \textit{Brown v. Board of Education}\textsuperscript{32} is but one prominent example of Warren’s social handiwork.\textsuperscript{33} Chief Justice John Marshall’s departure from the Court’s use of seriatim decisions\textsuperscript{34} allowed him to author many opinions for the Court, contributing to the importance of cases like \textit{Marbury v. Madison}\textsuperscript{35} and reflecting his intellectual leadership.

There is more analysis of the dynamics among the members of the Supreme Court than of the Court of Appeals; nevertheless, the New York Court of Appeals has had a tradition of strong chief judges who have elevated the reputation of that court and have steered it in distinct ideological directions. Benjamin Cardozo’s common law jurisprudence left a lasting impression on the court’s repute as a national leader and as a catalyst for progressive social change. Stanley Fuld’s national reputation contributed to his successful term as chief judge from 1967 to 1973.\textsuperscript{36} Chief Judge Charles Breitel (1974-1978) exerted what has been called “rough fondling” on his colleagues in his efforts to move the court.\textsuperscript{37}

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\item \textsuperscript{31} See, e.g., Sue Davis, \textit{Power on the Court: Chief Justice Rehnquist’s Opinion Assignments}, 74 \textit{JUDICATURE} 66 (1990).
\item \textsuperscript{32} 347 U.S. 483 (1954). In \textit{Brown}, the Court held that state mandated racial segregation in public schools is violative of the Equal Protection Clause. \textit{Id.} at 495.
\item \textsuperscript{33} See generally Bernard Schwartz, \textit{Super Chief: Earl Warren and His Supreme Court} (1983) (discussing Earl Warren’s leadership that led to the Court’s decision in \textit{Brown}).
\item \textsuperscript{34} See, e.g., Wasby, supra note 19, at 240.
\item \textsuperscript{35} 5 U.S. 137 (1803). See Schwartz, supra note 33, at 71-77.
\item \textsuperscript{36} See Bonventre, supra note 7; Galie, supra note 7; see also Feiner v. New York, 340 U.S. 268, 273, 288 (Frankfurter, J., concurring).
\item \textsuperscript{37} Sol Wachtler, Remarks at a Memorial for former Chief Judge Charles D. Breitel (January 7, 1992), \textit{reprinted in} 78 N.Y.2d at vii. Breitel was described in this fashion because through his management style he pushed his colleagues to meet higher standards. \textit{Id.} at ix.
\end{itemize}
Sol Wachtler, Chief Judge of the Court of Appeals during the 1987-1992 terms, was a strong leader with a substantial capacity to move the court in particular directions.\textsuperscript{38} By the beginning of the 1987 term, Wachtler was by far the most experienced of the Court of Appeals judges, having served fifteen years on the state’s high court (he had served almost a full fourteen year term as an associate judge when selected as chief in 1985), with the most senior associate at this time having served only four years (Richard Simons was appointed in January 1983). In 1990, Wachtler was described as a “dominant force,”\textsuperscript{39} whose “cordial, pragmatic and intelligent” personality had permeated the court’s work.\textsuperscript{40} Aspirations for other public office, perhaps the New York statehouse or a seat on the United States Supreme Court,\textsuperscript{41} might well have motivated Wachtler to use his leadership capabilities on the court to further his ambitions.

Wachtler’s leadership on the court during this period has been recognized by scholars examining the court’s doctrinal directions. Prior to this period, Wachtler had been characterized by court observers and even his colleagues as liberal on many civil rights and liberties issues and he was at the forefront of the “new judicial federalism.”\textsuperscript{42} A perceptible “retrenchment” in the Court

\textsuperscript{38} Kolbert, supra note 11, at A1, B4.
\textsuperscript{39} Kolbert, supra note 12, at B4.
\textsuperscript{40} Kolbert, supra note 12, at B4 (quoting Norman Siegel, Executive Director of New York Civil Liberties Union).
\textsuperscript{41} See Eric Pooley, Crazy For You, NEW YORK MAGAZINE, Dec. 14, 1992, at 43; Sam Roberts, A Judge’s Interest in Being Governor is Decided the Hard Way, N.Y. TIMES, Nov. 9, 1992, at B6; Sam Howe Verhovek, Friends’ View of Judge: G.O.P. Answer to Cuomo, N.Y. TIMES, Nov. 8, 1992, at 49; see also Judge Wachtler Resigns, ALBANY TIMES-UNION, Nov. 11, 1992, (Editorial) at A-10.
of Appeals' traditional progressive and independent decision making during this period has been identified. This decision making process is consistent with Wachtler's "moderation" in support of liberal positions. This postural change may have occurred as he prepared to run against the liberal standard bearer Mario Cuomo or perhaps to appear more attractive to conservative presidents seeking nominees for the United States Supreme Court.

Wachtler's ability to exercise leadership over his colleagues could have been effective in more than simply doctrinal outcomes. Upon his selection as Chief Judge in 1985, Wachtler indicated that consensual decision making at the Court of Appeals was among his priorities. The presence of consensus on his court might have enhanced Wachtler's reputation as a coalition builder, either as a gubernatorial candidate or as a potential Supreme Court nominee. Regardless of the precise motivation, Wachtler's "dominant" presence seeking "cordial" decision making seems consistent with a court that was unanimous in about 85% of its cases.

Chief Judge Kaye's ability to lead the court also has been suggested. Although she has presided over the Court of Appeals for only a brief time, some shifts in the court's decisions to renewed support for independent state decision making were apparent almost immediately after Kaye became chief judge. Her national leadership in the "new judicial federalism" suggests that the shifts in the court's decision making may not be coincidental. Kaye's apparent concern over the court's divided

43. See Bonventre, supra note 12.
44. Caher, supra note 43, quoting Associate Judge Richard D. Simons; see also Bonventre supra note 12.
46. See Bonventre, supra note 5, at 1201-04.
47. For a comprehensive list of Judge Kaye's decisions see Bonventure, supra note 4, at 1208 n.317.
48. See Bonventre, supra note 5; Kevin Sack, Cuomo's Choice to Head the Court of Appeals: A Judge's Judge, N.Y. TIMES, Feb. 23, 1993; see also Kaye, supra note 8.
decision making in resolving issues of state constitutional law, as reflected in the quote that opens this article, indicates some elevated commitment to consensus for the court.\textsuperscript{49} The court’s preference for agreement during 1994-95 should not have disappointed her.

\textbf{C. Influence}

Related to the capacity to exercise leadership, whether because the accoutrements of the office permit the Chief Justice to control how work is accomplished or because of the personality and prestige of the chief judge, is the opportunity for one judge to influence a colleague. This horizontal pressure derives not so much from a judge’s formal position on an appellate court but rather from the “ability to persuade or convince another of the correctness of one’s opinions.”\textsuperscript{50} Some judges, like Abe Fortas or Felix Frankfurter, may be intelligent and well connected but they fail to move others because of personality flaws that inhibit their effectiveness.\textsuperscript{51} Likewise, Clarence Thomas’ penchant for harsh language has been identified as a potential limitation on his ability to persuade.\textsuperscript{52} In contrast, it generally is acknowledged that although he did not enjoy the accoutrements of leadership

\textsuperscript{49} Chief Judge Kaye has indicated that she does not actively promote or discourage dissent among her colleagues. See John Caher, \textit{Rulings are Anything But Predictable at the Top}, \textit{ALBANY TIMES-UNION}, Jan. 28, 1996, at A-6.


\textsuperscript{51} See Phillip Cooper and Howard Ball, \textit{The United States Supreme Court from the Inside Out} 199-201 (1996); Bruce Allen Murphy and Abe Fortas: \textit{The Rise and Ruin of a Supreme Court Justice} (1988).

\textsuperscript{52} Christopher E. Smith and Scott Patrick Johnson, \textit{The First-Term Performance of Justice Clarence Thomas}, 76 \textit{JUDICATURE} 172, 177 (1993) (discussing Justice Clarence Thomas’ modest impact on judicial decisions during his inaugural term).
associated with the position of Chief Justice, Justice William Brennan's "stature" derives from "the way he enabled others charged with writing an opinion for the Court to bring a majority together or hold it together . . . and in the way he led so much of the discussion within the Court on the issues that served as the cornerstones of major Supreme Court pronouncements."  

At the New York Court of Appeals, Judge Bellacosa seems to have the background to have been particularly influential. He authored popular commentaries on New York criminal law and procedure and served as the state court system's chief administrator. Bellacosa was a law professor before and after his term, serving for several years as Clerk and Counsel to New York's high court, where at least one judge was so impressed with Bellacosa that he publicly expressed his preference for Bellacosa to succeed him upon retirement. Moreover, Bellacosa was a close friend of not only Wachtler but also of Governor Mario Cuomo. His voting preferences during the 1987-92 terms placed him on a conservative block with Wachtler and Simons and his credentials should have contributed to an ability to persuade his colleagues in forming majority coalitions and ultimately producing unanimity.

It appears, however, that Bellacosa has not been as influential with his colleagues as might have been expected. Despite his preferences for the conservative outcomes often favored by a majority during most of the time covered by these terms, Bellacosa voted with the moderate non-bloc members, including Kaye, Alexander and Hancock, less frequently than the other bloc members, Wachtler and Simons. Moreover, Bellacosa

53. An example of the leadership advantages of the Chief Justice includes authority over assigning opinions if in the majority, assembling the Discuss List, leading conference, and presiding in court.
54. Cooper and Ball, supra note 52, at 247-48.
55. Remarks of Domenick Gabrielli, 58 N.Y.2d at x.
56. It was Wachtler who originally had convinced Bellacosa to serve as the Court of Appeals' Clerk and Counsel. Paul Pines, Orbiting Eagle Street, UPSTATE LEGAL RECORD, July 23, 1990, at 4.
57. Id.
58. See Bierman, supra note 5, at 1439-43.
59. See id.
tended to write separate opinions in judicial federalism cases even though his preference for federal constitutional doctrine comport with the court's usual preference during these terms. It may be that Bellacosa's characteristic strident separate opinions inhibited other judges from accepting his positions. These disagreements may reflect some more divisions that restricted Bellacosa's overall persuasiveness.

If so, the role of Judge Simons stands in particular contrast. As the senior associate during the terms reviewed here, whose usual judicial demeanor is reflected in his distinguished service as Acting Chief Judge for several months following Wachtler's shocking arrest and resignation, Simons may have enjoyed some particular credibility to influence his colleagues. Simons' more regular agreement (as compared to Bellacosa) with the moderate non-block members may have allowed him to serve as a bridge to these judges so that the three member conservative bloc could produce consensus despite concerns raised by the tenor of Bellacosa's separate opinions. In this regard, it is noteworthy that Simons joined a Bellacosa written dissent or concurrence in the more contentious Court of Appeals cases only once, and this at a time when Simons might have been distracted by the tragic death of his wife in a hospital accident. Simons' influence may best be seen in the case where he might have exerted none.

Through the 1994-95 term, the dynamics surrounding the new court members may still have been uncertain so that the influence of Simons or any other judge is not yet apparent. It is worth

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60. See id.
61. See Bierman, supra note 4, at 1439-43; see also Wasby, supra note 10.
62. See, e.g., Gary Spencer, Kaye Is Selected Chief Judge by Governor: First Woman in Post; Awaits Confirmation by State Senate, N.Y.L.J., Feb. 23, 1993, at 1; see also Bonventre, supra note 5, at 1164 n.5.
63. See Bierman, supra note 5, at 1437. The only time that Simons joined a Bellacosa authored concurrence or dissent in the contentious cases was in People v. Scott, 79 N.Y.2d 474, 506, 593 N.E.2d 1328, 1348, 583 N.Y.S.2d 920, 940 (1992), supra note 2.
64. Id. See Bierman, supra note 4, at 1437.
noting that Bellacosa's characteristic harshness surfaced during the term when he dissented from the dismissal of an indictment and castigated the majority for "burying their heads like ostriches." Only Judge Levine joined in this assessment, with Simons firmly among the majority. Simons' failure to contribute to such hyperbole may at least partly be responsible for his apparent ability to exert some influence.

D. Socialization

Of course, without perusing archival papers or conducting on-the-record interviews, it is difficult to confirm that a judge has exercised leadership or influenced another even if voting behavior is compatible with these horizontal pressures. My mostly confidential interviews with several former and current Court of Appeals judges and others familiar with the court left me with the general impression that the effects of leadership and influence were part of the calculus of the New York high court judges' decision making, even if not independently confirmable. These interviews also convinced me that there was an even more pervasive factor affecting how Court of Appeals judges approach their work -- socialization.

Generally, judges are affected by the manner in which they are acclimated to the operation of the judicial system and the specific courts in which they serve. Because appellate judges do not ordinarily undergo any formal training about how to accomplish their judicial responsibilities, they seem to be affected by what has been characterized as "anticipatory socialization," which roughly relates to their experiences before they become appellate judges. Similarly, the concept of "local legal culture" suggests


66. The papers of current and former Court of Appeals judges are not readily available and most of the specific information provided by the judges during interviews is to remain confidential.


68. Id.
norms and limitations for judges to follow as a trial or appellate jurist. The influences are seen in the way United States Supreme Court Justices’ vote on petitions for writs of certiorari, which has been attributed to an individual Justice’s perception of his or her role on the Court.Chief Justice Stone’s failure to adhere to previously prevailing practices (inhibiting public expressions of disagreement through the use of concurring and dissenting opinions) has been seen as contributing to the proliferation of separate opinion writing at the United States Supreme Court and reflects how socialization and standard operating procedures can affect a court’s voting behavior.

Judges serving on the New York Court of Appeals, like most appellate courts, undergo no formal training session. Yet, they become immersed in the traditions and practices of the court almost at once. For example, the courtroom is decorated with portraits of the court’s judges, including a prominent one of John Jay, who served not only as the first Chief Justice of the United States but also as Chief Justice of the New York Supreme Court. While serving as Chief Judge, Sol Wachtler was known to show off his desk with pride as the one used by Cardozo. In a decidedly low-tech ceremony that dates back decades, primary opinion writing responsibility is assigned when, following oral

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69. See Thomas W. Church, Jr., Examining Local Legal Culture, 10 AM. B. FOUND. J. 449 (1985).


71. See Doris Marie Provine, Case Selection in the United States Supreme Court (1980).

argument, each judge randomly selects index cards with case names written on the back.73

These traditions and procedures may acclimate the judges to certain expectations about how the Court of Appeals is to do its work. The most important contributions to this process, however, may well begin long before a Court of Appeals judge reaches the pinnacle of the New York judiciary through “anticipatory socialization.”74 It is not long ago that the opinions of the New York Court of Appeals, along with those of the United States Supreme Court, made up the standard fare for educating prospective lawyers.75 Even undergraduates are acquainted with some of the more noteworthy contributions that have been made to American legal development by New York’s judiciary. The influence of John Peter Zenger’s trial76 in New York colonial courts on the development of freedom of expression and on the importance of a jury trial is regularly part of a college curriculum, as is Cardozo’s The Nature of the Judicial Process.77

A lawyer practicing in New York and a judge serving on New York’s lower courts also would be exposed to some decision making habits of the Court of Appeals. During the Court of Appeals’ prominence earlier in the century, patterns in its decision making became entrenched. For example, the court seemed to place a premium on congeniality among its members and consensus in its decision making. In the 1934-35 court term, only thirty one concurrences and dissents were written in 718 appeals decided.78 This phenomenon of consensus apparently


74. See supra note 66.

75. John Caher, Scholars Return Attention to State’s High Court, ALBANY TIMES-UNION, July 23, 1995, at B4 (quoting Martin Belsky, Dean of University of Tulsa College of Law).

76. Trial of John Peter Zenger, 17 HOWELL'S STATE TRIALS 675 (1735).


78. ROBERT MACCRATE, JAMES D. HOPKINS AND MAURICE ROSENBERG, APPELLATE JUSTICE IN NEW YORK 178, Appendix E-8 (1982).
existed in the Cardozo era and can be followed into the early 1980s, as well as in the terms studied here. The civility of the dissents written during Cardozo’s time also has been noted. Judges serving between the 1940s and 1980s indicated that dissenting opinions at the Court of Appeals were expected to be few and restrained.

These patterns over time can be seen to have established expectations about how the Court of Appeals was supposed to act in deciding cases. The preeminent state high court in the country placed great emphasis in deciding cases unanimously, in marked contrast to the more divisive patterns developing at the nation’s high court. The expectations about the Court of Appeals and its decision making preferences might well have been internalized by those New York lawyers and judges who were watching the court during its preeminence and who were coming of professional age. From this perspective, it may be significant that during the 1987-92 terms, all seven of the court’s judges had previous experience as lower New York state court judges or as attorneys practicing in New York, and all seven of the Court of Appeals judges during the 1994-95 term had extensive careers as judges on New York courts.

The effects of socialization and standard operating procedures might have manifested themselves in other ways. As career judges in the New York state judiciary, the Court of Appeals judges during the 1987-92 and 1994-95 terms had extensive experience in the lower echelons of the state judiciary. Of the ten different Court of Appeals judges during these terms, six had served on the Appellate Division, New York’s intermediate

80. See Bierman, supra note 9; MacCrate et al., supra note 75.
81. See supra notes 15-23 and accompanying text.
82. See Posner, supra note 78, at 13.
83. See, e.g., Stanley H. Fuld, The Voices of Dissent, 62 Colum. L. Rev. 923 (1962); see also Hugh R. Jones, Cogitations on Appellate Decision-making, 34 Rec. Ass’n Bar City N.Y. 543 (1980).
84. See Halpern & Vines, supra note 23; Walker et al., supra note 71.
appellate court, and three of the others had served as judges on New York state trial courts. Each judges’ respective experience in the lower courts surely colored their perception of their roles as high court judges, particularly with respect to the normative degree of deference and consensus expected. The Appellate Division, like most mandatory jurisdiction, intermediate appellate courts, typically acts unanimously. 85 Similarly, trial judges are expected to act deferentially to higher courts by applying rules of law and implementing administrative directives. In this way, the Court of Appeals judges very well could have internalized expectations for consensus, deference and civility while serving as lower court judges, which resulted in a minimum of dissent and concurrence writing after these judges were elevated to the Court of Appeals.

From these perspectives, the effects of horizontal pressures are apparent. The convergence of a strong leader seeking consensus, an influential judge imposing some restraint on strongly worded separate opinions, and patterns of socialization and standard procedures adds up to high rates of agreement for a court that is seeking to impose itself into the more important and potentially divisive issues of the day. The absence of dissent in the plenary caseload can be attributed to the court’s internal dynamics, the interactions of judges who have come of professional age in largely similar ways and who, thus, approach their work and resolve their cases from common vantages. The presence of an outside tension, imposed from an institution usually placed higher in the hierarchical judicial system, may well distinguish the judicial federalism cases from the plenary caseload, and it is to this possibility that attention now turns.

III. VERTICAL TENSIONS IN JUDICIAL FEDERALISM CASES

A. Vertical Tensions in a Hierarchical System

In addressing the issues generally raised in its plenary caseload, the New York Court of Appeals is virtually unlimited. Most of the cases forming its plenary caseload raise questions involving subjects traditionally within the ken of state courts as the federal constitutional structure recognizes the supremacy of the states in defining the scope of state law, subject, of course, to the minimum standards imposed by the federal constitution. Interpreting state legislation, defining the scope of state common law rules in tort and contract, and overseeing the state’s lawyers, judiciary and legal processes make up much of the Court of Appeals’ work. Acting in these areas, the Court of Appeals not only has supreme judicial authority in the state but is accustomed to a preeminent national role in offering legal interpretations and resolving societal disputes.

In exercising its independence and priority, the Court of Appeals resolves most of its plenary caseload without any serious consideration of, or citation to, law from another jurisdiction. When it does look to the opinions and rationales suggested by other courts, the Court of Appeals seems to use them for illustrative purposes rather than for authoritative sources. The Court of Appeals’ general approach to other state court decisions

86. See, e.g., Michigan v. Long, 463 U.S. 1032 (1983) (holding that “respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this court’s refusal to decide cases where there is an adequate and independent state ground”).

87. U.S. CONST. art. VI, § 2. Article VI, § 2 provides in pertinent part: “This Constitution . . . shall be the supreme Law of the Land; and . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” Id.

88. See Bierman, supra note 12; Kaye, supra note 72.

89. See supra note 6.
is reflected in *Armstrong v. Simon & Schuster, Inc.*,\(^90\) where the court was asked to determine whether the plaintiff’s allegations constituted “defamation by implication,” as well as to specify the applicable standard in assessing the legal sufficiency of such a claim.\(^91\) Although recognizing the different standards adopted by different state courts to test the legal sufficiency of defamation by implication allegations,\(^92\) the Court of Appeals unanimously concluded that the plaintiff’s allegations could be assessed under “standards . . . well established in *our* law.”\(^93\) The court’s decision might well have been affected less by out-of-state legal rules than by the horizontal pressures exerted from within for a unanimous decision relying on settled New York law.\(^94\)

The dynamics of state constitutional adjudication should not be very different. The state constitution is the fundamental law of New York and, as such, is subject to the same kind of decision making that the Court of Appeals applies to New York law generally. The state constitution has its own language\(^95\) and has developed under the state’s unique history, the kind of

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\(^91\) *Id.* at 380-81, 649 N.E.2d at 829, 625 N.Y.S.2d at 481.
\(^92\) *Id.* at 381, 649 N.E.2d at 829-30, 625 N.Y.S.2d at 481-82.
\(^93\) *Id.* at 381, 649 N.E.2d at 830, 625 N.Y.S.2d at 482 (emphasis added).
\(^94\) A more rigorous and systematic examination of how the Court of Appeals treats out-of-state decisions would be appropriate to confirm this assessment and I thank Professor Barry Latzer for discussing this point. Preliminary and random review of Court of Appeals decisions suggests that *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 649 N.E.2d 825, 625 N.Y.S.2d 477, *supra*, is not atypical in this regard.
\(^95\) For example, in contrast to the federal constitution’s *limitation* on Congress not to abridge the freedom of speech or of the press, U.S. CONST., amend. I, New York’s Constitution *affirmatively grants* rights for expression by providing, “Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” N.Y. CONST. art. I, § 8 (McKinney 1996). Peter Galie notes that several provisions of New York’s Bill of Rights derive from the State Constitution of 1821 and were adopted with language comparable or identical to the federal Bill of Rights. PETER GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK (1996). This, of course, begs the larger question of how to *interpret* those provisions.
circumstances that can illuminate independent state constitutional interpretation. Indeed, most of the judges serving on the New York Court of Appeals between 1987 and 1992 expressed their support for independent state constitutionalism in extrajudicial writings. From this perspective, analyzing the New York Constitution should not be appreciably different from deciding the rules applicable in tort or contract.

Yet judicial federalism cases, by definition, are different. In these cases, the Court of Appeals is faced with the question of whether to adopt a federal constitutional doctrine as a matter of state constitutional law or to create an independent state constitutional standard distinct from the prevailing federal rule. Unlike the usual state law case in the plenary caseload, where there generally is no authoritative preexisting legal doctrine to be applied to resolve the case, the judicial federalism cases come with a possible fixed solution provided by the United States Supreme Court.

The presence of the Supreme Court seems significant for it may alter the Court of Appeals’ usual way of exercising its decision making prerogatives. No longer is the Court of Appeals at the top of the judicial hierarchy. Rather, in accordance with how the federal judicial system usually is portrayed, the state high court may be perceived as in some ways subordinate to the Supreme Court.

This possibility introduces a consideration that is not

96. See, e.g., Tarr, supra note 4.

97. See, e.g., Joseph W. Bellacosa, A New York State Constitution Touch of Class, N.Y. ST. B.J., April 1987, at 14; Stewart Hancock, Jr., The State Constitution, A Criminal Lawyer’s First Line of Defense, 57 ALB. L. REV. 271 (1993); Kaye, Foreword, supra note 8; Kaye, Contributions, supra note 8; Kaye, Dual Constitutionalism, supra note 8; Vito J. Titone, State Constitutional Interpretation: The Search for an Anchor in a Rough Sea, 61 ST. JOHN’S L. REV. 431 (1987); Wachtler, Constitutional Rights, supra note 42, at 23; Wachtler, Our Constitutions, supra note 42.

98. Diagrams of the relations between federal and state courts typically show state high courts below the United States Supreme Court in the hierarchical structure. See, e.g., Wasby, supra note 19, at 181. Similarly, diagrams of the hierarchy of law often suggest that state law is subordinate to
present in the court’s plenary caseload and that derives from how the Court of Appeals judges themselves as actors in the federal judicial system, relating to the tension exerted from an institution that may be perceived to rank above them in the judicial order. The impact of this vertical tension can be seen in the way in which the Court of Appeals judges addressed representative judicial federalism issues during the terms under examination.

B. Freedom of Expression

In Matter of Town of Islip v. Caviglia,\textsuperscript{99} the Court of Appeals addressed the validity of a zoning ordinance that required adult bookstores to be located in specified industrial areas.\textsuperscript{100} After concluding that the ordinance satisfied federal constitutional standards, the court considered whether the state constitution provided broader protections.\textsuperscript{101} Ostensibly applying the state’s “no broader than necessary” test derived from an earlier state constitutional case\textsuperscript{102} that afforded greater protection to expression than the federal constitution, the Court of Appeals nonetheless upheld the ordinance as “an appropriate method for addressing existing problems . . . .”\textsuperscript{103} In his dissent, Judge Titone suggested that the majority simply was “incorporating, under our State Constitution, the federal test for determining whether a zoning ordinance is ‘content-based.’”\textsuperscript{104} Titone found.

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\textsuperscript{100}  Id.\textsuperscript{a} at 548, 540 N.E.2d at 216, 542 N.Y.S.2d at 140.
\textsuperscript{101}  Id.\textsuperscript{a} at 556, 540 N.E.2d at 221, 542 N.Y.S.2d at 145.
\textsuperscript{102} See People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 503 N.E.2d 492, 510 N.Y.S.2d 844 (1986). An order closing down an adult bookstore “to curtail illegal [sexual] acts of customers” was challenged on the ground that it violated the “bookseller’s First Amendment rights.” Id. at 555, 503 N.E.2d at 493, 510 N.Y.S.2d at 845.
\textsuperscript{103} Caviglia, 73 N.Y.2d at 560, 540 N.E.2d at 224, 542 N.Y.S.2d at 147.
\textsuperscript{104} Id. at 565, 540 N.E.2d at 226, 542 N.Y.S.2d at 150 (Titone, J., dissenting).
that the adoption of federal constitutional standards "severely undermines this State's strict protection against content-based regulations, and indicates an abandonment of the highly protective view of speech taken [earlier]."\textsuperscript{105}

\textbf{Caviglia} sets forth how the presence of United States Supreme Court precedent can infuse the Court of Appeals' deliberation even over an issue of state constitutional law that is within the exclusive authority of the state high court. The majority appears to have redefined the "no broader than necessary" test to an "appropriate method" test.\textsuperscript{106} This alteration of the applicable test, at least in the judgment of the dissent, seems to derive from prevailing federal constitutional doctrine.\textsuperscript{107} The adoption by the Court of Appeals of a Supreme Court-announced standard that it essentially just had applied in the federal constitutional context evidences the impact of the Supreme Court, the judicial institution that most usually is considered at the apex of the judicial system.

The impact of the Supreme Court on the Court of Appeals is seen even more clearly in \textit{Immuno A.G. v. Moor-Jankowski},\textsuperscript{108} where the New York Court of Appeals was faced with a remand from the United States Supreme Court. The New York court previously held, under the state and federal constitutions, that a letter to the editor expressing an opinion on a topic of public controversy was insulated from a defamation action.\textsuperscript{109} The United States Supreme Court vacated and remanded "for further consideration in light of" its decision in a subsequent case that altered the applicable federal constitutional standard.\textsuperscript{110} Upon

\begin{itemize}
\item \textsuperscript{105} Id. (Titone, J., dissenting).
\item \textsuperscript{106} Id. at 559, 540 N.E.2d at 223, 542 N.Y.S.2d at 147.
\item \textsuperscript{107} Id.
reargument, the Court of Appeals concluded that under the newly announced federal constitutional principles the expression of opinion was not actionable,111 and that as separate and independent grounds, the state constitution provided even greater protection to freedom of expression.112 According to the court, dual constitutional analysis was "appropriate because of the unusual procedural posture of the case [where the] Supreme Court has specifically directed us to [re]consider the case . . . ."113

Not all judges, however, agreed with this approach. In his concurrence, Judge Simons saw no reason to address the state constitutional claims that had been raised by the majority.114 Seeing the Court of Appeals' role in resolving federal constitutional issues as that of "an intermediate court"115 in "a larger judicial system,"116 Judge Simons preferred to resolve only federal law in order to allow the United States Supreme Court "the opportunity to accept, modify or reject a State court's determination of what the Federal Constitution requires."117 Judge Hancock agreed with Simons' assessment, but indicated that dual constitutional analysis might be necessary under some unspecified circumstances.118 Judge Titone found no reason to address the federal constitutional claims because the case was resolvable on state law grounds, which rendered any discussion of federal law issues by the Court of Appeals mere dicta.119

112. Id. at 248-56, 567 N.E.2d at 1277-82, 566 N.Y.S.2d at 913-18.
113. Id. at 251-52, 567 N.E.2d at 1279-80, 566 N.Y.S.2d at 915-16.
114. Id. at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921
115. Id. (Simons, J., concurring).
116. Id. at 260, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring).
117. Id. at 261, 567 N.E.2d at 1285, 566 N.Y.S.2d at 921 (Simons, J., concurring).
118. Id. at 268, 567 N.E.2d at 1290, 566 N.Y.S.2d at 925 (Hancock, J., concurring).
119. Id. at 263-68, 567 N.E.2d at 1085-89, 566 N.Y.S.2d at 922-25 (Titone, J., dissenting).
The impact of the presence of the Supreme Court on the Court of Appeals' decision making is apparent. Unlike the state court's plenary caseload, where the judges tend to be faced with familiar state law questions over which they have supreme judicial authority, these judicial federalism cases raise important and, for the judges, unusual questions about the Court of Appeals' role in the federal judicial system. From Simons' description of the Court of Appeals as an intermediate court in federal constitutional development to Titone's concern over the court's dicta on federal constitutional questions to the majority's reliance on the Supreme Court's direction to reconsider the case as justification for dual constitutionalism, the Court of Appeals judges seem to be responding very differently to the fundamental questions about their court's role. The effects of leadership, influence and shared socialization experiences may not have prepared the judges to respond to the presence and authority of the Supreme Court in ways that promote consensual decision making.

C. Rights of the Accused

In People v. Harris, the Court of Appeals reversed a murder conviction obtained by using the defendant's incriminating statements that were procured in violation of the federal constitutional rule, announced in Payton v. New York, that prohibited warrantless entries into a suspect's home to effect an arrest. The United States Supreme Court reversed and limited the scope of Payton's federal constitutional rule by allowing the evidentiary use of incriminating statements that were made after

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122. Id. at 576 ("We...hold that the Fourth Amendment...to the United States Constitution made applicable to the States by the Fourteenth Amendment...prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.").
arrests with probable cause despite warrantless entries. Upon remand and reargument, the Court of Appeals held that the state constitution prevented the use of the defendant’s inculpatory statement. The court concluded that despite the similarity in the state and federal constitutional language prohibiting unreasonable searches and seizures, New York’s long-standing and unique commitment to the right to counsel compelled a state rule more protective of defendants’ rights than contemplated by the federal rule announced by the Supreme Court in Harris.

In a dissent joined by Chief Judge Wachtler, Judge Bellacosa argued that the identically worded state and federal constitutional provisions against unreasonable searches and seizures “should be consistently construed.” In reaching this conclusion, Bellacosa wrote that the majority “rejects the analysis, wisdom and experience of the United States Supreme Court,” “declares its deviation from the United States Supreme Court decision,” and “effectively relegates [the] Supreme Court’s work to an academic judicial exercise with no consequence for the real outcome of this case.” According to the dissenters, the Court of Appeals’ decision to reject federal constitutional doctrine “is the epitome of institutional egocentricity, a kind of Copernican view of the judicial universe.” This language indicates that the dissenters placed the federal constitutional rule at the point of departure for the state court’s analysis of judicial federalism issues.

This conception of the “judicial universe” with a federal focus perhaps is seen most clearly in the consolidated cases of People

125. Id. at 437-41, 570 N.E.2d at 1053-55, 568 N.Y.S.2d at 704-06.
126. Id. at 443, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708.
127. Id. at 442, 570 N.E.2d at 1056, 568 N.Y.S.2d at 707 (Bellacosa, J., dissenting).
128. Id. at 444, 570 N.E.2d at 1057, 568 N.Y.S.2d at 708 (Bellacosa, J., dissenting).
129. Id. at 447, 570 N.E.2d at 1059, 568 N.Y.S.2d at 710 (Bellacosa, J., dissenting).
130. Id.
v. Scott and People v. Keta.131 In Scott, the Court of Appeals was faced with whether to adopt the federal constitutional rule affording no Fourth Amendment protection to areas outside the curtilage, commonly referred to as open fields, as a matter of state constitutional law.132 In Keta, the court was faced with whether to allow warrantless so-called administrative searches as allowed under the Fourth Amendment.133 In rejecting the federal constitutional doctrines in both cases, the Court of Appeals adopted under the state constitution's search and seizure provision broader protections than recognized under the federal constitution.134 In Scott, the court found that "under established New York law and traditions some greater degree of protection must be given."135 Likewise in Keta, the court identified state interests that required interpretation of the state constitution "independently of its Federal counterpart . . . to assure that our State's citizens are adequately protected from unreasonable governmental intrusions."136

The dissent by Judge Bellacosa and joined by Chief Judge Wachtler and Judge Simons takes the majority to task in strikingly strident language that clearly reflects the preferred federal focus approach to state constitutional interpretation. It accuses the majority of writing a "declaration of independence from the Supreme Law of the Land [that] propels the Court across a jurisprudential Rubicon into a kind of Articles of Confederation time warp."137 It chastises the court for

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132. Id. at 478, 593 N.E.2d at 1330, 583 N.Y.S.2d at 922 (citations omitted).
133. Id. at 491, 492, 593 N.E.2d at 1329, 1329, 583 N.Y.S.2d at 930, 931.
134. Id. at 491, 500, 593 N.E.2d at 1338-39, 1344, 583 N.Y.S.2d at 930-31, 936.
135. Id. at 491, 593 N.E.2d at 1338, 583 N.Y.S.2d at 930.
136. Id. at 497, 593 N.E.2d at 1342, 583 N.Y.S.2d at 934 (Titone, J., concurring).
137. Id. at 506, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting) (citations omitted).
"[r]ejecting uniformity of Federal and State law" and for "[d]iscarding the United States Supreme Court's guidance in the two categories of law involved." 138 It finds "no appropriate basis, unique to New York, . . . warranting this double-barreled declaration of peculiar New York-style separatism," 139 concluding that there was an insufficient justification for "a departure from the United States Supreme Court's decisions." 140

In contrast, Judge Kaye's concurrence applicable to both cases eloquently explained basic concepts of federalism. 141 She pointed to the constitutional structure of sovereign states in a federal system to demonstrate how disagreeing with the nation's high court was an appropriate exercise of state court power. 142 Indeed, Judge Kaye drew from Supreme Court opinions themselves to show that state courts have a "right" and "responsibility" to engage in protecting fundamental rights under state constitutions subject only to the minimums established by federal constitutional doctrine. 143 Relying on an oft-used phrase, Judge Kaye referred to Justice Brandeis' description of the states as "laboratories" to justify divergence from Supreme Court doctrine. 144

These very different approaches to the resolution of state constitutional issues reflect the impact of the United States Supreme Court on the Court of Appeals' decision making. In *Harris, Scott* and *Keta*, the dissents seemed to proceed from the belief that the Court of Appeals was somehow bound to give priority to the Supreme Court and federal constitutional doctrine,

138. *Id.* at 507, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Bellacosa, J., dissenting).

139. *Id.* at 507, 593 N.E.2d at 1349, 583 N.Y.S.2d at 941 (Bellacosa, J., dissenting).

140. *Id.* at 510, 593 N.E.2d at 1351, 583 N.Y.S.2d at 943 (Bellacosa, J., dissenting) (emphasis added).

141. *Id.* at 502-06, 593 N.E.2d at 1346-48, 583 N.Y.S.2d at 938-40.

142. *Id.*

143. *Id.* at 505, 593 N.E.2d at 1347, 583 N.Y.S.2d at 939 (Kaye, J., concurring).

144. *Id.* at 505-06, 593 N.E.2d at 1348, 583 N.Y.S.2d at 940 (Kaye, J., concurring) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
and failing to do so meant a "departure" from the "Supreme Law of the Land." Primary authority for this approach seems to rest with the United States Supreme Court as it sits atop the Court of Appeals in the national judicial system. The potent power exercised by the Supreme Court over the Court of Appeals is unique to how the latter court usually approaches its cases.

A contrary view for state constitutional decision making, as suggested by Judge Kaye, recognizes that the Supreme Court's decisions provide a minimum level to which state law must adhere; the precise standard depends not on the federal rule but on the state's commitment to the particular right in question. It remains the appropriate province of the Court of Appeals to make that determination of state law. It is noteworthy, though, that even in defending independent state constitutional adjudication, the Court of Appeals seems to be acknowledging the importance of the nation's high court. Its reliance on Supreme Court pronouncements about state sovereignty is hardly a stirring legitimization of independent state constitutional adjudication; if truly independent, the Court of Appeals would not need the high court's approval for legitimacy. Indeed, adopting Brandeis' analogy of the states as laboratories suggests only that the states have no unique role in the federal system but exist solely to serve the national government, or other states.

In both views, although to very different degrees, the presence of the Supreme Court as an institution with apparent precedential authority is affecting the Court of Appeals' decision making. This is quite distinct from how the New York court seems to approach its plenary caseload, where its own precedential authority is less subject to outside forces. The tension imposed from above by the nation's high court apparently has undermined the effects of leadership, influence and socialization in producing consensus.

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146. Peter Galie's examination of the Court of Appeals' adoption of the exclusionary rule as a matter of state law reflects quite nicely the tensions
D. Educational Funding

In 1973, the United States Supreme Court held that education was not a fundamental right under the Federal Constitution and rejected a federal equal protection challenge to the Texas scheme of funding public education.\textsuperscript{147} In 1982, the New York Court of Appeals followed the United States Supreme Court’s lead and rejected a similar challenge based on, inter alia, the federal and state equal protection clauses.\textsuperscript{148} In 1995, the Court of Appeals revisited the issue of educational funding and, inter alia, again rejected the state and federal equal protection claims asserted.\textsuperscript{149} The court, however, was not unanimous on these causes of action which raised judicial federalism issues.

Five of the six judges participating concluded that there was no United States Supreme Court precedent that required reexamination of the conclusion that education is not a fundamental right under the Federal Constitution.\textsuperscript{150} Judge exerted by the Supreme Court and the resulting problems even in the name of independent state law decision making. See Ronald K.L. Collins and Peter Galie, \textit{Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions}, 55 U. Cin. L. Rev. 317 (1986).

\textsuperscript{147} San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). Appellees, consisting of Mexican-American parents, instituted a class action suit against San Antonio Independent School District challenging the way the Texas school system was being financed. \textit{Id.} at 4-6.

\textsuperscript{148} Board of Educ. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 453 N.Y.S.2d 643 (1982). The plaintiffs contend that the system for financing public schools presently in effect in this State . . . by which funds raised by locally imposed taxes are augmented by allocations of State monies in accordance with a variety of formulas and grants, violates the equal protection clauses of both the State and the Federal Constitutions and the education article of our State Constitution because that system results in grossly disparate financial support . . . in the school districts of the State. \textit{Id.} at 35-36, 439 N.E.2d at 361-62, 453 N.Y.S.2d at 646.


\textsuperscript{150} \textit{Id.} at 319-21, 655 N.E.2d at 667-69, 631 N.Y.S.2d at 571-73. Chief Judge Kaye recused herself. It should be noted that the judges’ opinions suffer from abstruseness regarding how particular judges resolved the federal equal
Smith, however, distinguished existing federal equal protection precedent and the earlier state decision to argue that at least intermediate scrutiny was warranted where the allegations charged “denial of a basic minimal education.” Four of the judges rejected a state equal protection claim because, consistent with “the case law from our Court and the Supreme Court holding that an equal protection cause of action based upon a protection allegations. For example, Judge Ciparick’s majority opinion indicates that “Judges Simons, Tione, Bellacosa and Levine” agree that the state and federal equal protection causes of action must be dismissed, id. at 319, 655 N.E.2d at 667, 631 N.Y.S.2d at 571, that “Judge Smith and I” would uphold the allegations of state equal protection violations, id. at n.5, 655 N.E.2d at 668 n.5, 631 N.Y.S.2d at 572 n.5, and that “Judge Smith, alone” would sustain allegations under the federal equal protection clause. Id. This leaves Judge Ciparick’s position on the federal equal protection allegations unclear.

The fact that she wrote the majority opinion that rejects this federal claim, id. at 319-21, 655 N.E.2d at 667-69, 631 N.Y.S.2d at 571-73, does not clearly resolve the matter as her opinion also explains the court’s reasoning for rejecting the state equal protection cause of action even though she does not join the court’s majority on that issue. Id. at 321, 655 N.E.2d at 668, 631 N.Y.S.2d at 572. Judge Smith’s opinion, dissenting in part, does not clearly specify Judge Ciparick’s position either, indicating that “Judge Ciparick agrees only that plaintiffs have made a valid State equal protection claim,” id. at 344, 655 N.E.2d at 682, 631 N.Y.S.2d at 586 (Smith, J., dissenting in part), thereby raising the question of whether Judge Ciparick agrees with anything or anybody else in the case despite her having written majority positions (including a majority position in which she did not agree with the state equal protection allegations). The summary of the judges’ positions at the end of the opinion, before the decretal paragraph, seems to clear things up, until one realizes that Judge Ciparick is identified as having written the majority opinion and as dissenting from the majority opinion. Id. at 359-60, 655 N.E.2d at 691-92, 631 N.Y.S.2d at 595-96

Although it seems apparent from the sum total of the court’s disposition that Judge Ciparick is among a five judge majority to dismiss the federal equal protection allegations, this obfuscation, unusual at the Court of Appeals where most cases are resolved with a single opinion that is clearly labeled as to author (or with an unsigned memorandum), seems representative of difficulties that the court faces in deciding judicial federalism issues.

151. Id. at 344-55, 655 N.E.2d at 682-89, 631 N.Y.S.2d at 586-93 (Smith, J., dissenting).
disproportionate impact upon a suspect class requires establishment of intentional discrimination[,"]152 there were no allegations of such intent.153 Two judges dissented on the basis of "New York's historical and constitutional commitment to public education."154 These judges would have analyzed the state constitution's guarantee of equal protection under a disparate impact standard rather than the majority's intentional discrimination standard adopted from federal doctrine.155

The differing interpretations of the federal and state equal protection clauses again reflect the impression left by the United States Supreme Court on how judicial federalism issues are resolved by the Court of Appeals. The majority's rejection of a state constitutional equal protection cause of action was based on the adoption of federal precedent as state constitutional doctrine. The dissenters' embrace of a state constitutional cause of action acknowledged unique state circumstances as justification, but even here the preferred disparate impact rule is one familiar in United States Supreme Court jurisprudence. The judicial federalism debate seems to have focused around the United States Supreme Court's decision making even in the context of state constitutional adjudication. That the state equal protection claim was rejected without any extensive discussion in a single paragraph of Judge Ciparick's opinion when she did not even agree with that result156 is hardly the kind of informed and reasoned justification that one would expect from a court committed to independent state constitutional adjudication.

It may be that the New York judges, perhaps perceiving themselves in a position of inferiority due to the hierarchical presence of the Supreme Court, have reacted to federal precedent rather than affirmatively acting from their usual position of authority at the top of the state judicial system. The tensions

152. Id. at 321, 655 N.E.2d at 669, 631 N.Y.S.2d at 573.
153. Id.
154. Id. at 355, 655 N.E.2d at 689, 631 N.Y.S.2d at 593 (Smith, J., dissenting).
155. Id. at 355-59, 655 N.E.2d at 688-91, 631 N.Y.S.2d at 592-95 (Smith, J., dissenting).
156. See supra note 149.
imposed on the Court of Appeals by the presence of the hierarchically superior Supreme Court seem to have had an impact as the New York court again failed to gain consensus in the kind of case that might be considered among the most important on the court’s docket — defining the fundamental liberties of the state citizens and the parameters of the relationship between state and public, and in so doing, the nature of the state society. The absence of Chief Judge Kaye from this judicial federalism debate might have been particularly acute considering her apparent recognition of the dynamics of the federal constitutional structure with sovereign states and state courts as integral components.157 The irony, of course, is that the Court of Appeals in these cases is free to be as innovative and independent as it is in resolving other issues of state law.

IV. PRESSURES, TENSIONS AND DISCORDANCY

Although additional research may shed more light on the matter, what began as a mystery may be less so. The New York Court of Appeals is a court that emphasizes consensus and deference in its decision making generally but fails to accomplish these objectives in addressing fundamental issues of state constitutionalism. Horizontal pressures that are exerted on the judges from within the court, such as leadership, influence and socialization, may contribute to the usual tendency for agreement in the plenary caseload, whereas the impact of vertical tensions from the hierarchical presence of the United States Supreme Court may be responsible for the discordancy observed in judicial federalism cases. So long as the New York judges have some conception of themselves as part of a federal system where the Supreme Court sets the point of departure in the resolution of constitutional issues, even state constitutional issues, this discordancy is likely to remain. If, however, the judges can

present an independent self image comparable to that emphasized in their usual decision making modes, then greater consensus in judicial federalism cases might result.

This concern is not without practical implications. As New York's recently enacted capital punishment legislation\(^{158}\) is subjected to constitutional challenge, especially under the state constitution, the approaches of the judges to the court's role are essential to how such cases will be resolved. If the judges consider this statute from the perspective of federal constitutional doctrine, with the need to establish intentional discrimination,\(^{159}\) then independent state constitutionalism may be found wanting. If, however, the judges recognize their obligation as proud members of the sovereign New York community to interpret state law in light of the Empire State's independence in the federal system so as to provide greater protections than the federal constitution if warranted, then and only then will they be discharging the responsibilities to uphold not only the federal constitution but also the state constitution, as they swore in their oaths of office.\(^{160}\) It remains to be seen whether the New York Court of Appeals judges can release the vertical tensions imposed by the presence of the United States Supreme Court and act as independent decision makers exercising a New York frame of mind as the federal constitutional system contemplates.

\(^{158}\) 1995 N.Y. Laws 1.


\(^{160}\) See N.Y. CONST. art. XIII, sec. 1. Section 1 provides in pertinent part:

Member of the . . . judicial, . . . before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of . . . . . . . , according to the best of my ability." . . .

Id.
### TABLE A

**AGREEMENT ON OUTCOME - PLENARY CASELOAD**

<table>
<thead>
<tr>
<th>PLENARY</th>
<th>87/88</th>
<th>88/89</th>
<th>89/90</th>
<th>90/91</th>
<th>91/92</th>
<th>94/95</th>
</tr>
</thead>
<tbody>
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<td>235</td>
<td>244</td>
<td>209</td>
<td>230</td>
<td>266</td>
</tr>
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<td>81%</td>
<td>84%</td>
<td>83%</td>
<td>84%</td>
<td>86%</td>
</tr>
<tr>
<td>All Not Agree</td>
<td>34</td>
<td>56</td>
<td>46</td>
<td>44</td>
<td>43</td>
<td>43</td>
</tr>
<tr>
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<td>19%</td>
<td>16%</td>
<td>17%</td>
<td>16%</td>
<td>14%</td>
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<tr>
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<td>291</td>
<td>290</td>
<td>253</td>
<td>273</td>
<td>309</td>
</tr>
</tbody>
</table>

### CIVIL

| All Agree | 181  | 148  | 150  | 143  | 136  | 147  |
| All Agree Percent | 88%  | 82%  | 87%  | 85%  | 86%  | 88%  |
| All Not Agree | 25   | 32   | 22   | 26   | 22   | 20   |
| All Not Agree Percent | 12%  | 18%  | 13%  | 15%  | 14%  | 12%  |
| Total | 206  | 180  | 172  | 169  | 158  | 167  |

### CRIMINAL

| All Agree | 115  | 87   | 94   | 66   | 94   | 119  |
| All Agree Percent | 93%  | 78%  | 80%  | 80%  | 82%  | 84%  |
| All Not Agree | 9    | 24   | 24   | 17   | 21   | 23   |
| All Not Agree Percent | 7%   | 22%  | 20%  | 20%  | 18%  | 16%  |
| Total | 124  | 111  | 118  | 83   | 115  | 142  |

**NOTE:** Percentages are of total cases
### TABLE B

**AGREEMENT TO ONE OPINION - PLENARY CASELOAD**

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<th>1987-1988</th>
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<th>CASES ALL AGREE</th>
<th>CASES W/ CONCUR AND/OR DISSENT</th>
<th>CASES W/ CONCUR</th>
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<td>13%</td>
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<td>2%</td>
<td>7%</td>
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<th>CASES W/ CONCUR AND/OR DISSENT</th>
<th>CASES W/ CONCUR</th>
<th>CASES W/ DISSENT</th>
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<td>Cases W/ Concur</td>
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<td>84%</td>
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<tr>
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<tr>
<td>1990-1991</td>
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<td>1991-1992</td>
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<td></td>
<td>82%</td>
<td>18%</td>
<td>3%</td>
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</tbody>
</table>
### TABLE C

**AGREEMENT ON OUTCOME - JUDICIAL FEDERALISM CASES**

<table>
<thead>
<tr>
<th>CASES</th>
<th>TOTAL CASES</th>
<th>CASES AGREE</th>
<th>CASES NOT ALL AGREE</th>
</tr>
</thead>
<tbody>
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<td>8</td>
<td>22</td>
</tr>
<tr>
<td>Federalism</td>
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</tr>
</tbody>
</table>

**NOTES:** Percentages are of total cases.
**TABLE D**

AGREEMENT TO ONE OPINION - JUDICIAL FEDERALISM CASES

<table>
<thead>
<tr>
<th></th>
<th>TOTAL CASES</th>
<th>CASES ALL AGREE</th>
<th>CASES W/ CONCUR AND/OR DISSENT</th>
<th>CASES W/ CONCUR</th>
<th>CASES W/ DISSENT</th>
</tr>
</thead>
<tbody>
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<td>8</td>
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<td>Federalism</td>
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<td>27%</td>
<td>73%</td>
<td>20%</td>
<td>63%</td>
</tr>
</tbody>
</table>

NOTES: Percentages are of total cases.

* Because some cases had both concurrences and dissents, the sum of columns “CASES W/ CONCUR” and “CASES W/ DISSENT” may not total column “CASES W/ CONCUR AND/OR DISSENT.”