"Streams of Tendency" on the New York Court

"STREAMS OF TENDENCY" ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES' VOTING AND OPINIONS

by
Vincent Martin Bonventre

Albany Law School

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Vincent Martin Bonventre

Albany Law School, 2003

About the Author

Dr. Vincent Martin Bonventre, a professor of law at Albany Law School and leading court commentator, served as a law clerk to two different judges on the New York Court of Appeals and as a U.S. Supreme Court Judicial Fellow. Dr. Bonventre has written extensively, both as a legal expert and a political scientist, about the N.Y. Court of Appeals, state and federal constitutional law, and judicial decision making. He also is the editor of two scholarly publications: *State Constitutional Commentary* and *Law & Policy Journal.*

Dr. Bonventre is the Director of the Center for Judicial Process, and is a graduate of Union College (B.S.), Brooklyn Law School (J.D.), and the University of Virginia (M.A.P.A, Ph.D.).

PREFACE

The purpose of this study is to discern, in the words of Benjamin Cardozo, the "[s]treams of tendency"[1] of the current judges of his former court in New York, the Court of Appeals, the state's highest tribunal. By examining the judges' voting and opinions in divided cases—the cases that provide a window into a court's "inner sanctum," as Herman Pritchett put it[2]—the aim is to uncover common threads, patterns, ideological or jurisprudential values, leanings, and outlooks that the individual judges bring to decision making.

Like Herman Pritchett's *The Roosevelt Court,* this study looks to divided cases as a reliable source for clues about the judges' "different assumptions," "inarticulate major premises," and "value systems." Like Henry Abraham's *Freedom and the Court,* this study examines the opinions in those cases to understand where and why the judges have drawn their respective "line[s] between individual rights and the rights of the community." As in David O'Brien's *Storm Center,* this study takes a critical eye to the opinions as evidence, along with the voting records, of the "direction of judicial policy-making." Finally, like Stephen Gottlieb's critique of the Rehnquist court in *Morality Imposed,* this study treats "the patterns of the [judge's] conclusions [as] at least as important as the[ir] explanations."

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1. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921).
2. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES 1937–1947, at xii (1948).

There is no comparable study of the Court of Appeals. In fact, with a few exceptions, this tribunal has not been subject to the scrutiny regularly applied to the Supreme Court and its justices. Previous studies authored or supervised by this writer were narrower in time and scope. Works by others focused on specific phenomena or on a particular area of the law.

This study, seeking to identify ideological and jurisprudential patterns, entailed a review of the nearly 400 divided public law cases from 1987 through 2001. The votes, the decisions, and the opposing separate opinions revealed common denominators for each of the court's judges and sharp contrasts among them.

Chapter I
INTRODUCTION

Judge Vito J. Titone compiled a 77% pro-defendant voting record in criminal cases.[1] At the opposite end of the New York court's ideological spectrum,[2] Judge Joseph W. Bellacosa voted in favor of the prosecution

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1. *See* Chart 2.4, *infra* (reflecting Judge Titone's voting record on criminal issues dividing the court from 1987 through August 1998, during which time both he and Judge Bellacosa served on the court). *See also* Chart 2.5, *infra* (showing Titone's voting record on civil issues to be, though somewhat less lopsided than his record on criminal issues, still considerably more favorable to the claims of individual right than the court as whole).

   Unless otherwise specifically noted, all the voting calculations in this study, whether stated in the text or reflected visually in a chart, were derived from the tables *Judges' Votes: Divided Public Law Decisions, 1987–2001,* included in the Appendix, *infra.* The votes reflected in those tables were derived from the court's decisions as published in the official *New York Reports.*
2. *See* Charts 1.1 and 1.2 (reflecting the findings of prior studies, undertaken or supervised by the author, that the voting records of Titone and Bellacosa consistently placed them on the opposite ends of the court's ideological spectrum for both civil and criminal issues).

   The prior studies reflected in Charts 1.1 and 1.2, as well as in subsequent charts that refer to such studies, were: Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990,* 12 PACE L. REV. 1 (1992) (examining decisions of the Court of Appeals in cases presenting issues of independent state protection of rights and liberties; the voting percentages reflect those cases on which the court was divided on such issues); Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1991,* 14 PACE L. REV. 353 (1994) (same); Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well For Renewed State Constitutionalism*

in an equally striking 80% of the time during the same nearly twelve-year period, from 1987 through August 1998, that his tenure and Titone's overlapped.[3] The two were evidently viewing the cases through very different ideological and jurisprudential lenses.[4]

Chief Judge Judith S. Kaye's voting record during that period—considerably more moderate than that of Titone or Bellacosa—was 55% pro-defendant.[5] Kaye's voting in public law cases generally, both civil and criminal, was found in prior studies to place her near the center of

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at the Court of Appeals, 67 TEMP. L. REV. 1163 (1994) (same); John M. Bagyi, Comment, *Carmen Beauchamp Ciparick: The Court of Appeals' Voice of Compassion*, 59 ALB. L. REV. 1913 (ST. CONST. COMM. 1996) (same); Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments, 2000*, 64 ALB. L. REV. 1355 (ST. CONST. COMM. 2001) (examining decisions of the Court of Appeals on public law issues, civil and criminal, statutory and common law as well as constitutional, involving issues of individual right, liberty, equal protection, or analogous government assistance or protection; the voting percentages reflect those cases in which the court was divided on such issues); Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085 (ST. CONST. COMM. 2002) (same).

3. *See* Chart 2.4, *infra* (reflecting Bellacosa's strongly pro-prosecution voting record on criminal issues throughout the period, as well as for each of the consecutive three-year periods).
4. *See* discussion in Chapter II, *infra*.
5. *See* Chart 3.2, *infra* (reflecting Kaye's voting record throughout the period as roughly falling midway between that of Titone and Bellacosa, and usually to the pro-defendant side of the court as a whole).

the court's spectrum, if perhaps on the "liberal"[6] side of that center.[7] Not surprisingly then, her record over the fifteen-year period examined for this study, 1987 through 2001, indicates a rather moderate record overall: 45% pro-individual rights in the civil realm, and 53% pro-defendant on criminal issues.[8]

Curiously, however, a closer look at Kaye's voting reveals an unmistakable recent shift, rather than consistency. In the last five years of the study, 1997 through 2001, Kaye's voting on bothcivil and criminal issues became more conservative—i.e., voting less frequently to sustain claims of civil rights, liberties and government entitlements in civil cases, and less frequently in favor of the rights and protections of the accused in criminal cases.[9] The change in her civil voting has been noticeable, but gradual. On criminal issues the change has been more dramatic. In the first two five-year periods, 1987 through 1991 and 1992 through 1996, her criminal voting was virtually identical, 57% and 56% pro-defendant, respectively. In the most recent five-year period, it fell

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6. The terms "liberal" and "conservative" are used here as they customarily are in social science and legal studies of judicial decision making, such as the National Science Foundation's United States Supreme Court Data Base Project. *See* Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 103 (1989); Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403, 1416 (1995); Bonventre, *Kaye*, *supra* note 2, at 1165 n.11. Thus, "liberal" indicates support for claims of civil rights, liberties, equal protection, government provided assistance or protections, or rights of the criminally accused. By contrast, "conservative" indicates support for the government, powerful interests or the prosecution against such claims. Additionally, where "liberal" would apply to support for extending such rights, liberties, protections, or entitlements, "conservative" applies to support for limiting them.
7. *See* Charts 1.1 and 1.2 (showing Kaye's voting record on public law issues, both civil and criminal, typically to have been somewhat more pro-individual right than that of the court as a whole, but not at or near the Titone end of the court's spectrum).
8. *See* Chart 3.3, *infra* (reflecting Kaye's voting on civil and criminal issues for the entire 15-year period, as well as for the three consecutive five-year periods).
9. *See* Chart 3.3, *infra* (reflecting a significant drop in the percentage of cases in which Kaye voted in favor of claims of individual right, liberty or government entitlement–the drop being particularly sharp on criminal issues).

to 32%.[10] Notably, this conservative shift in Kaye's voting followed on the heel's of the harsh public criticism directed at the court by Governor Pataki, other high level political officials, and the press, in 1995 and 1996, for being too "liberal" in criminal cases.[11] Notable also, however, is that while her voting changed, that of her colleagues did not evince a uniform response.[12]

Judge George Bundy Smith's record on criminal issues actually became more liberal. His record for 1997 through 2001 was 61% pro-defendant, compared to 47% in the immediately preceding years. Likewise, Judge Howard A. Levine's voting shifted from a rather conservative 25% pro-defendant record to a more moderate 40%.[13]

But with Smith and Levine, perhaps even more than with the others on the court, the percentages may conceal as much as they reveal.[14] Over the course of his tenure on the court, Smith's voting has placed him on the moderately liberal side of the court's ideological center.[15] A closer examination of his voting and his opinions, however, shows something different than a necessarily pro-accused, pro-individual perspective. Both his voting and his writings suggest an overriding concern for substance, rather than procedure; for fundamental fairness

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10. *See* Chart 3.3, *infra* (showing the percentage of divided issues, both civil and criminal, on which Kaye cast a pro–individual rights vote over the course of the three five-year periods from 1987–2001), and Chart 3.4, *infra* (comparing Kaye's pro–individual rights voting percentage with that of her three colleagues who were on the bench with her throughout the most recent five-year period, 1997–2001, and at least a few years before).
11. *See generally* Vincent Martin Bonventre & Judi A. DeMarco, *Court Bashing and Reality: A Comparative Examination of Criminal Dispositions at the New York Court of Appeals and Neighboring High Courts*, A.B.A. JUDGES' J., Winter 1997, at 9; Clyde Haberman, *State Courts Found Guilty by Jury of Peers*, N.Y. TIMES, Mar. 8, 1996 at B1; John Caher, *Pataki Assails Court of Appeals; Liberal Rulings Are "Mindless" Safeguards for Criminals, He Says*, TIMES UNION (Albany), Nov. 2, 1995, at A1.
12. *See* discussion in Chapter III, *infra*.
13. *See* Chart 3.4, *infra* (reflecting the voting records of Smith and Levine on criminal issues becoming more supportive of the rights of the accused in the most recent five-year period, while Kaye's was becoming less so).
14. *See* discussion in Chapter IV, *infra*.
15. *See* Charts 1.1 and 1.2 (reflecting the findings in prior studies that Smith's public law voting record on both civil and criminal issues placed him between the center of the court's spectrum and Titone).

and the avoidance of actual prejudice, rather than technical compliance and strict deterrence of procedural violations.[16]

Prior studies have shown Levine's overall record to be somewhat conservative.[17] His voting has generally been favorable to the prosecution—if somewhat less so in recent years.[18] It has, moreover, been very deferential to government in civil cases. In fact, his 11% pro-individual record in the civil realm for 1997 through 2001 was lower than that of any of his colleagues who were on the bench through that five-year period.[19]

While Levine's numbers are revealing, they do not disclose his willingness—perhaps greater than that of any of his colleagues except Smith—to challenge conventional rules, judicial norms, or customary pro-prosecution or pro-government views. Though not regularly, Levine has been willing to take an unconventional or rights-protective position, and to do so in the context of a particularly controversial or otherwise significant court ruling.[20]

What is true of Titone, Bellacosa, Kaye, Smith, and Levine is true of the other judges on the New York court as well. Their respective voting records and bodies of written opinions provide insights into their approaches to decision making and to what they each bring with them to that task.

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16. A somewhat similar observation was noted earlier in Smith's tenure on the court; *see*, Charles J. Scibetta Jr., Comment, *George Bundy Smith: A Reliability Based Criminal Jurisprudence*, 59 ALB. L. REV. 1853 (ST. CONST. COMM. 1996).
17. *See* Chart 1.1 (reflecting the findings in prior studies that Levine's combined civil and criminal voting record on public law issues placed him on the conservative side of the court's spectrum or, recently, at its conservative center).
18. *See* Chart 1.2 (reflecting the findings in prior studies that Levine's voting on criminal issues typically, albeit less clearly in recent years, placed him on the pro-prosecution side of the court), and Charts 3.4 and 5.1, *infra* (reflecting Levine's voting on criminal issues in the most recent five-year period, 1997–2001, to be considerably more supportive of the claims of the accused than in previous years and among the most supportive on the court).
19. *See* Chart 5.1, *infra* (reflecting the public law voting of Levine and the other current members of the court for the most recent five-year period, 1997–2001).
20. *See, e.g.*, Clara C. v. William L., 96 N.Y.2d 244, 251 (2001) (Levine, J., concurring) (arguing in a separate concurrence that the court should reach the constitutional issue and invalidate statutory provisions that treat nonmarital children less favorably than others, even though the case was resolved by the majority on a narrower procedural ground).

The purpose of this study is to discern, in the words of Justice (or Chief Judge)[21] Benjamin Cardozo, the "[s]treams of tendency"[22] of the current judges of his former court in New York, the Court of Appeals, the state's highest tribunal. By examining the judges' voting and opinions in divided cases–the cases that provide a window into a court's "inner sanctum," as Herman Pritchett put it[23]—the aim is to uncover common threads, patterns, ideological or jurisprudential leanings or predilections that help explain the values, principles and outlooks that the individual judges bring to the job of decision making. As Cardozo noted in his first Storrs Lecture, delivered at Yale University while he was a member of New York's high court:

> It is often through [ ] subconscious forces that judges are kept consistent with themselves, and inconsistent with one another. . . . There is in each of us a *stream of tendency*, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current anymore than other mortals. . . . [I]nherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . which, when reasons are nicely balanced, must determine where choice shall fall. . . . We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.[24]

"[S]tream[s]" or "current[s]" that seem to give "coherence and direction" to the Court of Appeals judges are identified in this study. This is accomplished through an examination of every decision rendered by the court, from 1987 through 2001, in which the judges were

21. Benjamin Nathan Cardozo, who sat on the United States Supreme Court from 1932 to 1938 (*see* Henry J. Abraham & Barbara A. Perry, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES, 246 (7th ed. 1998)), was an Associate Judge of the New York Court of Appeals from 1917 to 1927, and Chief Judge from 1928 to 1932. *See The Judges Through the Decades, in* "THERE SHALL BE A COURT OF APPEALS . . . " 100 & 108 n.134 (1997).

22. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 12 (1921).

23. C. HERMAN PRITCHETT, THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES, 1937–1947, at xii (1948). For a recent discussion on the use of divided opinions to study the Court of Appeals, *see* Bonventre & Galligan, *supra* note 2, at 1085–87.

24. CARDOZO, *supra* note 22, at 12–13 (emphasis added).

divided on an issue of criminal law or civil rights, liberties or analogous government assistance or protection. The fifteen-year period of decisions begins in 1987, several years prior to the commencement of the current era under Chief Judge Kaye. Inclusion of those years is intended to provide perspective to the ideological composition and direction of the court in subsequent years, and to permit comparisons and contrasts between the court in recent years and in the latter years under Chief Judge Sol Wachtler—a period during which Kaye, Titone and Bellacosa played prominent roles.[25] Moreover, in 1987, with the arrival of Bellacosa, the court's membership was fixed until shortly before Wachtler's resignation six years later[26] in November 1992.[27] The 15 years covered in this study ends with 2001, the last complete year of court at the time this is being written.

The study is consciously modeled after works of C. Herman Pritchett,[28] Henry J. Abraham,[29] David M. O'Brien,[30] and Stephen E. Gottlieb.[31] Like Pritchett's THE ROOSEVELT COURT, this study looks at voting in divided cases for clues—preliminary, but nevertheless typically reliable—for determining the judges' "different assumptions," "inarticulate major premises," "value systems," and "political,

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25. *See* discussion in chapters II & III, *infra*. *See generally* Vincent Martin Bonventre, *Kaye*, *supra* note 2; Vincent Martin Bonventre, *State Constitutional Adjudication at the Court of Appeals, 1990 and 1991: Retrenchment is the Rule*, 56 ALB. L. REV. 119 (1992). For judicial sketches of Kaye, Titone, and Bellacosa which rely in large measure on their voting and opinions in the Wachtler era, *see* Marcia B. Smith, Comment, *Judith S. Kaye: Progressive Decisionmaking Rooted in the Common Law*, 59 ALB. L. REV. 1763 (ST. CONST. COMM. 1996); John D. Powell, Comment, *Vito J. Titone: Stalwart or Curmudgeon?* 59 ALB. L. REV. 1803 (ST. CONST. COMM. 1996); Timothy B. Lennon, Comment, *Joseph W. Bellacosa: Cardozo's Knight-Errant?* 59 ALB. L. REV. 1827 (ST. CONST. COMM. 1996).
26. *See The Judges Through the Decades*, *supra* note 21, at 105.
27. *See* Josh Barbanel, *Chief Judge Quits Post in New York in Extortion Case*, N.Y. TIMES, Nov. 11, 1992, at A1.
28. PRITCHETT, THE ROOSEVELT COURT, *supra* note 23.
29. ABRAHAM & PERRY, FREEDOM AND THE COURT, *supra* note 21.
30. DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (5th ed. 2001).
31. STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND LIBERTY IN AMERICA (2000).

economic, and social views."[32] Like Abraham's *Freedom and the Court,* this study examines the judges' opinions in these cases, not solely or even primarily to determine the specific rulings or the distinctions announced in the court's decisions, but to understand whereand why those judges have drawn their respective "line[s] between individual rights and the rights of the community," and where and how they disagree on the appropriate "accommodation[s] between our cherish rights and obligations under our government system."[33]

As in O'Brien's *Storm Center,* this study takes a critical eye to judicial opinions and their authors. The published opinions—the "residue[s] of conflicts and compromises"—are analyzed, along with the judges' voting records, as evidence of the "direction of judicial policy-making and constitutional politics" of the institution and its individual members.[34] At least in "cases of [particular] importance for public law and policy," such as those involving the questions of individual right, liberty, and governmental protection that are the focus of this study, the New York Court of Appeals, like the Supreme Court under O'Brien's scrutiny, is a "'storm centre' of political controversy," "a fundamentally political institution."[35] The voting and opinions of the judges are examined in that light, rather than on a more formalistic, legalistic basis.

Finally, like Gottlieb's critique of the Rehnquist Court in *Morality Imposed,* this study's focus is on the individual judges rather than on the

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32. PRITCHETT, THE ROOSEVELT COURT, *supra* note 23, at xii. Delivering the inaugural Judge Hugh Jones Memorial Lecture at Albany Law School, Court of Appeals Judge Richard C. Wesley recently remarked:

> The necessity of expressing a view contrary to that of the majority of one's colleagues must be kept in check and reserved for limited applications. . . . Of course, there will be times when *matters of high principle* are at stake and *deeply held differences* need to be aired—to fail to do so diminishes the competing views.

Hon. Richard C. Wesley, *Hugh Jones and Modern Courts: The Pursuit of Justice Then and Now,* 65 ALB. L. REV. 1123, 1125–26 (2002) (emphasis added). As noted elsewhere, "Wesley's point is precisely why divided decisions are so revealing. . . . [They] reveal the dissenters' and separate concurrers' 'high principle[s]' and 'deeply held differences' [and] what the majority of a court necessarily rejected or subordinated to other considerations." Bonventre & Galligan, *supra* note 2, at 1085–86. *See also,* Bonventre, *Kaye, supra* note 2, at 1166–69.

33. ABRAHAM & PERRY, FREEDOM AND THE COURT, *supra* note 21, at 1 & 6.

34. O'BRIEN, STORM CENTER, *supra* note 30, at ix & 295.

35. *Id.* at xiii & 315.

law or policy they have collectively created, the doctrinal elaboration they have offered, or how they function as a collegial body. Hence, just as Gottlieb "treat[ed] judicial rhetoric as a much smaller element in the study of judicial approaches" than if he had been preparing a legal treatise on the Rehnquist court, so too this study treats "the patterns of the [judge's] conclusions [as] at least as important as the[ir] explanations."[36]

There has been no other study on the Court of Appeals comparable to the one undertaken here. In fact, with a few exceptions, the New York court has not been subject to the kind of institutional scrutiny regularly applied to the Supreme Court of the United States and its justices—at least not in studies extant in the scholarly literature in the last several decades.[37]

The single comprehensive work on the court in recent years had a different focus than this study. It examined specific phenomena such as the appointment process, jurisdiction, and influences on voting unanimity and dissent.[38] Other works focused on the court's jurisprudence in specific areas of the law.[39] Most closely related to the present study were those previously authored or supervised by this writer. Those prior studies, however, were narrower in scope, either limited to an annual or biennial update, to specific changes in the court's composition and

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36. GOTTLIEB, MORALITY IMPOSED, *supra* note 31, at xii.
37. The paucity of scholarship on the Court of Appeals was noted by a few commentators several years ago. *See* Luke Bierman, *When Less Is More: Changes to the New York Court of Appeals' Civil Jurisdiction*, 12 PACE L. REV. 61 (1992). The situation changed noticeably, if not substantially, thereafter. *See* John Caher, *Scholars Return Attention to State's Highest Court*, TIMES UNION (Albany), July 23, 1995, at B4.
38. 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); *see also* Luke Bierman, *Horizontal Pressures and Vertical Tensions: State Constitutional Discordancy at the New York Court of Appeals*, 12 TOURO L. REV. 633 (1996); Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403 (1995); Bierman, *When Less Is More*, *supra* note 37.
39. *See* Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996); Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants' Rights: The Case of New York, 1960–1978*, 28 BUFF. L. REV. 157 (1979).

direction at the time, or to state constitutional law profiles of individual judges.[40]

Notably, those prior studies typically generated public coverage and debate; indeed, criticism from within the court itself about both content and procedure have become an expected sequel to any critique of the judges' work.[41] This study, like my prior ones, would be fairly standard fare for the Supreme Court. The controversy and hostile reaction that studies of the New York court seem to provoke might wellbe a consequence of the paucity of such critical scholarship. The court, the bar, and the public generally in New York remain largely unaccustomed to academic and journalistic scrutiny of the Court of Appeals and its judges.[42]

This study, seeking to identify the ideological and jurisprudential themes informing the voting and opinions of the Court of Appeals judges and, by cumulation and extrapolation, of the court itself, entailed a review of the entire decisional output of the court from 1987 through

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40. See, for example, the articles cited in note 2, *supra*. *See also*, *High Court Study, New York's Court of Appeals*, 59 ALB. L. REV. 1761 (ST. CONST. COMM. 1996) [various authors]; Vincent Martin Bonventre & John D. Powell, *Changing Course at the High Court*, EMPIRE ST. REP., Mar. 1994, at 55; Vincent Martin Bonventre, *The New York Court of Appeals: An Old Tradition Struggles with Current Issues*, 22 PERSP. ON POL. SCI. 149 (1993); Bonventre, *Retrenchment is the Rule*, *supra* note 25.

41. *See, e.g.*, Ken Myers, *Professor's Analysis of State Court Sparks Debate on Free Expression*, NAT'L L.J., July 1, 1991, at A4; John Caher, *Court Critique Prompts Controversy Over Academic Freedom*, TIMES UNION (Albany), Aug. 18, 1991, at B6; Joseph W. Bellacosa, *A Letter of Appeals*, EMPIRE ST. REP., Aug. 1992, at 8; Joseph W. Bellacosa, *Judging Cases v. Courting Public Opinion*, 65 FORDHAM L. REV. 2381 (1997); John Caher, *Wesley Finds Trend in Modern Research on Court is Flawed*, N.Y.L.J., March 12, 2002, at 1. *See also* Gary Spencer, *Study of Court of Appeals Reveals Criminal Rulings in the Mainstream*, N.Y.L.J., Mar. 26, 1997, at 1; John Caher, *Study Disputes Court of Appeals' Liberal Tag*, TIMES U NION (Albany), Mar. 19, 1997, at B2; Daniel Wise, *Study Finds Court of Appeals Becoming More Conservative*, N.Y.L.J., June 3, 1991, at 1.

42. Indeed, as a writer for the New York Times recently observed in conversation, "The problem is that the court is immune from scrutiny" in the press, because it is not regularly covered by any major newspaper, including the Times itself. The court was, however, subject to critical coverage by that reporter in stories on the court's recent hearing of a death penalty appeal. *See* William Glaberson, *First Arguments in Death Penalty Appeals Focus on Technicalities*, N.Y. TIMES, May 7, 2002, at B6; William Glaberson, *For Death Penalty, A Day of Reckoning*, N.Y. TIMES, May 5, 2002, at B1.

2001. Every divided decision involving civil rights and liberties, similar government protections, or rights of the accused was identified. The votes of the judges, the decisions of the court, and the opposing separate opinions in each of those 388 cases were examined, collated, compared and contrasted to ascertain common denominators in the decision-making content and approach of each of the court's judges, and the differences among them.[43]

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43. In greater detail, the research for this study proceeded along the following lines. An extensive review of the pertinent literature was undertaken. Standard works of judicial study were consulted. Works dealing more specifically with Supreme Court and state high court voting and decisional data, and with independent state constitutional adjudication were researched (typically re-researched and re-read). Most specifically, works dealing with the New York Court of Appeals—including articles in legal and general circulation newspapers and magazines, as well as books and articles in scholarly and professional journals—were collected and reviewed (in most cases, again, these materials being already familiar to the writer). These materials on the Court of Appeals have served as the primary source of background and corroboration for this study. This extensive—perhaps overly exhaustive—body of general and specific secondary source material, together with the primary source materials—i.e., the relevant Court of Appeals decisions—were compiled in a selected bibliography. See SELECTED BIBLIOGRAPHY, in APPENDIX, *infra* (including BOOKS AND JOURNALS; NEWSPAPERS AND MAGAZINES; NEW YORK COURT OF APPEALS DECISIONS: Divided Public Law Decisions, 1987–2001).

Next, as noted, all the court's decisions from 1987 through 2001 were surveyed. From that pool of cases, all of those in which the court divided on an issue of public law were identified. For the purposes here, that category of cases was broadly applied to include every issue involving an individual claim against government, or vice versa, whether in the criminal or civil realm; it also included issues arising in the context of private litigation involving claims of government guaranteed protection—e.g., claims against private employers or business for statutorily prohibited discrimination.

The vote of each judge and the decision of the court in each of the 388 divided decisions were then classified as either pro-prosecution or pro-defendant in criminal cases, and pro-government (to include pro-powerful and majoritarian interests) or pro–individual rights in the civil cases. Tables were prepared, one for each year of court, recording the votes in each case, as well as the authorship of the majority, separate concurring, and dissenting opinions. *See* JUDGES' VOTES: DIVIDED PUBLIC LAW DECISIONS, 1987–2001, in Appendix, *infra*.

These tables provide a readily accessible source of primary data for determining voting and decisional patterns. Specifically for this study, those tables reflect the primary data from which the calculations were made regarding the frequency with which the judges and the court as a whole supported the

Following this introduction, Chapter II focuses on Judges Titone and Bellacosa, examining the judicial behavior of these recently retired members of the court. They defined the court's ideological spectrum during most of the past fifteen years, and they continue to serve as standards with which to gauge the currently-sitting judges' ideological proclivities and relative positions vis-á-vis these two long-time philosophical poles.[44] Chapter III looks at Chief Judge Kaye and Judge Carmen Beauchamp Ciparick. Kaye's decision making in recent years has shown either a conversion in judgement and values,[45] or perhaps an increased caution in

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prosecution or the accused, the government/powerful interests or the individual. Notably, they reflect the votes and decisions in those cases where the internal disagreements within the court were expressed publicly in divided decisions and, thus, where the judges' respective choices between opposing positions were revealed.

Numerous calculations were made to uncover patterns, changes, trends, and ultimately, together with the judges' written opinions, to determine the significance, strength, and underlying meaning of these "streams" or "currents" at the court. Many of these calculations were incorporated into charts—i.e., bar graphs—which allow for visual observations of the patterns, changes and trends in the voting of the individual judges, as well as comparisons and contrasts among them. *See* Charts 1.1, *et seq.* in the corresponding chapters, *infra.* The visual observations from the charts—seemingly proving that a picture is worth a thousand numbers, as well as words—provide sometimes striking corroboration and overview of what is revealed, though not always as emphatically, by the judges' voting records and written expressions in opinions.

Each judge's entire body of written opinions from the 388 cases was scrutinized to detect themes, arguments, policy preferences, decision-making methodology, and jurisprudential or ideological views. From each judge's body of judicial work, several written opinions were culled that seemed representative of the salient or otherwise significant characteristics of that judge's decision making over the years. Those representative opinions, and the decisions in the cases in which they were written, were summarized and placed in separate tables prepared for each judge. *See* Table 2.1, Representative Opinions of Judge Titone, et seq. in the chapters corresponding to each judge, *infra.*

44. *See, e.g.*, Charts 1.1 and 1.2 (reflecting the findings of prior studies that Titone and Bellacosa occupied the opposite poles of the court's ideological axis, with the other judges and the court itself occupying either consistent positions between them or drifting towards one or the other).

45. *See, e.g.*, People v. Tortorici, 92 N.Y.2d 757 (1999) (authoring the opinion for the majority, over the dissent of Smith, to uphold the trial judge's failure to hold a competency hearing, despite the state-appointed psychiatrist's assessment that the criminal defendant was incapable of understanding the

espousing unchanged views.[46] Ciparick, like Kaye, appears to have shifted in the past several years. An unhesitant, unmistakable liberal in her earlier years on the court,[47] her record has steadily become less sympathetic to criminal defendants and to civil claimants.[48]

Chapter IV focuses on Judges Smith and Levine. It explores Smith's sometimes surprising and seemingly erratic voting and writings. An increasingly outspoken liberal voice,[49] Smith has nonetheless taken pro-prosecution and pro-government positions where the court was sharply divided, and even for himself in lone dissent.[50] Levine's voting, which paints an overall picture of a judicial conservative,[51] will also be shown

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proceedings against him); Johnson v. Pataki, 91 N.Y.2d 214 (1997) (authoring the opinion for the majority—and siding with the court's conservatives against the dissenting liberal judges, Titone, Smith and Ciparick—to uphold Governor Pataki's removal of an anti-death penalty district attorney in the prosecution of a capital murder case).

46. *See, e.g.*, People v. Edwards, 96 N.Y.2d 445 (2001) (joining the majority to limit the application of a prior decision she authored which invalidated the death penalty-avoiding guilty plea provision of the state's death penalty statute); *In re Duckman*, 92 N.Y.2d 141 (1998) (joining the majority to uphold the removal of a New York City judge whose "criminal coddling" record was the target of harsh criticism by politicians and the press and was the instigation for the investigation against him).
47. *See generally*, Bagyi, *Ciparick*, *supra* note 2.
48. *See* Bonventre & Galligan, *supra* note 2, at 1111–12; Bonventre & Hiller, *supra* note 2, at 1392.
49. *See, e.g.*, People v. Edwards, 96 N.Y.2d 445, 456 (2001) (Smith, J., dissenting) (arguing in lone dissent in support of the retroactive application of the court's prior decision invalidating the death penalty-avoiding guilty plea provision of the state's death penalty statute); *In re* Shaw, 96 N.Y.2d 7, 16 (2001) (Smith, J., dissenting) (arguing in lone dissent that due process required the consideration of newly discovered exculpatory evidence). *See also* Charts 4.4 and 4.5 (reflecting the comparatively high number of dissents and separate concurrences authored by Smith from 1997 through 2001, and the high number that were pro–individual rights).
50. *See, e.g.*, People v. Robinson, 97 N.Y.2d 341 (2001) (authoring the majority opinion for a deeply divided 4–to-3 court to permit pretextual stops of automobiles under the state constitution); Attorney General v. Firetog, 94 N.Y.2d 477, 485 (2000) (Smith, J., dissenting) (arguing in lone dissent that the trial judge had no authority to disclose grand jury minutes to assist the criminal defendant).
51. *See* Bonventre & Galligan, *supra* note 2, at 1110; *see generally* Jason Legg, Comment, *Howard A. Levine: Paladin of the State*, 59 ALB. L. REV. 1879 (ST. CONST. COMM. 1996).

to include exceptions that are manifested in opinions in which he has broken with convention, and with his colleagues, to reach a decidedly "liberal" position.[52]

In Chapter V, Judge Richard C. Wesley, the first appointee of governor and court critic George Pataki,[53] is shown to be a reliable vote for the prosecution[54]—as consistent, if not as militant, as Bellacosa[55]—but much less pro-government on civil issues.[56] The records of the court's newest additions, Judges Albert M. Rosenblatt and Victoria A. Graffeo,[57] are also examined. The early clues suggest that these are two conservative judges, with Rosenblatt being a somewhat moderate one,[58] especially in criminal cases. All three Pataki appointees are shown to be conservative, but in different and diverging ways.

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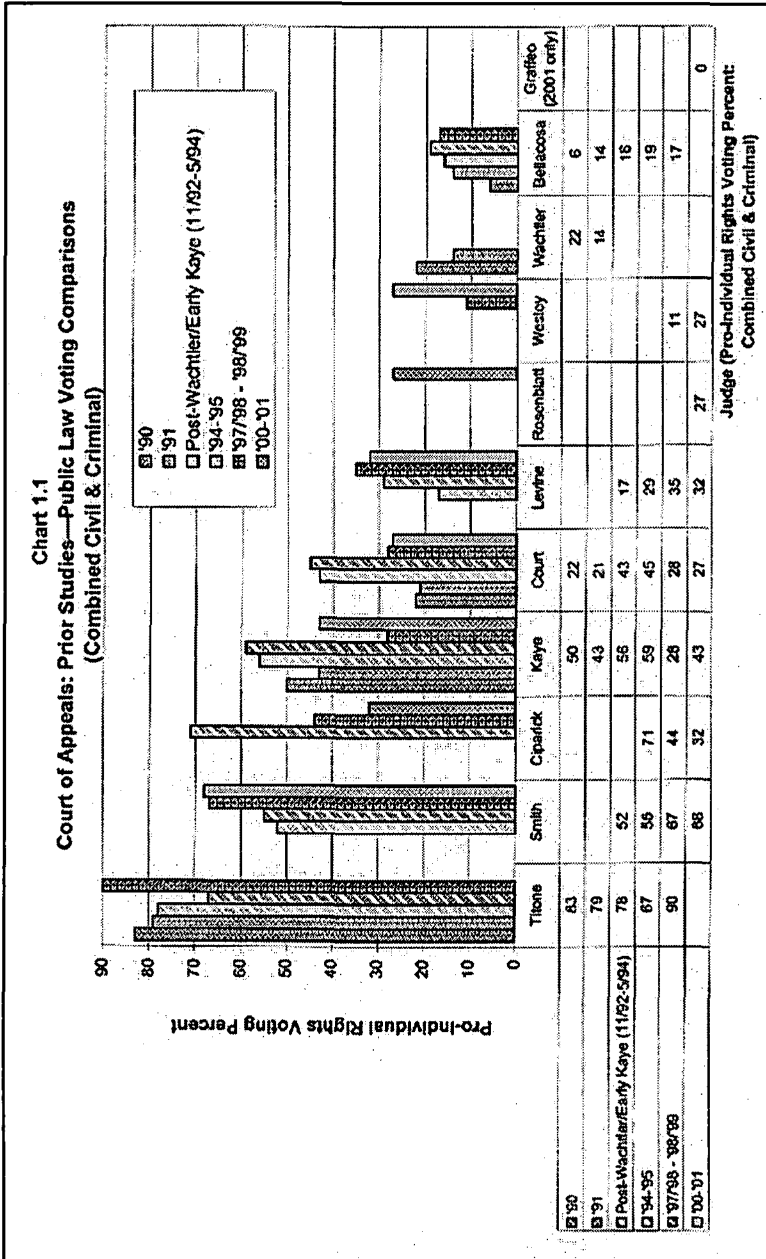
52. *See, e.g.* People v. Robinson, 97 N.Y.2d 341, 360 (2001) (Levine, J., dissenting) (arguing in dissent that the court should reject the Supreme Court's jurisprudence and adopt, as a matter of independent state constitutional law, a rule prohibiting pretextual stops of automobiles); Clara C. v. William L., 96 N.Y.2d 244, 251 (2000) (Levine, J., concurring) (arguing in a separate concurrence that the court should invalidate the discriminatory provisions of the state statute in question, instead of merely deciding the case on a narrow procedural ground).
53. *See* John Caher, *Conservative Picked for State's Top Court*, TIMES UNION (Albany), Dec. 4, 1996, at A1; Gary Spencer, *Wesley Nominated to Court of Appeals*, N.Y.L.J., Dec. 4, 1996, at 1.
54. *See* Bonventre & Galligan, *supra* note 2, at 1113; Bonventre & Hiller, *supra* note 2, at 1393.
55. *See* Lennon, *Bellacosa, supra* note 25, at 1844–50; Stephen L. Wasby, *Judicial Federalism and State Protections Against Searches: Once Again in the New York Court of Appeals*, ST. CONST. COMMENTS. & NOTES, Winter 1993, at 1, 3–4.
56. *See* Bonventre & Galligan, *supra* note 2, at 1113–14; *see, e.g.*, Galapo v. City of New York, 95 N.Y.2d 568, 576 (2000) (Smith, J., dissenting) (joining Smith's dissent in arguing to permit an action for negligence and wrongful death against the city by the family of a police officer killed in the line of duty); Anello v. Zoning Bd. Appeals, 89 N.Y.2d 535, 541 (1997) (Wesley, J., dissenting) (arguing in lone dissent that present owners of private property should be permitted to bring a takings action against a municipality for confiscatory zoning previously imposed but not challenged by prior owners).
57. *See* Gary Spencer, *Rosenblatt Picked for Court of Appeals*, N.Y.L.J., Dec. 10, 1998, at 1; John Caher, *Pataki Names Graffeo to Court of Appeals*, N.Y.L.J., Nov. 3, 2000, at 1.
58. *See* Bonventre & Galligan, *supra* note 2, at 1114–17.

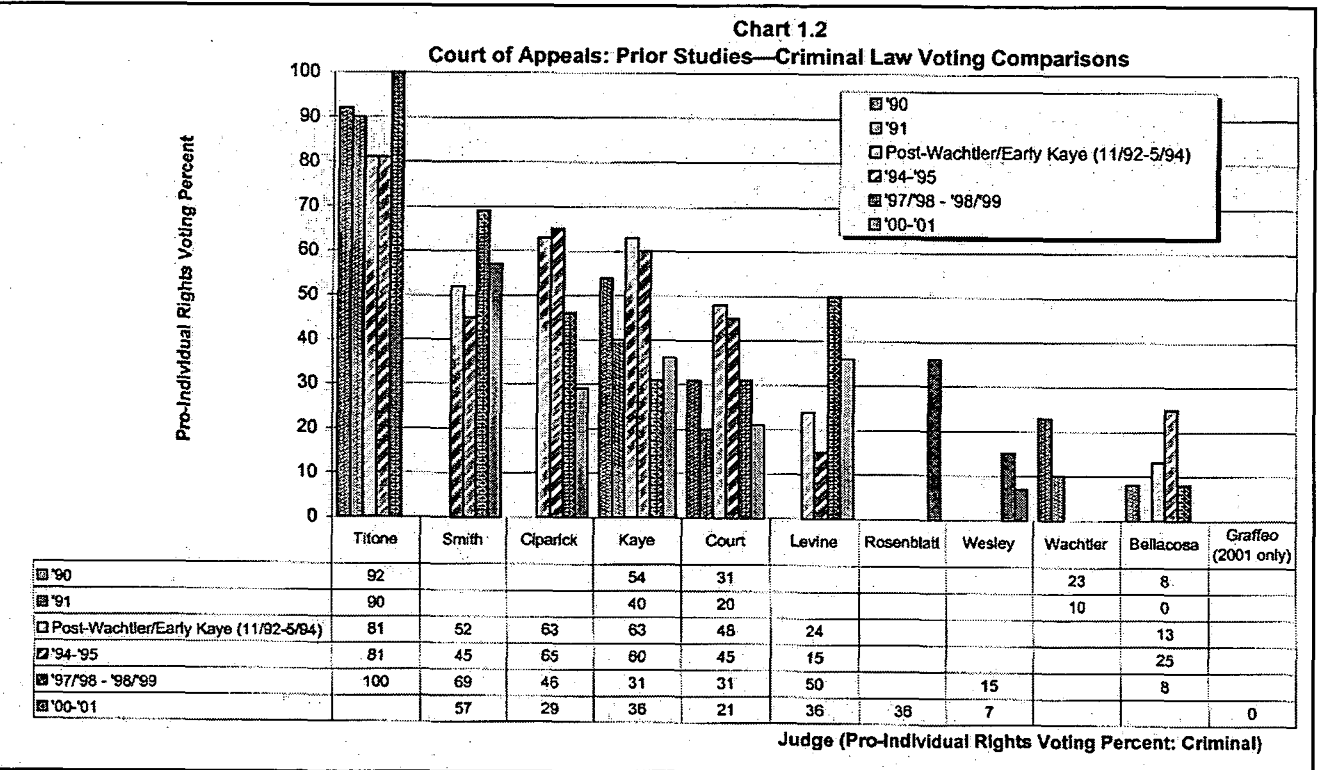
Chapter VI, the Conclusion, summarizes the findings and offers some final observations, including a glance at decisions rendered by the Court of Appeals during the first half of the 2002 term, as this study was being written.

Chart 1.1



	Titone	Smith	Ciparick	Kaye	Court	Levine	Rosenblatt	Wesley	Wachtler	Bellacosa	Graffeo (2001 only)
'90	83			50	22				22	6	
'91	79			43	21				14	14	
Post-Wachtler/Early Kaye (11/92-5/94)	78	52		56	43	17				16	
'94-'95	67	56	71	59	45	29				19	
'97/'98 - '98/'99	90	67	44	28	28	35		11		17	
'00-'01		68	32	43	27	32	27	27			0

Chart 1.2



	Titone	Smith	Ciparick	Kaye	Court	Levine	Rosenblatt	Wesley	Wachtler	Bellacosa	Graffeo (2001 only)
'90	92			54	31				23	8	
'91	90			40	20				10	0	
Post-Wachtler/Early Kaye (11/92-5/94)	81	52	63	63	48	24				13	
'94-'95	81	45	65	60	45	15				25	
'97/'98 - '98/'99	100	69	46	31	31	50		15		8	
'00-'01		57	29	36	21	36	36	7			0