EDITOR’S FOREWORD

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Freedom of religion, freedom of expression, and freedom of the press.
Police encounters, automobile stops, search of private land, and electronic surveillance.
Self-incrimination, custodial interrogation, pre-interrogation warnings, and the right to counsel.
Unenumerated liberty, fundamental fairness, bodily integrity, and sexual privacy.
Slavery and the death penalty.

On these and so many other legal issues—maybe most—of vital importance to right and responsibility, to liberty and authority, to individual and community in the governance of a free society, state high courts have taken the lead. Historically, the highest courts of our nation’s states have led the way for the nation itself and for the nation’s high court. Indeed, much the same can be said not only of state courts collectively, but even of any single one of a number of the nation’s most distinguished state high courts.

Of course, New York’s highest court, the Court of Appeals, is and, since it was instituted in 1846, has been counted among the nation’s most influential judicial tribunals, state or federal. In fact, in every one of those aforementioned vital issues, the New York Court has been a, if not the, leader.¹

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¹ People v. Barber, 46 N.E.2d 329 (N.Y. 1943) (discussing the free exercise of religion through door-to-door proselytizing); Immuno AG v. Moor-Jankowski, 567 N.E.2d 1270 (N.Y. 1991) (analyzing freedom of expression in non-actionable opinion); O’Neill v. Oakgrove Construction Inc., 523 N.E.2d 277 (N.Y. 1988) (examining freedom of the press through reporter’s privilege); People v. DeBour, 352 N.E.2d 562 (N.Y. 1973) (analyzing police encounters and requiring increased levels of justification for increased levels of intrusion); People v. Belton, 432 N.E.2d 745 (N.Y. 1982) (discussing automobile stops and holding that vehicle searches must be related to reason for arrest); People v. Scott, 593 N.E.2d 1328 (N.Y.)
Speaking through eminent judicial figures of the past—such as Hiram Denio, Robert Earl, Charles Andrews, Benjamin Cardozo, Cuthbert Pound, Irving Lehman, Stanley Fuld, Lawrence Cooke, and Charles Breitel, as well as those who have most recently led the Court, such as Sol Wachtler, Judith Kaye, and presently Jonathan Lippman—the Court of Appeals has been an independent, intelligent, and forceful voice in establishing precedents to safeguard what is precious and essential in the American “scheme of ordered liberty”\(^2\)—to use Cardozo’s own phrase.

It is for this reason that the *Albany Law Review* produces the annual issue of *State Constitutional Commentary* to study and celebrate the work of state high courts such as the Court of Appeals. And by “celebrate” is meant, of course, to chronicle, examine, analyze, critique, applaud, and criticize the work of these state courts, as well as the constitutional law and, more generally, public law issues with which they deal.

For the past seven years, this “celebration” has included the Chief Judge Lawrence H. Cooke State Constitutional Commentary Symposium. This roundtable, held each spring and named in honor of New York’s former Chief Judge, the first chairperson of this journal’s Board of Editors and a 1937 graduate of Albany Law School, has become one of the signature, most awaited, and enthusiastically attended events of its namesake’s alma mater.

The reason is no mystery. The Cooke Symposium has brought the leading state jurists from around the country to participate in lively, frank, spirited discussions—and debates—about critical issues of public law, judicial decision-making, judicial selection, federalism,
and other facets of courts, law, and politics.

In the last few years, for example, the Cooke Symposium hosted “Great Women, Great Chiefs.” That roundtable included Chief Justices Margaret Marshall of Massachusetts, Marsha Ternus of Iowa, and Jean Toal of South Carolina. Last year for the “State of State Courts,” New York’s Chief Judge Jonathan Lippman moderated a freewheeling discussion with Chief Justices Shirley Abrahamson of Wisconsin, Christine Durham of Utah, and Chase Rogers of Connecticut.

Several years ago, the entire New York Court of Appeals participated in “Judges on Judges: The New York State Court of Appeals Judges’ Own Favorites in Court History.” At that event, each of the Court’s seven members selected a Judge of the past and explained the choice. Notably, then Chief Judge Judith Kaye chose her predecessor Lawrence Cooke, whose family—several generations of them—were present for the dedication of the annual symposium to him.

This year, the entire Court of Appeals returned. This time, Kaye’s successor, Chief Judge Lippman, moderated (as in prodded and needled) each of his colleagues to reveal the “Untold Secrets of Eagle Street.” In a very candid, most enlightening, and thoroughly entertaining two-hour exchange, the Judges disclosed their respective perspectives on appellate briefs, oral arguments, conferencing cases, voting, writing opinions, and other internal dynamics of decision-making at the Court. The overflow crowd was then treated to a lively question and answer period. To say it was a great event is to do it an injustice.

This issue of State Constitutional Commentary opens with a transcript of that symposium—a truly a difficult act to follow. But what follows in these pages would constitute an especially impressive edition all by itself.

In the Perspectives section, seven of the nation’s Chief Justices weigh in on some special virtues of their respective state courts.

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6 See Symposium: The Untold Secrets of Eagle Street, 76 ALB. L. REV. 1897 (2013). The title refers to 20 Eagle Street, the address of the magnificent Greek Revival styled Court of Appeals Hall.
Chief Justice Robert Young of Michigan, a self-described “judicial traditionalist,” commends his state’s high court for returning to a jurisprudence of “original understanding,” following a period in which it had “veered off toward the [Justice William] Brennan ‘living constitution’ approach.”

Ohio’s Chief Justice Maureen O’Connor focuses on the administrative improvements in her state’s judiciary, from case management, reducing delays, simplifying procedures, and other achievements that reflect the spirit of practicality, incremental change and common sense—the “old fashioned pragmatism”—of this “crossroads” of the Midwest.

Chief Justice John Minton of Kentucky takes pride in his state’s unified court system, established through constitutional amendments in the 1970s, which not only made the Chief Justice the “executive of the court of Justice,” but ultimately also the veritable “construction manager” for the building and renovation of “modern, functional, and safe judicial centers” throughout the commonwealth. Iowa’s Chief Justice Mark Cady celebrates his state’s supreme court for its history, from its first published opinion and continuing today, of independent protection of equal rights, “notwithstanding political and public relations consequences.”

Michael Cherry, Chief Justice of Nevada, touts his state’s court system, including the highest court, which handles an “overabundance of cases” with limited resources, and the specialty courts, which offer an alternative to incarceration for non-violent offenders.

Missouri’s Chief Justice Richard Teitelman, with state court administrator Gregory Linhares, applauds the implementation of “evidence-based assessments and treatments of juvenile offenders,” which mandates a standardized, objective evaluation to determine whether a juvenile actually needs to be placed in detention or may do well in a program of supervision, counseling, and other rehabilitative activities.

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North Dakota salutes the populous ideals of his state which are reflected in several distinct features of its judiciary—e.g., the supermajority requirement for constitutionally invalidating legislation, appeals to the Supreme Court as of right, and the non-partisan election of Supreme Court justices.\textsuperscript{14}

The Articles section opens with Oregon’s Chief Justice Thomas Balmer and his law clerk, Katherine Thomas, who co-author an exploration of the competing merits of the ‘balancing’ and ‘categorical’ approaches to constitutional adjudications.\textsuperscript{15} Kenneth Miller of Claremont McKenna College examines popular referendums as a source of democratic legitimacy for judicially recognized and enforced rights.\textsuperscript{16} John Dinan of Wake Forest College considers the relative flexibility of state constitutional amendment processes as a vehicle, in addition to judicial decision-making, for state experimentation with civil right and liberties beyond those required under federal law.\textsuperscript{17}

James Cauken of the John Jay College of Criminal Justice studies attempts to amend state constitutions to dilute the so-called Blaine Amendments (i.e., the generally anti-Catholic instigated no-aid-to-religion clauses,) which mostly fail because of well-funded and organized opposition.\textsuperscript{18} James McHugh, a member of the Professional Board of Editors and frequent contributor, takes a look at the Ohio Constitution’s indelicately phrased ban on voting for any “idiot” or “insane person.”\textsuperscript{19} Another Board member and reliable supporter of \textit{State Constitutional Commentary}, Peter Galie, Professor Emeritus of Canisius College, and Christopher Bopst of the Goldberg Segalla firm in Buffalo focus critically on the “message of necessity” exception to New York’s three-day state constitutional requirement for legislative consideration of all laws prior to

\textsuperscript{15} Thomas A. Balmer & Katherine Thomas, \textit{In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation}, 76 A.L.B. L. REV. 2027 (2013). Retired Oregon Justice Hans Linde, a member of the Board of Editors of \textit{State Constitutional Commentary} from the beginning, and current Justice Jack Landau provided input to the article.
passage.\textsuperscript{20} And finally, Patrick Woods, \textit{Albany Law Review}'s Editor-in-Chief for 2011–2012, offers a proposal for Lieutenant Governor succession in New York to avoid the kind of deadlock and subsequent controversial unilateral appointment by gubernatorial action as took place in 2009.\textsuperscript{21}

Before closing, a few words of thanks are in order. First, it has been my privilege to be the Faculty Advisor to the \textit{Albany Law Review} and Editor of the annual \textit{State Constitutional Commentary} issue for many years now. Working with the marvelous students who edit our school's flagship journal has been an absolute joy. They, more than anything or anyone else are, of course, responsible for the success and reputation of the \textit{Law Review} and of this special yearly issue.

There are two among them who deserve to be singled out. Mary D'Agostino, this year's Editor-in-Chief, has been nothing short of magnificent in that position. She has been a first-class leader and editor with ultimate charge for all four issues of Volume 76, including this one. And she did it all—all year—with exceptional grace, skill, warmth, and a smile. Oh, and with her infant son Lucca, who regularly camped-out in the Law Review suite.

Then there is Michelle Mallette. What can I say about this year's Executive Editor for \textit{State Constitutional Commentary} that would not understate her efforts and productivity? To begin with, she was astonishingly efficient, proficient, and effective. She was utterly dedicated, dependable, and loyal. She was also in command—yes, this West Point alum was, indeed, “the General” who exercised unwavering care, control, and dominion over both this issue of the \textit{Commentary} and this year's Cooke Symposium. Oh, and Micky did all this with her toddler, Maggie, who frequently visited the Law Review suite and “reorganized” the bookshelves. And if that wasn't enough, Micky also did all this while expecting Maggie's sibling-sister, Katherine Collins, who was born while this Foreword was being written. Like I said, what can I say that's not an understatement. Let me just say a big, wholehearted, unqualified “Thank You and Congratulations!”